

MEMORANDUM OF UNDERSTANDING

WHEREAS, on or about July 1, 2011 the Workers' Compensation Board (Board) assumed the administration and final distribution of the assets and liabilities of the Community Residence Insurance Savings Plan (CRISP); and

WHEREAS, upon the Board's assumption of the administration and final distribution of CRISP's assets and liabilities, the Board commissioned a forensic accounting of CRISP with the stated purpose of verifying CRISP's accumulated deficit, as determined by Bollam, Sheedy, Torani & Co., and allocating the accumulated deficit among the former employer members of CRISP (CRISP Forensic Accounting); and

WHEREAS, after the Board's assumption of CRISP's assets and liabilities, the Board determined pursuant to 12 NYCRR§317.20 that CRISP was insolvent and, pursuant to Workers' Compensation Law (WCL) §50(5)(f), the Board has advised that it had been meeting the obligation of CRISP out of its administrative fund and simultaneously obtaining cash flow by assessing the self-insurance community pursuant to WCL 50(5)(g); and

WHEREAS, the CRISP Forensic Accounting has been completed and the Board has stated it has provided all former members of CRISP with a copy of the Deficit Reconstruction and 2013 Forensic Assessment, dated January 14, 2013, and a copy of the Forensic Analysis of the CRISP by making the same available on its website; and

WHEREAS, the Board has also stated that it has served all former members of CRISP with invoices detailing their pro rata share and joint and several liability for CRISP's alleged accumulated deficit (2013 Forensic Assessment); and

WHEREAS, certain Former CRISP Members participated in a premium retention payment plan (Former CRISP Retention Members) such that each Former CRISP Retention Member retained liability on its employees' claims, subject to annual maximums beyond which Former CRISP Retention Members could not be charged directly (Program Year Maximums); and

WHEREAS, the Board has also stated that it has served all Former CRISP Retention Members with invoices detailing their liability arising out of their participation in the retention plan (Retention Plan Assessment); and

WHEREAS, the Board also has stated that it has served all former CRISP members with Credit Memo and/or Invoice dated on or about March 27, 2013 (2013 Forensic Adjustment);

WHEREAS, annexed hereto as "Attachment A" is a list of certain former member(s) of CRISP (Former CRISP Member[s]) who dispute their liability and/or the amounts assessed in connection with their membership in CRISP as set forth in the CRISP Forensic Accounting, and/or the 2013 Forensic Assessment and/or Retention Plan Assessment; and/or 2013 Forensic Adjustment; and

WHEREAS, the Former CRISP members also seek a thorough review of the CRISP Forensic Accounting, and/or 2013 Forensic Assessment, and/or Retention Plan Assessment and/or 2013 Forensic Adjustment and may seek review by actuaries, claims reviewers and forensic accountants; and

WHEREAS, the Former CRISP Members seek the production of necessary documentation to permit review of the CRISP Forensic Accounting, 2013 Forensic Assessment and/or Retention Plan Assessment and/or 2013 Forensic Adjustment and wish to avoid the time, effort and expense of litigation, including, but not limited to, Article 78 proceedings, other discovery proceedings and/or FOIL requests; and

WHEREAS, the Board is in need of a steady flow of funds from the former employer members of CRISP, including the Former CRISP Members, to meet the obligations of CRISP; and

WHEREAS, the Board wishes to avoid the time, effort and expense of litigation to compel the payment of the 2013 Forensic Assessment and/or Retention Plan Assessment and/or 2013 Forensic Adjustment by the Former CRISP Members; and

WHEREAS, both the Board, and the Former CRISP Members wish to preserve all of their legal rights with respect to CRISP, any Board assessment, invoice, charge or demand including 2013 Forensic Assessment, and/or Retention Plan Assessment and/or 2013 Forensic Adjustment.

NOW THEREFORE, in consideration of this Agreement and for other good and valuable consideration, receipt of which is hereby acknowledged, the Former CRISP Member(s), as reflected in Attachment A, and the Board hereby agree as follows:

1. Tolling of Limitations Periods. The time period during which this Agreement is in effect, commencing on the execution date by both parties, shall not be included, asserted, or relied upon in any way in computing the running of the time under any applicable statute of limitations, or limitations period, or by way of laches, in defense of any administrative and/or civil action brought by the Board or its agents against the Former CRISP Members or brought by Former CRISP Members against the Board, including, but not limited to, actions arising under Article 78 of the CPLR. Nothing in this Agreement shall have the effect of reviving any claims which were barred by the passage of time or the statute of limitations as of the execution date hereof.

2. Standstill Commitment by the WCB. During the time that this Agreement is in effect, the Board and its agents will not take or commence any action, including administrative and/or civil action against any individual Former CRISP Member, including and not limited to any action to collect the 2013 Forensic Assessment, a Retention Plan Assessment and/or 2013 Forensic Adjustment so long as that Former CRISP Member is in compliance with the obligations of Paragraph 9, herein. The failure of one or more Former CRISP Members to comply with the obligations of Paragraph 9 shall not trigger or permit action, including but not limited to an administrative and/or civil action by the Board or its agents against Former CRISP Members who are in compliance with Paragraph 9.

3. Standstill Commitment by Former CRISP Members against the Board. During the time that this Agreement is in effect, the Former CRISP Members will not commence any civil action and/or proceeding pursuant to CPLR Article 78 against the Board to challenge the CRISP Forensic Accounting,

the amount of the 2013 Forensic Assessment, the amount of the Retention Plan Assessment or for any other reason and will not file FOIL or other information requests with the Board relative to the CRISP Forensic Accounting and/or the amount of the 2013 Forensic Assessment and or the amount of the Retention Plan Assessment and/or 2013 Forensic Adjustment. Nothing herein shall prevent, limit or restrict Former CRISP Member's right to access to CRISP information as set forth in this Agreement. Also, nothing herein shall prevent, limit or restrict Former CRISP Member's from requesting and obtaining CRISP information regarding said Member's workers compensation claims, including but not limited to said Member's: claim information, loss runs, and/or Section 32 information.

3(a). Standstill Commitment by Former CRISP Members against third-party entities. During the time that this Agreement is in effect, the Former CRISP Members will not commence any civil action, third-party action, derivative action, and/or proceeding against former administrators of CRISP including but not limited to the third-party (trust) administrator(s), claims administrator(s), actuaries, accountants, auditors, agents, marketing agents, brokers, trustees, trustee employers, chairperson of the trustees, attorneys, administrator executives in their individual capacity, or individual CRISP member companies. The Former CRISP Members acknowledge and agree that the Board, in its capacity as the current administrator of CRISP, is the only party who holds standing to implement any legal proceeding against the above-named former administrative agents or agencies and any proceeds recovered through such legal action will be distributed in accordance with paragraph 13 entitled "Third Party Proceeds". The Former CRISP Members agree not to implead or otherwise interfere with any legal action initiated by the Board against the above-named former administrative agents or agencies. The Former CRISP Members further agree to discontinue, withdraw, or otherwise cease any civil action, third-party action, derivative action, and/or proceeding against the above-named administrative agents or agencies previously filed in any Court of any jurisdiction in the State of New York, without prejudice to any action the Board files against same or similar entities.

4. Other than the commitments made herein, both the Board and the Former CRISP Members reserve all other rights, defenses and claims that may be asserted in any action, including administrative actions, civil action and/or proceedings pursuant to CPLR Article 78, except as modified by Paragraphs 1, 2, 3, and 3(a), above. The Former CRISP Member(s)' execution of this Agreement shall in no way be interpreted or construed to be an admission of joint and several liability for the 2013 Forensic Assessment and/or 2013 Forensic Adjustment claimed owed by the Board, that they are obligated to pay said assessments, or that the amounts set forth in the 2013 Forensic Assessment or 2013 Forensic Adjustment are accurate.

5. Terms of Agreement. This agreement shall expire on June 1, 2015 unless either party terminates the agreement pursuant to Paragraph 7 below or renews the agreement pursuant to Paragraph 6 below. Monthly payments due hereunder in accordance with Attachment A hereto shall be made on the 1st of each month for a period of eighteen (24) months beginning on June 1, 2013, through and including June 1, 2015.

6. Extension of Agreement Term. The Former CRISP Members and the Board may agree in writing to extend the term of this Agreement.

7. Termination of Agreement. Any Former CRISP Member, or the Board, may terminate this Agreement by giving ninety (90) days prior written notice of such termination to the other party hereto.

Default and/or termination pursuant to this Agreement by and/or as to any Former CRISP Member shall not effect in any manner the rights and obligations in connection with any other Former CRISP Member.

8. Notices. Any notice given pursuant to this Agreement shall be made by any delivery with proof of service, addressed to the other party as hereinafter set forth, or to such other address as a party may designate, and shall be deemed given upon mailing or hand delivery.

a. Any such notice given to the Board shall be addressed to:

Michael Papa
Associate Attorney
Workers' Compensation Board
328 State Street
Schenectady, New York 12305

b. Any such notice given to a Former CRISP Member(s) shall be addressed as follows:

[Name of person receiving notices on behalf of member]

[Title]

[Company, Firm]

[Street Address]

[City, State, Zip Code]

[E-Mail Address]

Either party may amend this notice provision by providing notice of change of address pursuant to the terms of this paragraph.

9. Monthly Payment of Assessments. Each and every one of the Former CRISP Members, shall, within thirty (30) days of the execution of this Agreement, and monthly each and every month thereafter, so long as this Agreement is in effect, remit payments to the Board in an amount equal to 65 percent of the March 2013 Forensic Adjustment charges against that Member, at the rate corresponding to the longest repayment plan available to such Former CRISP Members. All funds received pursuant to this paragraph shall be applied toward principal of any amounts said Former CRISP Member is found to owe, if any, in connection with CRISP. In addition to the above payment, each and every one of the Former CRISP Members who were also a Retention Plan Participant (Former CRISP Retention Members) shall, within thirty (30) days of the execution of this Agreement, and monthly each and every month thereafter, so long as this Agreement is in effect, remit payments to the Board in the amount set forth on Schedule 1 to Retention Rider denominated as "Retention MOU Payment". Retention MOU Payment shall be determined as set forth in Retention Rider, attached hereto. All Retention MOU Payments shall be applied toward principal in connection with that provider's respective Retention Claims.

10. Interest and Penalties. All Former CRISP Members who begin and continue to make the monthly payments set forth in Paragraph 9, above, do not seek any recoupment of such payments except pursuant to Paragraphs 13 and 14 of this Agreement, and comply with all other terms of this Agreement, shall be treated in all respects as if said Former CRISP Member had been paying during the period of the Agreement 100% of any obligation in connection with CRISP whether pursuant to any assessment, demand, invoice or otherwise and shall not be assessed by the Board or its agents in any administrative and/or civil action(s), nor shall the Board recover from any such Former CRISP Member: (i) any interest, collection fees and/or penalties associated with the State Finance Law or any other law or rule relative to payments made during the period of this Agreement; (ii) any interest for the period of this agreement.

11. Discovery. A former CRISP Member shall be entitled to retain an expert or experts, as defined below, for purposes of a review as detailed in this paragraph including actuarial, accounting and claims. The former CRISP Members agree that in no event shall the total number of experts in each such category be more than five. The Former CRISP Members further agree that the right to employ an expert pursuant to this paragraph shall be extinguished upon the maximum number of experts in a category having already been provided access to material pursuant to this paragraph. The Board shall provide the expert or experts selected by any Former CRISP Member with access to all documentation reasonably required by a set of duly accredited and licensed actuaries, claims reviewers and forensic accountants (Expert(s)) to review CRISP, the CRISP Forensic Accounting, 2013 Forensic Assessment, and/or Retention Assessment, and/or 2013 Forensic Adjustment as well as any subsequent assessment, as to all former employer members of CRISP as a whole and the Former CRISP Members in particular, subject to the restrictions on disclosure and confidentiality protections set forth below. The actuarial Expert selected shall be a fellow or associate of the Casualty Actuarial Society, the claim Expert selected shall have had at least seven years of experience performing claims management and/or independent claim reviews and/or claims audits in the capacity of an independent claims management consultant, and the accounting Expert selected shall be a Certified Public Accountant. The review performed by the Experts shall consist of the production of the following documents and/or the providing of access to documents at the following times and in the following manner:

a. Claims Review: No sooner than August 1, 2013, the Expert shall provide the Board with a proposed process to be used in connection with the granting of access to CRISP's claims reserve data contained at the office of the Board's third party administrator in Buffalo, New York. Said process must include the execution of a confidentiality agreement, to be drafted by the Board and mutually agreed upon by both parties, and a detailed recitation of the manner in which the Expert plans to prevent disclosure of any and all individually identifiable claimant information contained within the reserve data from public disclosure, including a limitation on written or verbal disclosure to counsel for the Former CRISP Members and disclosure in any subsequent report created. The Board shall evaluate the reasonableness of such process and, not later than thirty (30) days after receipt shall either approve, propose amendments to, or disapprove, with good-faith reasons therefore, such proposed process. In the event of a good-faith disapproval, the parties shall have an additional thirty (30) days in which to arrive at a mutually-agreeable process. Within thirty (30) days after the approval of a mutually agreed-upon process, the Expert shall be granted access to the reserve data pursuant to the agreed-upon process and at an agreed-upon time that will minimize disruption to the Board's consultants and cause no interruption in the provision of benefits to injured workers. Within thirty (30) days of the completion of a final report, such report shall be provided to the Board to the extent any such final report is prepared.

b. Updated Loss Run: In connection with actuarial review, at least twice, but not more than four (4) times, within ten (10) business days of the receipt of a written request from the Former CRISP Members to the Board, the Board shall provide a summary loss run and detailed loss run for use by the actuarial Expert. In the event that this Agreement is extended pursuant to Paragraph 6 herein, then the Board shall subsequently provide bi-annual loss runs to the extent the same are reasonably necessary. Said loss runs shall be redacted to remove all individually identifiable claimant information contained within the loss runs and shall be produced in Excel format unless the loss runs do not exist in Excel format, in which case the Board will provide the loss runs in another mutually-agreeable format that will minimize the time and expense of manually imputing data. Nothing herein shall limit a Former CRISP Member's right to access to its respective loss run(s) and the Board, its agents, servants, employees and contractors shall make regular loss runs reasonable available to Former CRISP Members regarding the claims of their employees. Also, notwithstanding the foregoing, on a monthly basis the Board shall make available on the CRISP website a redacted monthly summary loss run for all CRISP claims. Furthermore, every six months, the Board shall also make available on the CRISP website a redacted summary of monthly check registers evidencing payments in connection with CRISP.

c. Documents regarding the CRISP Forensic Accounting, 2013 Forensic Assessment, and/or 2013 Forensic Adjustment: Not sooner than January 1, 2014, the Expert shall provide the Board with a proposed process to be used in connection with the granting of access to documents sufficient to review the CRISP Forensic Accounting and 2013 Forensic Assessment (collectively Employer Material). Said process must include the execution of a confidentiality agreement, to be drafted by the Board and mutually-agreed upon by both parties, and a detailed recitation of the manner in which the Expert plans to protect from verbal or written disclosure to the Participating Members and the Public: i) any and all individually identifiable claimant information contained within the Employer Material; and ii) any and all financial information within the Employer Material, including but not limited to, payroll information, experience modification calculations, premium calculation, audited financial statements, tax returns, credit histories, Federal Employer Identification Numbers, Unemployment Insurance Identification Numbers, and names of individual employees contained within the Employer Material. To the extent that counsel for any Former CRISP Member will seek access to Employer Material said counsel shall execute the same or similar confidentiality agreement executed by the Expert. The Board shall evaluate the reasonableness of such process and, within thirty (30) days of its receipt, either approve, or disapprove, with good-faith reasons therefor, such proposed process. In the event of a good-faith disapproval, the parties shall have an additional thirty (30) days in which to arrive at a mutually-agreeable process. Within thirty (30) days after the approval of a mutually-agreed upon process, the Expert shall be granted access to the Employer Material pursuant to the agreed-upon process and at an agreed upon time that will minimize disruption to the Board's consultants and cause no interruption in the provision of benefits to injured workers. Within thirty (30) days of the completion of a final report, such report shall be provided to the Board, to the extent any such final report is prepared.

12. Claims Management. The Board agrees it is responsible to reasonably defend, adjust and resolve CRISP workers' compensation claims to protect CRISP members, including Former CRISP Members, from liability arising out of said claims. The Board agrees it and/or its program and claims administrator, NCAComp. Inc., or any subsequent program or claims administrator, will pursue reasonable, expeditious resolution of CRISP workers' compensation claims, including and not limited to pursuing settlement demands and making reasonable settlement offers to mitigate against and/or protect

CRISP members, including Former CRISP Members, from liability arising from such claims of CRISP. The Board acknowledges Former CRISP Members have an interest in the reasonable defense, adjustment and resolution of their CRISP workers' compensation claims. In that regard, the Board and its program and claims administrator(s) agree to work with Former CRISP Members in connection with CRISP workers' compensation claims. To the extent Former CRISP Member(s) wish to retain a third party to serve as a liaison regarding claims management or resolution between multiple Former CRISP Members and the Board and/or its program or claims administration (Former CRISP Member Claims Service), the Former CRISP Members may do so. The Board and its program and claims administrator(s) shall work reasonably with Former CRISP Member Claims Service. Any Former CRISP Member Claims Service shall have had at least seven years of experience performing claims management, and/or independent claim reviews and/or claims audits in the capacity of an independent claims management consultant. Also, any Former CRISP Member Claims Service must execute a confidentiality agreement mutually agreed upon by both parties, to prevent any disclosure of individually identifiable claimant information. The parties shall work in good faith on such agreement. The Former CRISP Members agree that any Former CRISP Member Claims Service: i) is solely advisory in nature; ii) shall not have authority to adjust claims; and iii) all final decisions on claims adjusting are reserved solely to the Board and/or its designated claims administrator.

13. **Third Party Proceeds.** The Board has received and reviewed the 2013 Program Audit for CRISP. The Board has found viable causes of action against third parties relative to their acts or omissions in connection with the administration of the CRISP and is commencing a third-party action to recoup damages. In the event that the Board recoups damages against any third-party as a result of said third party's acts or omissions in connection with the administration of CRISP, said funds shall be used to first to repay prior statutory assessments relative to CRISP levied upon other self-insured employers; second to repay current statutory assessments relative to CRISP levied upon other self-insured employers; and third to be distributed in accordance with Paragraph 14. CRISP deficit, if any, shall be reduced by the amount of damages recouped by the Board.

14. **Repayment in the Event of a Fund Surplus.** In the event that the application of Paragraph 13, when combined with the payments of the Former CRISP Members pursuant to this Agreement and/or an agreement by the parties as to the ultimate amount of the CRISP deficit, results in a surplus of funds over and above the CRISP deficit, then the Board shall, within forty-five (45) days, refund said surplus (in the appropriate proportion and not to the exclusion of non-Former CRISP Members) to the Former CRISP Members in the same proportion in which the total payments made pursuant to this Agreement were made individually by the Former CRISP Members. Any allocation of said surplus shall also consider prior payments by CRISP Members, if any were so made.

15. **Most Favored Nation.** To the extent the Board enters into any Agreement with any other CRISP member(s) or their representative counsel, which any Former CRISP Member deems to be more beneficial to it than that which is provided for herein, the Board shall agree to extend the same terms to the said Former CRISP Member and shall provide Former CRISP Members copy of said agreement. For purposes of this Agreement, the Board's granting of the Hardship payment plan on an individual basis shall not be deemed to be a more beneficial Agreement.

16. **Assumption of Liability Policy.** The Board agrees an assumption of liability policy may be in the interest of CRISP members, including Former CRISP Members and agrees to investigate costs

and pursue quotes for the purchase of such policy. The Board also agrees to provide CRISP members, including Former CRISP Members, the quotes received and quoting insurer's name within a reasonable time after receipt of same but in no instance more than sixty (60) days after quote is received by the Board.

17. **Workers' Compensation Costs.** The Parties agree that any payment in connection with CRISP, or alleged obligation arising in connection with CRISP, including alleged obligation arising from Forensic Assessment, and/or a Retention Assessment, represents costs of Former CRISP Members' workers compensation coverage.

18. **No Third Party Beneficiary.** This Agreement is not intended to create and does not create any rights in or benefits to any third party.

19. **Effective Date, Counterparts.** This Agreement shall become effective upon its execution by the parties hereto, through their respective counsels, if applicable. This Agreement may be executed in counterparts, each of which shall be an original, but all of which, taken together, shall constitute one Agreement binding on all parties.

20. **Use of Agreement.** This Agreement may not be introduced into evidence, construed as an admission or otherwise mentioned in any action or other proceeding between the Board and/or its agents and the Former CRISP Members except to enforce compliance with this Agreement, demonstrate compliance with the terms of this Agreement, or to establish the Former CRISP Members' agreed upon payment schedule during this Agreement's term. Notwithstanding the foregoing, nothing herein shall preclude the use of this Agreement, or Payment Receipts issued in connection with this Agreement, in connection with any HRA or Medicaid audit, or review to evaluate any CRISP Member's costs, or in subsequent litigation to reduce the amount of monies/damages sought against any Former CRISP Member.

21. **Governing Law.** This Agreement shall be governed by the laws of the State of New York, without giving effect to rules of conflict of laws.

22. **Authority to Sign Agreement.** The signatory on behalf of the Former CRISP Members warrants and represents that it is duly authorized to enter into this Agreement on behalf of the Former CRISP Members set forth on Attachment A.

23. **Bi-Lateral Negotiations.** The parties acknowledge that this Agreement is the result of negotiations between the parties hereto. It is understood and agreed that both parties shall be deemed to have drafted this document in order to avoid any negative inference by any court as against the party preparing this Agreement.

24. **Captions.** All captions set forth herein are for ease of reference only and shall not affect the meaning of the paragraph.

25. **Amendment.** This Agreement may not be amended, modified, or changed except in writing with notice as set forth above.

26. Compliance. For purposes of this agreement, “compliance” shall mean full compliance, provided that neither the Board nor a Former CRISP Member shall be found not to be in compliance until that party has been given the opportunity to cure the defect during a period of ten (10) days from receipt of written notice, in the manner set forth in Paragraph 8. In the event that a Former CRISP Member defaults on its payment obligation under Paragraph 9 of this agreement and fails to cure such default in accordance with this Paragraph the Board shall be entitled to terminate this Agreement with said defaulting Former CRISP Member by giving twenty (20) days written notice. In the event of such a default, the Board may, in its discretion, either commence a civil action to collect the full amount of the joint and several liability claimed owed by the Former CRISP Member, file any judgment to which it is entitled under the WCL, or take action consistent with any other remedy provided by law. Default and/or termination pursuant to this paragraph as to any Former CRISP Member shall not effect in any manner the rights and obligations in connection with any other Former CRISP Member. Also, in the event that: i) a Former CRISP Member notifies the Board, prior to the due date of a monthly payment required under this Agreement, that financial circumstances have changed such that the Former CRISP Member can no longer meet its agreed upon financial obligation under this Agreement, and (ii) such former CRISP Member further provides a completed Hardship application and supporting documentation; and iii) the Board approves such Hardship application, then such Former CRISP Member shall not be held in default under this paragraph.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed and intend to be legally bound herby, as of May 15, 2013.

Dated: _____, 2013

Dated: _____, 2013

Attorney for the Board

By:

By:

[Name of person signing on behalf of member]

Kenneth J. Munnelly, Esq.
General Counsel
Workers’ Compensation Board
20 Park Street
Albany, New York 12207
(518) 486-9564

[Title]

[Company, Firm]

[Street Address]

[City, State, Zip Code]
(_____) _____ - _____

[E-Mail Address]