

**Tribal Comments on CMS "Model QHP Addendum for  
Indian Health Providers (Tribal Addendum)"**

Prepared by: NW Portland Area Indian Health Board  
*Revised: April 11, 2013*

**General Observation:**

The purpose of the Tribal Addendum is to encourage and facilitate the contracting process for Indian health care providers to be included in qualified health plan provider (QHP) networks. The Tribal Addendum is also intended to assist QHPs to meet certification standards and facilitate acceptance of contracts by Indian health providers.

Unfortunately, the Tribal Addendum issued by CMS on April 4, 2013, includes substantive changes by CMS' Center for Consumer Insurance Information and Oversight (CCIIO) that will only serve as a barrier to Tribes entering into contractual relationships with QHPs. The changes made by CMS to the final addendum were not included in the draft Tribal Addendum sent out for Tribal consultation. HHS, CMS, and CCIIO did not consult with Tribes about these changes. Tribal leaders and the TTAG had absolutely no opportunity to discuss them with CMS or CCIIO before they were adopted into the final Tribal Addendum.

The changes made to the Tribal Addendum are likely to result at an impasse between QHPs and Tribes to enter into contracts. Thus, QHPs will not be adequate to meet the needs of Indian people if they do not include Indian health providers. Absent a contract, the QHP issuers and Tribes are likely to face administrative and legal issues over reimbursement of services, care coordination, and referrals over shared Indian patients. CMS and CCIIO dismissed their federal responsibility to be a steward of IHS, Tribal, and urban Indian health programs in the interest of satisfying the concerns of QHPs.

Attached is a redline comparing the Tribal draft ITU addendum with the FINAL HHS ITU Addendum. The following is a summary of the substantive changes and legal concerns:

**Section 4: Persons Eligible for Items and Services from Provider**

CMS/CCIIO CMS/CCIIO added the following sentence: "Provider acknowledges that the nondiscrimination provisions of federal law may apply."

The insertion of this clause will cause considerable confusion and will likely be a *deal breaker* to contracting with QHPs. The entire point of this provision is to make it clear to issuers that tribes can serve only non-Indians without running afoul of non-discrimination laws, and that issuers will not be held liable if they contract with tribes that do so. In the explanation to the Addendum, CCIIO explains this provision as follows (relevant language highlighted below):

Persons Eligible for Items and Services from an Indian Health Care Provider: This section acknowledges that Indian health programs are generally not available to the public; they are established to serve AI/ANs, as provided in the IHCA. The applicable eligibility rules are generally set out in the IHS regulations at 42 C.F.R. Part 136. The IHCA § 813 (25

U.S.C. §1680c) sets out the circumstances under which certain non-AI/ANs connected with an AI/AN (such as minor children or a spouse) can receive services as beneficiaries. Also, the IHCIA § 813 authorizes services to certain other non-AI/ANs if defined requirements are satisfied. Pursuant to 45 C.F.R. 80.3(d), an individual shall not be deemed as subjected to discrimination by reason of his/her exclusion from benefits limited by federal law to individuals eligible for services from an Indian health program.

Providers should note that 45 C.F.R. 80.3(d) is not an exemption from civil rights obligations generally. It simply clarifies that certain types of exclusions are not considered discrimination under Title VI of the Civil Rights Act of 1964. Providers may be subject to applicable federal nondiscrimination statutes.

The sole purpose of this Section was to inform the issuers that the nondiscrimination provisions of federal law do not apply to Tribal health care providers, and that with limited exceptions, are required to limit services to Indians. It is unclear what HHS/CMS/CCIIO hoped to accomplish by including this clause, but it confuses the meaning of this section.

### **Section 10: Dispute Resolution**

The purpose of this section was to state simply that the parties would agree to meet in good faith to resolve any disputes. This was intended to supersede any dispute resolution provision in the main provider agreement, which often call for binding arbitration in State court (which the Supreme Court has held is a waiver of immunity). HHS/CMS/CCIIO revised the section to now read as follows:

In the event of any dispute arising under the QHP issuer's network provider agreement or any addendum thereto, the parties agree to meet and confer in good faith to resolve any such disputes prior to resolution of any disputes through any process identified in the network provider agreement. If the Provider is an IHS provider, the laws of the United States shall apply to any problem or dispute hereunder that cannot be resolved by and between the parties in good faith. Notwithstanding any provision in the provider network agreement, IHS shall not be required to submit any disputes between the parties to binding arbitration.

The language highlighted in yellow is new clause added. It suggests that the parties are going to follow any dispute resolution process in the main agreement (which will usually mean a waiver of immunity). The section maintains the IHS exemption from agreement to any binding arbitration – but does not exempt Tribal facilities from agreeing to binding arbitration. As a result, this provision now appears to require tribal providers to resolve disputes pursuant to the main agreement, which may involve binding arbitration, state court, etc. and could result in a waiver of tribal immunity.

### **Section 14: Payment of Claims**

Our language stated that the issuers must pay claims in accordance with federal law, including Section 206 of the IHCIA. CCIIO added the second sentence in this section which states that if the Tribe agrees to a different rate in the agreement, then the issuer is deemed to comply with Section 206 (even though that law may mandate a higher rate be paid). The language now reads as follows – new language highlighted in yellow:

The QHP issuer shall pay claims from the Provider in accordance with federal law, including Section 206 of the IHCA (25 U.S.C. §1621e), and 45 C.F.R., Part 156, Subpart E. The QHP issuer shall be deemed compliant with Section 206 to the extent the QHP issuer and Provider mutually agree to the rates or amounts specified in the QHP issuer agreement as payment in full.

It may well be true that a Tribe can waive its right to the 206 rate to get a contract signed, but it is unhelpful for tribes' negotiating position to have this spelled out in the Addendum.

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DEPARTMENT OF HEALTH & HUMAN SERVICES

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## Overview of the Model QHP Addendum for Indian Health Care Providers

### I. Purpose

CMS has developed the attached Model QHP Addendum for Indian health care providers to facilitate the inclusion of Indian Health Service (IHS), tribes and tribal organizations, and urban Indian organization (I/T/U) providers in qualified health plan (QHP) provider networks and help health insurance issuers comply with the QHP certification standards set forth in 45 C.F.R. Part 156. Similar to the standardized contract addendum used in the Medicare Part D program, this Model QHP Addendum has been developed for QHP issuers to use when contracting with I/T/U providers. This Model QHP Addendum is not required, but the U.S. Department of Health and Human Services (HHS) received several comments supporting the development and issuance of a model addendum for this purpose to assist QHP issuers in including I/T/U providers in their networks.

The federal government has a historic and unique government-to-government relationship with Indian tribes. In adhering to QHP certification standards, QHP issuers should reach out to I/T/U providers. A significant portion of American Indians and Alaska Natives (AI/ANs) access care through longstanding relationships with providers in the Indian health system. An important consideration in evaluating network adequacy and essential community provider accessibility will be the extent to which a QHP includes I/T/U providers and whether it can assure that services to AI/ANs will be accessible without unreasonable delay.

It is anticipated that the Model QHP Addendum will assist issuers to meet the QHP certification standards and facilitate acceptance of network contracts by I/T/U providers. We anticipate that offering contracts that include the Model QHP Addendum will provide QHP issuers with an efficient way to establish contract relationships with I/T/U providers, and also ensure that AI/ANs can continue to be served by their Indian provider of choice.

Indian tribes are entitled to special protections and provisions under federal law, which are described further in Section II. The Addendum identifies several specific provisions that have been established in federal law that apply when contracting with I/T/U providers. The use of this Model QHP Addendum benefits both QHP issuers and the I/T/U providers by lowering the perceived barriers to contracting, assuring QHP issuers comply with key federal laws that apply when contracting with I/T/U providers, and minimizing potential disputes. AI/ANs enrolled in QHPs will be better served when I/T/U providers can coordinate their care through the QHP issuer provider network.

### II. Background on Indian Health Care

Indian tribes are afforded specific protections and provisions under federal laws, including the Indian Health Care Improvement Act (IHCIA), the Indian Self-Determination and Education Assistance Act (ISDEAA), and the Patient Protection and Affordable Care Act (ACA). In order

to carry out its obligation to provide health care to American Indians and Alaska Natives (AI/ANs), the federal government has established a unique health care delivery system through the Indian Health Service (IHS). As part of the Indian health care system, health care services to AI/ANs are provided either directly by the IHS, by tribes or tribal organizations, or by urban Indian programs.

Today the Indian health care system includes 44 Indian hospitals (16 of which are tribally-operated and all of which are accredited) and nearly 570 Indian health centers, clinics, and health stations (of which 83 percent are tribally-operated). When specialized services are not available at these sites, health services are purchased from public and private providers through the IHS-funded Contract Health Services (CHS) program. Additionally, 33 urban programs offer services ranging from community health to comprehensive primary care.

### III. Key Provisions in the Addendum

The following is a synopsis of key provisions outlined in the Addendum.

Persons Eligible for Items and Services from an Indian Health Care Provider: This section acknowledges that Indian health programs are generally not available to the public; they are established to serve AI/ANs, as provided in the IHCA. The applicable eligibility rules are generally set out in the IHS regulations at 42 C.F.R. Part 136. The IHCA § 813 (25 U.S.C. §1680c) sets out the circumstances under which certain non-AI/ANs connected with an AI/AN (such as minor children or a spouse) can receive services as beneficiaries. Also, the IHCA § 813 authorizes services to certain other non-AI/ANs if defined requirements are satisfied. Pursuant to 45 C.F.R. 80.3(d), an individual shall not be deemed as subjected to discrimination by reason of his/her exclusion from benefits limited by federal law to individuals eligible for services from an Indian health program.

Providers should note that 45 C.F.R. 80.3(d) is not an exemption from civil rights obligations generally. It simply clarifies that certain types of exclusions are not considered discrimination under Title VI of the Civil Rights Act of 1964. Providers may be subject to applicable federal nondiscrimination statutes.

Applicability of Other Federal Law: This section describes several federal laws that apply variously when contracting with I/T/U providers.

- *Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450 et seq.* This law directs HHS at the request of an Indian tribe, to enter into a contract or compact with a tribe, a tribal organization, or an inter-tribal consortium to operate federal health programs for AI/ANs with the funds the IHS would have otherwise used to carry out the program directly. Through this law, many Indian tribes and tribal organizations have taken over direct operation of health programs from the IHS.
- *Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680.* Congress generally extended the FTCA to cover Indian tribes and tribal organizations operating federal programs pursuant to contracts or compacts under the ISDEAA, 25 U.S.C. § 450f. Urban Indian organization health providers who acquire Federally Qualified Health Center status under Section 224 of the Public Health Service Act can acquire FTCA coverage. Since a claim under the FTCA is

the exclusive remedy for actions against Indian health care providers that are covered by the FTCA, those entities are not required to obtain separate professional liability insurance.

- *Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. §§ 2651-2653.* This law authorizes federal agencies, including the IHS, to recover from a tortfeasor (or an insurer of a tortfeasor) the reasonable value of health services furnished to a tortfeasor's victim. The right of recovery under the FMCRA extends to Indian tribes and tribal organizations operating ISDEAA contracts and compacts. 25 U.S.C. § 1621.
- *Federal Privacy Act, 5 U.S.C. § 552a, 45 C.F.R. Part 5b.* This law and its regulations apply to the IHS, and may apply Indian tribes, tribal organizations, and urban Indian organizations that operate federally-funded health care programs. The Privacy Act governs the use and disclosure of personally identifiable information about individuals that is maintained in a federal system of records. While the Privacy Act generally applies to federal records maintained by a government contractor, patient records of a Tribal health program are not considered federal records for the purposes of chapter 5 of title 5 of the United States Code (including the Privacy Act and the Freedom of Information Act - see 25 U.S.C. § 4501).
- *Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2.* These regulations restrict disclosure and use of drug abuse patient records that are maintained in connection with the performance of any federally assisted alcohol or drug abuse program. The restrictions would apply to any such records maintained by the IHS, an Indian tribe, tribal organization, or urban Indian organization.
- *Health Insurance Portability and Accountability Act (HIPAA), (45 C.F.R. Parts 160 and 164).* These regulations restrict access to and disclosure of protected health information maintained by covered entities, including covered health care providers operated by the IHS, Indian tribes, tribal organizations, and urban Indian organizations.
- *Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601 et seq.* This law provides the comprehensive statutory framework for delivery of health care services to AI/ANs. It applies to all Indian health providers operating ISDEAA contracts and compacts from the Secretary of the HHS; and urban Indian organizations that receive grants from IHS under Title V of the IHCIA. Specific provisions of the IHCIA that would impact contracts between Indian health care providers and QHPs issuers are cited in various provisions of the Addendum.

Insurance and Indemnification: IHS, tribes and tribal organization providers are generally covered by the FTCA. Some urban Indian organizations are also covered under FTCA. Since a claim under the FTCA is the exclusive remedy for actions against FTCA covered I/T/U providers, those entities are not required to obtain professional liability insurance.

Licensure of Health Care Professionals: Section 221 of the IHCIA, 25 U.S.C. § 1621t, permits an Indian tribe or tribal organization to employ a health care professional who is subject to licensure if that individual is licensed in any state. Employees of the IHS obtain their "licensed in any state" status through other federal law.

**Medical Quality Assurance Requirements:** Section 805 of the IHCA, 25 U.S.C. § 1675, facilitates internal medical program quality reviews; shields participants in those reviews; and restricts disclosure of medical quality assurance records, subject to the exceptions in 25 U.S.C. 1675(d), which provides that medical quality assurance records created by or for I/T/U providers may not be disclosed to any person or entity. These disclosure limitations are also applicable to anyone to whom the I/T/U provider discloses such medical quality assurance records under the authority of 25 U.S.C. 1675(d). Although restrictive, we expect these limitations will have limited applicability to QHPs because there will be few, if any circumstances, where such records may be disclosed to a QHP under the law.

**Claims Format:** Section 206(h) of the IHCA, 25 U.S.C. § 1621e(h) is applicable to issuers when processing claims from an I/T/U provider. Section 206(h) of IHCA states that a health insurance issuer may not deny a claim submitted by the IHS, an Indian tribe or tribal organization based on the format on which the claim is submitted if the format complies with the Medicare claims format requirements.

**Payment of Claims:** Federal laws, including Section 206(a) and (i) of the IHCA, 25 U.S.C. § 1621e(a) and (i) and Title 45 Code of Federal Regulation, Part 156, Subpart E<sup>1</sup>, are applicable to health insurance issuers when paying claims from I/T/U providers. Section 206(a) and (i) of IHCA provide that the IHS, an Indian tribe, tribal organization, and urban Indian organization have a right to recover the reasonable charges billed, or, if higher, the highest amount an insurance carrier would pay to other providers. However, this paragraph also notes if the issuer and I/T/U Provider mutually agree to rates or amounts specified in the QHP agreement as payment in full, the QHP issuer is deemed to be compliant with Section 206 of IHCA.

**Contract Health Service Referral Requirements:** In some instances, I/T/U providers may be subject to referral requirements under the contract health services program. For example, IHS may have existing contractual arrangements that require IHS to refer to specific providers and suppliers; or IHS may be prohibited from referring to a provider that has been excluded from Federal Health Care Programs, as defined in § 1128 of the Social Security Act. We believe these circumstances will be rare, but to the extent that they occur, the I/T/U provider may not be able to adhere to QHP issuer referral requirements to use in-network providers. This section acknowledges the potential for conflicting requirements, and that I/T/U providers may be prevented from following QHP issuer referral requirements in such instances. This section affirms that the I/T/U provider will otherwise comply with in network coordination of care and referral requirements.

#### **IV. Database of Indian Providers**

To assist issuers in identifying I/T/U providers in their service areas, please use the attached link to obtain a database of I/T/U provider locations, developed with the assistance of the Indian Health Service: <http://cciio.cms.gov/programs/exchanges/qhp.html>.

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<sup>1</sup> Title 45 Code of Federal Regulation, Part 156, Subpart E describes rules for the elimination of cost sharing for EHB, for Indians at or below 300% of the Federal Poverty Level, and for no cost sharing for Indians receiving an item or service that is an EHB furnished by the Indian Health Service, an Indian Tribe, Tribal Organization or Urban Indian Organization, or through referral under contract health services. 78 Fed. Reg. 15410, 15535-39 (Mar. 11, 2013).



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**DRAFT**  
**Model QHP Addendum for Indian Health Care Providers**

**1. Purpose of Addendum; Supersession.**

The purpose of this Addendum for Indian health care providers is to apply special terms and conditions necessitated by federal law and regulations to the network provider agreement by and between \_\_\_\_\_ (herein "Qualified Health Plan issuer" and/or "QHP issuer") and \_\_\_\_\_ (herein " Provider"). To the extent that any provision of the Qualified Health Plan issuer's network provider agreement or any other addendum thereto is inconsistent with any provision of this Addendum, the provisions of this Addendum shall supersede all such other provisions.

**2. Definitions.**

For purposes of the Qualified Health Plan issuer's agreement, any other addendum thereto, and this Addendum, the following terms and definitions shall apply:

- (a) "Contract health services" has the meaning given in the Indian Health Care Improvement Act (IHCIA) Section 4(5), 25 U.S.C. § 1603(5).
- (b) "Indian" has the meaning given in 45 C.F.R. 155.300.
- (c) "Provider" means a health program administered by the Indian Health Service, a tribal health program, an Indian tribe or a tribal organization to which funding is provided pursuant to 25 U.S.C. § 47 (commonly known as the "Buy Indian Act"), or an urban Indian organization that receives funding from the IHS pursuant to Title V of the IHCIA (Pub. L. 94-437), as amended, and is identified by name in Section 1 of this Addendum.
- (d) "Indian Health Service or IHS" means the agency of that name within the U.S. Department of Health and Human Services established by the IHCIA Section 601, 25 U.S.C. § 1661.
- (e) "Indian tribe" has the meaning given in the IHCIA Section 4(14), 25 U.S.C. § 1603(14).
- (f) "Qualified Health Plan" (QHP) has the meaning given in Section 1301 of the Affordable Care Act, 42 U.S.C. § 18021.
- (g) "Tribal health program" has the meaning given in the IHCIA Section 4(25), 25 U.S.C. § 1603(25).
- (h) "Tribal organization" has the meaning given in the IHCIA Section 4(26), 25 U.S.C. § 1603(26).
- (i) "Urban Indian organization" has the meaning given in the IHCIA Section 4(29), 25 U.S.C. § 1603(29).

**3. Description of Provider.**

The Provider identified in Section 1 of this Addendum is (check the appropriate box):

The IHS.

An Indian tribe that operates a health program under a contract or compact to carry out programs, services, functions, and activities (or portions thereof) of the IHS pursuant to the ISDEAA, 25 U.S.C. § 450 et seq.



/ / A tribal organization that operates a health program under a contract or compact to carry out programs, services, functions, and activities (or portions thereof) of the IHS pursuant to the ISDEAA, 25 U.S.C. § 450 et seq.

/ / A tribe or tribal organization that operates a health program with funding provided in whole or part pursuant to 25 U.S.C. § 47 (commonly known as the Buy Indian Act).

/ / An urban Indian organization that operates a health program with funds in whole or part provided by IHS under a grant or contract awarded pursuant to Title V of the IHCA.

#### **4. Persons Eligible for Items and Services from Provider.**

- (a) The parties acknowledge that eligibility for services at the Provider's facilities is determined by federal law, including the IHCA, 25 U.S.C. § 1601, et seq. and/or 42 C.F.R. Part 136. Nothing in this agreement shall be construed to in any way change, reduce, expand, or alter the eligibility requirements for services through the Provider's programs.
- (b) No term or condition of the QHP issuer's agreement or any addendum thereto shall be construed to require the Provider to serve individuals who are ineligible under federal law for services from the Provider. The QHP issuer acknowledges that pursuant to 45 C.F.R. 80.3(d), an individual shall not be deemed subjected to discrimination by reason of his/her exclusion from benefits limited by federal law to individuals eligible for services from the Provider. Provider acknowledges that the nondiscrimination provisions of federal law may apply.

#### **5. Applicability of Other Federal Laws.**

Federal laws and regulations affecting the Provider, include but are not limited to the following:

(a) The IHS as a Provider:

- (1) Anti-Deficiency Act, 31 U.S.C. § 1341;
- (2) ISDEAA, 25 U.S.C. § 450 et seq.;
- (3) Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680;
- (4) Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653;
- (5) Federal Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a, 45 C.F.R. Part 5b;
- (6) Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2;
- (7) Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. Parts 160 and 164; and
- (8) IHCA, 25 U.S.C. § 1601 et seq.

(b) An Indian tribe or a Tribal organization that is a Provider:

- (1) ISDEAA, 25 U.S.C. § 450 et seq.;
- (2) IHCA, 25 U.S.C. § 1601 et seq.;
- (3) FTCA, 28 U.S.C. §§ 2671-2680;
- (4) Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653;
- (5) Privacy Act, 5 U.S.C. § 552a, 45 C.F.R. Part 5b; and
- (6) HIPAA, 45 C.F.R. Parts 160 and 164.

(c) An urban Indian organization that is a Provider:

- (1) IHClA, 25 U.S.C. § 1601 et seq. (including without limitation pursuant to the IHClA Section 206(e)(3), 25 U.S.C. § 1621e(e)(3), regarding recovery from tortfeasors);
- (2) Privacy Act, 5 U.S.C. § 552a, 45 C.F.R. Part 5b; and
- (3) HIPAA, 45 C.F.R. Parts 160 and 164.

## **6. Non-Taxable Entity.**

To the extent the Provider is a non-taxable entity, the Provider shall not be required by a QHP issuer to collect or remit any federal, state, or local tax.

## **7. Insurance and Indemnification.**

- (a) *Indian Health Service.* The IHS is covered by the FTCA which obviates the requirement that IHS carry private malpractice insurance as the United States consents to be sued in place of federal employees for any damages to property or for personal injury or death caused by the negligence or wrongful act or omission of federal employees acting within the scope of their employment. 28 U.S.C. §§ 2671-2680. Nothing in the QHP network provider agreement shall be interpreted to authorize or obligate any IHS employee to perform any act outside the scope of his/her employment. The IHS shall not be required to acquire insurance, provide indemnification, or guarantee that the QHP will be held harmless from liability.
- (b) *Indian Tribes and Tribal Organizations.* A Provider which is an Indian tribe, a tribal organization, or employee of a tribe or tribal organization shall not be required to obtain or maintain professional liability insurance to the extent such Provider is covered by the FTCA pursuant to federal law (Public Law 101-512, Title III, § 314, as amended by Public Law 103-138, Title III, § 308 (codified at 25 U.S.C. § 450f note); and 25 C.F.R. Part 900, Subpart M; 25 U.S.C. §458aaa-15(a); and 42 C.F.R. § 137.220). Nothing in the QHP issuer network provider agreement or any addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the QHP issuer will be held harmless from liability.
- (c) *Urban Indian Organizations.* To the extent a Provider that is an urban Indian organization is covered by the FTCA pursuant to Section 224(g)-(n) of the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act, Public Law 104-73, (codified at 42 U.S.C. § 233(g)-(n)), 42 C.F.R. Part 6, such Provider shall not be required to obtain or maintain professional liability insurance. Nothing in the QHP issuer network provider agreement or any addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such Provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the QHP issuer will be held harmless from liability.

## **8. Licensure of Health Care Professionals.**

- (a) *Indian Health Service.* States may not regulate the activities of IHS-operated health care programs nor require that IHS health care professionals be licensed in the state where they are providing services, whether the IHS employee is working at an IHS-operated facility or has been assigned to a health care program of a tribe, tribal organization, or urban Indian organization. The parties agree that during the term of the QHP issuer's agreement, IHS health care professionals shall hold state licenses in accordance with applicable federal law, and that IHS facilities shall be accredited in accordance with federal statutes and regulations.

- (b) *Indian tribes and tribal organizations.* Section 221 of the IHCIA, 25 U.S.C. § 1621t, exempts a health care professional employed by an Indian tribe or tribal organization from the licensing requirements of the state in which such tribe or organization performs services, provided the health care professional is licensed in any state. The parties agree that these federal laws apply to the QHP issuer's agreement and any addenda thereto.
- (c) *Urban Indian organizations.* To the extent that any health care professional of an urban Indian provider is exempt from state regulation, such professional shall be deemed qualified to perform services under the QHP Sponsor's agreement and all addenda thereto, provided such employee is licensed to practice in any state. The parties agree that this federal law applies to the QHP issuer's agreement and any addenda thereto.

#### **9. Licensure of Provider; Eligibility for Payments.**

To the extent that the Provider is exempt from state licensing requirements, such Provider shall not be required to hold a state license to receive any payments under the QHP issuer's network provider agreement and any addendum thereto.

#### **10. Dispute Resolution.**

In the event of any dispute arising under the QHP issuer's network provider agreement or any addendum thereto, the parties agree to meet and confer in good faith to resolve any such disputes prior to resolution of any disputes through any process identified in the network provider agreement. If the Provider is an IHS provider, the laws of the United States shall apply to any problem or dispute hereunder that cannot be resolved by and between the parties in good faith. Notwithstanding any provision in the provider network agreement, IHS shall not be required to submit any disputes between the parties to binding arbitration.

#### **11. Governing Law.**

The QHP issuer's network provider agreement and all addenda thereto shall be governed and construed in accordance with federal law of the United States. In the event of a conflict between such agreement and all addenda thereto and federal law, federal law shall prevail. Nothing in the QHP issuer's network provider agreement or any addendum thereto shall subject an Indian tribe, tribal organization, or urban Indian organization to state law to any greater extent than state law is already applicable.

#### **12. Medical Quality Assurance Requirements.**

To the extent the QHP issuer imposes any medical quality assurance requirements on its network providers, any such requirements applicable to the Provider shall be subject to Section 805 of the IHCIA, 25 U.S.C. § 1675.

#### **13. Claims Format.** *not substantive*

The QHP issuer shall process claims from the Provider in accordance with Section 206(h) of the IHCIA, 25 U.S.C. § 1621e(h), which does not permit an issuer to deny a claim submitted by a Provider based on the format in which submitted if the format used complies with that required for submission of claims under Title XVIII of the Social Security Act or recognized under Section 1175 of such Act.

#### **14. Payment of Claims.**

The QHP issuer shall pay claims from the Provider in accordance with federal law, including Section 206 of the IHCA (25 U.S.C. §1621e), and 45 C.F.R., Part 156, Subpart E. The QHP issuer shall be deemed compliant with Section 206 to the extent the QHP issuer and Provider mutually agree to the rates or amounts specified in the QHP issuer agreement as payment in full.

**15. Hours and Days of Service.**

The hours and days of service of the Provider shall be established by the Provider. Though not required prior to the establishment of such service hours, the QHP issuer and the Provider may negotiate and agree on specific hours and days of service. At the request of the QHP issuer, such Provider shall provide written notification of its hours and days of service.

**16. Contract Health Service Referral Requirements**

The Provider shall comply with coordination of care and referral obligations of the QHP issuer except only in specific circumstances in which such referrals would conflict with federal law or that referral requirements applicable to Contract Health Services would not be met. The Provider will notify the QHP issuer when such circumstances occur.

**17. Sovereign Immunity.**

Nothing in the QHP issuer's network provider agreement or in any addendum thereto shall constitute a waiver of federal or tribal sovereign immunity.

**18. Endorsement.**

An endorsement of a non-federal entity, event, product, service, or enterprise may be neither stated nor implied by the IHS Provider or IHS employees in their official capacities and titles. Such agency names and positions may not be used to suggest official endorsement or preferential treatment of any non-federal entity under this agreement.

**APPROVALS**

**For the Qualified Health Plan Issuer:**

**For the Provider:**

Date \_\_\_\_\_

Date \_\_\_\_\_





## DRAFT

Model OHP Addendum for Indian Health Care Providers**1. Purpose of Addendum; Supersession.**

The purpose of this Addendum for Indian ~~Health Care Providers~~ health care providers is to apply special terms and conditions necessitated by ~~Federal~~ federal law and regulations to the network provider agreement by and between \_\_\_\_\_ (herein "Qualified Health Plan") issuer and \_\_\_\_\_/or "OHP issuer") and \_\_\_\_\_ (herein "~~Indian Health Care~~ Provider"). To the extent that any provision of the Qualified Health ~~Plan's~~ Plan issuer's network provider agreement or any other addendum thereto is inconsistent with any provision of this Addendum ~~for Indian Health Care Providers~~, the provisions of this Addendum ~~for Indian Health Care Providers~~ shall supersede all such other provisions.

**2. Definitions.**

For purposes of the Qualified Health ~~Plan's~~ Plan issuer's agreement, any other addendum thereto, and this Addendum ~~for Indian Health Care Providers~~, the following terms and definitions shall apply:

- (a) ~~"Qualified Health Plan"~~ "Contract health services" has the meaning given in ~~See 1301 of the Patient Protection and Affordable~~ Indian Health Care Improvement Act (ACA), 42 IHCIA) Section 4(5), 25 U.S.C. § 1603(5).
- (b) ~~"Indian Health Care"~~ has the meaning given in 45 C.F.R. 155.300.
- (c) ~~"Provider"~~ means a health program administered by the Indian Health Service (IHS), a tribal health program, an Indian tribe or a tribal organization to which funding is provided pursuant to section 23 of the Act of June 25, 1910 (25 U.S.C. § 47 (commonly known as the "Buy Indian Act")), or an urban Indian organization that receives funding from the IHS pursuant to Title V of the Indian Health Care Improvement Act, IHCIA (Pub. L. 94-437), as amended (IHCIA), and is identified by name in Section 1 of this Addendum.
- (d) ~~"Indian Health Service" or IHS"~~ means the agency of that name within the U.S. Department of Health and Human Services established by the IHCIA See Section 601, 25 USC § U.S.C. § 1661.
- (e) ~~"Indian tribe"~~ has the meaning given in the IHCIA See Section 4(14), 25 USC U.S.C. § 1603(14).
- (e) ~~The term "tribal organization" has the meaning given in IHCIA Sec. 4(26), 25 USC § 1603(26).~~
- (f) ~~"Urban Indian organization"~~ "Qualified Health Plan" (QHP) has the meaning given in IHCIA Sec. 4(29), 25 USC § 1603(29). Section 1301 of the Affordable Care Act, 42 U.S.C. § 18021.
- (g) ~~The term "Indian," has the meaning given in 45 C.F.R. 155.300(a).~~
- (h) ~~The term "contract health services" has the meaning given in IHCIA Sec. 4(5), 25 U.S.C. § 1603(5).~~
- (g) ~~(i) The term "Tribal health program" has the meaning given in the IHCIA See Section 4(25), 25~~

U.S.C. § 1603(25).

(h) "Tribal organization" has the meaning given in the IHCA Section 4(26), 25 U.S.C. § 1603(26).

(i) "Urban Indian organization" has the meaning given in the IHCA Section 4(29), 25 U.S.C. § 1603(29).

### 3. Description of ~~Indian Health Care~~ Provider.

The Provider identified in Section 1 of this Addendum ~~for Indian Health Care Providers~~ is (check the appropriate box):

~~The Indian Health Service (IHS).~~

~~An Indian tribe that operates a health program under a contract or compact to carry out programs, services, functions, and activities (or portions thereof) of the IHS pursuant to the Indian Self Determination and Education Assistance Act (ISDEAA), 25 USC §U.S.C. § 450 et seq.~~

~~A tribal organization that operates a health program under a contract or compact to carry out programs, services, functions, and activities (or portions thereof) of the IHS pursuant to the ISDEAA, 25 USC §U.S.C. § 450 et seq.~~

~~A tribe or tribal organization that operates a health program with funding provided in whole or part pursuant to section 23 of the Act of June 25, 1910 (25 U.S.C. § 47 (commonly known as the Buy Indian Act), or urban Indian organization that receives funding from the IHS pursuant to Title V of the Indian Health Care Improvement Act, Pub. L. 94-437, as amended (IHCA)).~~

~~An urban Indian organization that operates a health program with funds in whole or part provided by IHS under a grant or contract awarded pursuant to Title V of the IHCA.~~

### 4. ~~Cost-Sharing Exemption for Indians; No Reduction in Payments.~~

~~If an Indian enrolled in a qualified health plan is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization or through referral under contract health services—~~

~~(a) No cost sharing under the plan shall be imposed under the plan for such item or service; and~~

~~(b) The issuer of the plan shall not reduce the payment to any such entity for such item or service by the amount of any cost sharing that would be due from the Indian but for subparagraph (a).—~~

~~ACA §1402(d)(2) (42 USC 18071(d)(2)).~~

### 5. ~~Persons eligible~~Eligible for ~~items~~Items and ~~services~~Services from ~~Indian Health Care~~ Provider.

~~(a) The parties agree that the IHS is limited to serving eligible IHS beneficiaries, except under limited circumstances pursuant to 42 CFR Part 136 and IHCA Sec. 813, 25 USC §1680e.~~

~~(b) The parties agree that the Indian Health Care Provider that is an Indian tribe, a tribal organization, or an urban Indian organization has the authority to limit its service population in accordance with the following authorities:~~

- ~~\_\_\_\_\_ (1) Sec. 813 of the IHCA, 25 USC §1680e;~~
- ~~\_\_\_\_\_ (2) 42 CFR Part 136; and~~
- ~~\_\_\_\_\_ (3) The terms of the ISDEAA contract or compact or IHCA grant or contract, as applicable.~~

- (a) ~~(e) The parties acknowledge that eligibility for services at the Provider's facilities is determined by federal law, including the IHCA, 25 U.S.C. § 1601, et seq. and/or 42 C.F.R. Part 136. Nothing in this agreement shall be construed to in any way change, reduce, expand, or alter the eligibility requirements for services through the Provider's programs.~~
- (b) No term or condition of the ~~Qualified Health Plan's~~ QHP issuer's agreement or any addendum thereto shall be construed to ~~change, reduce, expand or alter the eligibility of persons for services of~~ require the Provider to serve individuals who are ineligible under federal law for services from the Provider. The QHP issuer acknowledges that pursuant to 45 C.F.R. 80.3(d), an individual shall not be deemed subjected to discrimination by reason of his/her exclusion from benefits limited by federal law to individuals eligible for services from the Provider. ~~Provider acknowledges that the Indian Health Care Provider that is inconsistent with the authorities identified in subsection (a) or (b) nondiscrimination provisions of federal law may apply.~~

## **65. Applicability of Other Federal ~~laws.~~ Laws.**

Federal laws and regulations affecting ~~an Indian Health Care~~ the Provider, include but are not limited to the following:

- (a) The IHS as ~~an Indian Health Care~~ Provider:

- ~~(1) (1) Anti-Deficiency Act, 31 U.S.C. § 1341;~~
- ~~(2) (2) Indian Self-Determination and Education Assistance Act (ISDEAA); 25 USC § U.S.C. § 450 et seq.;~~
- ~~(3) (3) Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680;~~
- ~~(4) (4) Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653;~~
- ~~(5) (5) Federal Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a, 45 CFR C.F.R. Part 5b;~~
- ~~(6) (6) Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2;~~
- ~~(7) (7) Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45C45 C.F.R. Parts 160 and 164; and~~
- ~~(8) (8) IHCA, 25 U.S.C. § 1601 et seq.~~

- (b) An Indian tribe or a ~~tribal~~ Tribal organization that is ~~an Indian Health Care~~ Provider:

- ~~(1) (1) ISDEAA, 25 USC § U.S.C. § 450 et seq.;~~
- ~~(2) (2) IHCA, 25 USC § U.S.C. § 1601; et seq.;~~
- ~~(3) (3) FTCA, 28 USC §§ U.S.C. §§ 2671-2680;~~
- ~~(4) (4) Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653;~~
- ~~(5) Privacy Act, 5 U.S.C. § 552a, 45 C.F.R. Part 5b; and~~
- ~~(6) HIPAA, and regulations at 45 CFR parts 45 C.F.R. Parts 160 and 164.~~



(c) An urban Indian organization that is ~~an Indian Health Care~~ Provider:

- (1) ~~IHCIA, 25 USC §1601, et seq.;~~  
 (2)

- (1) IHCIA, 25 U.S.C. § 1601 et seq. (including without limitation pursuant to the IHCIA Section 206(e)(3), 25 U.S.C. § 1621e(e)(3), regarding recovery from tortfeasors);  
(2) Privacy Act, 5 USC § U.S.C. § 552a and regulations at, 45 CFR C.F.R. Part 5b; and  
(3) (3) HIPAA, and regulations at 45 CFR parts 45 C.F.R. Parts 160 and 164.

#### **76. Non-taxable entity- Taxable Entity.**

To the extent ~~an Indian Health Care~~ the Provider is a non-taxable entity, ~~such~~ the Provider shall not be required by a ~~Qualified Health Plan~~ OHP issuer to collect or remit any ~~Federal, State~~ federal, state, or local tax.

#### **87. Insurance and indemnification- Indemnification.**

(a) (a) Indian Health Service. The ~~Indian Health Service~~ IHS is covered by the ~~Federal Tort Claims Act~~ (FTCA) which obviates the requirement that IHS carry private malpractice insurance as the United States consents to be sued in place of federal employees for any damages to property or for personal injury or death caused by the negligence or wrongful act or omission of federal employees acting within the scope of their employment. 28 U.S.C. §§ 2671-2680. ~~Nothing in the Qualified Health Plan's~~ OHP network provider agreement shall be interpreted to authorize or obligate any IHS employee to perform any act outside the scope of his/her employment. The IHS shall not be required to acquire insurance, provide indemnification, or guarantee that the ~~Qualified Health Plan~~ OHP will be held harmless from liability.

(b) (b) Indian Tribes and Tribal Organizations. ~~An Indian Health Care A~~ Provider which is an Indian tribe, a tribal organization, or ~~an employee of a tribe or~~ tribal organization shall not be required to obtain or maintain professional liability insurance to the extent such Provider is covered by the ~~Federal Tort Claims Act~~ (FTCA) pursuant to ~~Federal~~ federal law (~~Pub.L. Public Law~~ 101-512, Title III, § 314, as amended by ~~Pub.L. Public Law~~ 103-138, Title III, § 308 (codified at 25 USC § U.S.C. § 450f note); and ~~regulations at 25 CFR C.F.R. Part 900, Subpt. Subpart M-;~~ 25 U.S.C. § 458aaa-15(a); and 42 C.F.R. § 137.220). Nothing in the ~~OHP issuer network provider agreement or any addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the OHP issuer will be held harmless from liability.~~

(c) Urban Indian Organizations. ~~Qualified~~ To the extent a Provider that is an urban Indian organization is covered by the FTCA pursuant to Section 224(g)-(n) of the Public Health ~~Plan's~~ Service Act, as amended by the Federally Supported Health Centers Assistance Act, Public Law 104-73, (codified at 42 U.S.C. § 233(g)-(n)), 42 C.F.R. Part 6, such Provider shall not be required to obtain or maintain professional liability insurance. Nothing in the ~~OHP issuer network provider agreement or any~~

addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such Provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the Qualified Health Plan QHP issuer will be held harmless from liability.

~~(e) Urban Indian Organizations. To the extent an Indian Health Care Provider that is an urban Indian organization is covered by the FTCA pursuant to section 224(g) (n) of the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act, Pub.L. 104-73, (codified at 42 USC §233(g) (n)) and regulations at 42 CFR Part 6, such Provider shall not be required to obtain or maintain professional liability insurance. Nothing in the Qualified Health Plan's agreement or any addendum thereto shall be interpreted to authorize or obligate such Provider or any employee of such Provider to operate outside of the scope of employment of such employee. Such Provider shall not be required to acquire insurance, provide indemnification, or guarantee that the Qualified Health Plan will be held harmless from liability.~~

## 9. Licensure of Health Care Professionals.

(a) *Indian Health Service.* States may not regulate the activities of IHS-operated health care programs nor require that IHS health care professionals be licensed in the State where they are providing services, whether the IHS employee is working at an IHS-operated facility or has been assigned to a health care program of a tribe, tribal organization, or urban Indian organization. The parties agree that during the term of the Qualified Health Plan's QHP issuer's agreement, IHS health care professionals shall hold state licenses in accordance with applicable federal law, and that IHS facilities shall be accredited in accordance with federal statutes and regulations.

~~(b)~~

~~(b) *Indian tribes and tribal organizations.* See Section 221 of the IHCA (25 U.S.C. § 1621t), exempts a health care professional employed by an Indian tribe or tribal organization from the licensing requirements of the state in which such tribe or organization performs services, provided the health care professional is licensed in any state. Sec. 408 of the IHCA (25 U.S.C. § 1647a) provides that a health program operated by an Indian tribe or tribal organization shall be deemed to have met a requirement for a license under state or local law if such program meets all the applicable standards for such licensure, regardless of whether the entity obtains a license or other documentation under such state or local law. The parties agree that these federal laws apply to the Qualified Health Plan's QHP issuer's agreement and any addenda thereto.~~

~~(c) *(e) Urban Indian organizations.* To the extent that any health care professional of an urban Indian Provider provider is exempt from State regulation, such professional shall be deemed qualified to perform services under the Qualified Health Plan QHP Sponsor's agreement and all addenda thereto, provided such employee is licensed to practice in any State. Sec. 408 of the IHCA (25 U.S.C. § 1647a) provides state. The parties agree that a health program operated by an urban Indian organization shall be deemed to have met a requirement for a license under state or local this federal law if such program meets all the applicable standards for such licensure, regardless of whether the entity obtains a license or other documentation under such state or local law applies to the QHP issuer's agreement and any addenda thereto.~~

**9. 10. Licensure of Provider; ~~eligibility~~ Eligibility for payments. ~~Payments.~~**

To the extent that the ~~Indian Health Care~~ Provider is exempt from ~~State~~state licensing requirements, such Provider shall not be required to hold a ~~State~~state license to receive any payments under the ~~Qualified Health Plan's~~QHP issuer's network provider agreement and any addendum thereto.

**10. 11. Dispute Resolution.**

In the event of any dispute arising under the ~~Qualified Health Plan's~~QHP issuer's network provider agreement or any addendum thereto, the parties agree to meet and confer in good faith to resolve any such disputes. ~~The prior to resolution of any disputes through any process identified in the network provider agreement.~~ **The prior to resolution of any disputes through any process identified in the network provider agreement.** If the Provider is an IHS provider, the laws of the United States shall apply to any problem or dispute hereunder that cannot be resolved by and between the parties in good faith. Notwithstanding any provision in the ~~Qualified Health Plan's agreement or any addendum thereto to the contrary, the Indian Health Care Provider~~provider network agreement, IHS shall not be required to submit any disputes between the parties to binding arbitration.

**11. 12. Governing Law.**

The ~~Qualified Health Plan's~~QHP issuer's network provider agreement and all addenda thereto shall be governed and construed in accordance with ~~Federal~~federal law of the United States. In the event of a conflict between such agreement and all addenda thereto and ~~Federal~~federal law, ~~Federal~~federal law shall prevail. Nothing in the ~~Qualified Health Plan's~~QHP issuer's network provider agreement or any addendum thereto shall subject an Indian tribe, tribal organization, or urban Indian organization to ~~State~~state law to any greater extent than ~~State~~state law is already applicable.

**12. 13. Medical Quality Assurance Requirements.**

To the extent the ~~Qualified Health Plan~~QHP issuer imposes any medical quality assurance requirements on its network providers, any such requirements applicable to ~~Indian Health Care Provider~~the Provider shall be subject to ~~See Section~~ 805 of the IHCA (~~25 U.S.C. § 1675~~).

**13. 14. Claims Format.**

~~Pursuant to Sec. 206(h) of the IHCA (25 USC § 1621e(h)), the Qualified Health Plan may), which does not permit an issuer to deny a claim submitted by the Indian Health Care Provider based on the format in which submitted if the format used complies with that required for submission of claims under Title XVIII of the Social Security Act or recognized under section~~**The QHP issuer shall process claims from the Provider in accordance with Section 206(h) of the IHCA (25 USC § 1621e(h)), the Qualified Health Plan may), which does not permit an issuer to deny a claim submitted by the Indian Health Care Provider based on the format in which submitted if the format used complies with that required for submission of claims under Title XVIII of the Social Security Act or recognized under section**Section 1175 of such Act.

**14. 15. Payment of Claims.**

The ~~Qualified Health Plan~~QHP issuer shall pay claims from the ~~Indian Health Care~~ Provider in accordance with ~~Federal~~federal law, including ~~Sec. Section~~ 206 of the IHCA (25 U.S.C. §1621e), and ~~Sec. 1402(d)(2)(B) of the ACA (42 U.S.C. §18071(d)(2)(B))~~, except F.R., Part 156, Subpart E. ~~The QHP issuer shall be deemed compliant with Section 206 to the extent the Indian Health Care QHP issuer and Provider expressly agrees in writing~~mutually agree to the rates or amounts specified in ~~[specify payment schedule here]~~the QHP issuer agreement as payment in full, provided that such rates or amounts shall not be lower than the ~~Qualified Health Plan~~ pays to any of its other preferred or in-network providers.

**15. 16. Hours and Days of Service.**

The hours and days of service of the ~~Indian Health Care~~ Provider shall be established by ~~such~~the Provider. ~~Though not required prior to the establishment of such service hours, the QHP issuer and the Provider may negotiate and agree on specific hours and days of service.~~ At the request of the ~~Qualified Health Plan~~QHP issuer, such Provider shall provide written notification of its hours and days of service.

**16. 17. Contract Health Service Referral Requirements**

~~The Provider shall comply with coordination of care and referral obligations of the QHP issuer except only in specific circumstances in which such referrals would conflict with federal law or that referral requirements applicable to Contract Health Services would not be met. The Provider will notify the QHP issuer when such circumstances occur.~~

**17. Sovereign Immunity.**

Nothing in the ~~Qualified Health Plan's~~QHP issuer's network provider agreement or in any addendum thereto shall constitute a waiver of federal or tribal sovereign immunity.

**18. 18. Endorsement.**

An endorsement of a non-~~Federal~~federal entity, event, product, service, or enterprise may be neither stated nor implied by the IHS ~~provider~~Provider or IHS employees in their official capacities and titles. Such agency names and positions may not be used to suggest official endorsement or preferential treatment of any non-~~Federal~~federal entity under this agreement.

**APPROVALS**

**For the Qualified Health Plan: \_\_\_\_\_ Issuer: For the Indian Health Care Provider:**

\_\_\_\_\_  
Date \_\_\_\_\_ Date  
\_\_\_\_\_ Date \_\_\_\_\_ Date