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January 10, 2019

Karynlee Harrington
Executive Director
Maine Health Data Organization
151 Capitol Street
102 State House Station
Augusta, Maine 04333-0102

VIA E-mail

MHDO Board of Directors
Maine Health Data Organization
151 Capitol Street
102 State House Station
Augusta, Maine 04333-0102

Re: Harvard Pilgrim ME Data Request Number 2018082201

Dear Ms. Harrington,

On behalf of UnitedHealthcare and its affiliated companies, hereinafter referred to as UnitedHealth Group, we submit the following appeal, and memorandum in support of appeal, of the decision made by the Maine Health Data Organization (MHDO) Data Release Subcommittee in the above captioned data request. In accordance with CMR 90-590-120, Section 11(2), UnitedHealth Group hereby appeals the decision issued on December 27, 2018 to the MHDO Board of Directors.

UnitedHealth Group strongly objects to MHDO's release of the requested data to Harvard Pilgrim because the release will result in the disclosure of UnitedHealth Group confidential and proprietary information, including competitive financial information, that Harvard Pilgrim is otherwise not entitled access to. Furthermore, because MHDO data contains competitive financial information of UnitedHealth Group, the release of such information to Harvard Pilgrim has the potential to facilitate anticompetitive behaviors, thereby increasing prices and reducing competition and availability of health care services in the Maine healthcare market. Even when payer cost data is de-identified and payer-masked, the disclosure of the requested data could nonetheless facilitate anticompetitive behaviors in Maine since Harvard Pilgrim would be granted access to competitor confidential and proprietary financial information. For these reasons we request that the MHDO Board of Directors either (1) deny the data release altogether, or (2) withhold any and all UnitedHealth Group data from the data release.

While the MHDO's enabling statute allows MHDO to make the database "publicly accessible" and directs MHDO to "report clinical, financial, quality and restructuring data," the Maine legislature nonetheless clearly intended that MHDO balance disclosures for transparency projects against the confidentiality protections it outlined in the law.¹ Specifically, the enabling statute states that the MHDO Board of Directors "may determine financial data submitted to [MHDO]... to be confidential information if the

¹ 22 MRS §8703(1).

public disclosure of the data will directly result in the provider of the data being placed in a competitive economic disadvantage.”² Furthermore, MHDO’s own regulations contemplate balancing protection of “proprietary information” of data submitters against MHDO’s transparency activities, noting that the “MHDO will make data publically available and accessible to the broadest extent **consistent with the laws protecting individual privacy and proprietary information.**”³

The information submitted to MHDO unquestionably meet’s the MHDO regulation’s definition of “Proprietary Data” because the information is not publicly available and provides UnitedHealth Group a competitive economic advantage with its secrecy.⁴ This type of data release has the opportunity to enable the data recipient access to competitive financial and reimbursement information paid to other provider groups that is commonly held by payers and providers as confidential and proprietary information. Its release would place UnitedHealth Group, other payers (besides Harvard Pilgrim), and providers at a competitive economic disadvantage.

A release of payer confidential and proprietary information that a data submitter’s competitor is not otherwise entitled to obtain should be supported by more than a mere counter-argument from that competitor that any concerns about disclosure are “misplaced”. MHDO should set a particularly high bar for a data release that will result in the disclosure of a party’s confidential and proprietary information by requiring a showing of significantly strong evidence supporting such a release since this type of data release has the potential to directly harm the data submitter and can only benefit the data requester.⁵

UnitedHealth Group considers data submitted to MHDO to be confidential and proprietary information. It is the type of information that we would not normally disclose to outside third parties (including competitor payers), but have done so in compliance with the State’s law and in trusting that the State will continue to protect the confidentiality of such information from improper disclosure to third parties. Regardless of historical action taken by MHDO, the information submitted is still considered by UnitedHealth Group to be confidential and proprietary information; a position UnitedHealth Group has reiterated to MHDO in comments to many other prior data release applications. In addition, this type of information qualifies as a trade secret subject to protection under Maine’s Uniform Trade Secrets Act, because it derives independent economic value for UnitedHealth Group from not being generally known and not being readily ascertainable by proper means by other persons; and UnitedHealth Group endeavors to maintain its secrecy.⁶

The release of UnitedHealth Group’s information through this data release has a high potential to undermine UnitedHealth Group’s competitive economic advantage in its confidential, proprietary, and trade secret information. In giving the MHDO Board of Directors the power to determine information to be confidential, the Maine legislature clearly recognized the importance of balancing transparency

² 22 MRS §8707(4).

³ CMR 90-590-120(1)(1) (emphasis added).

⁴ CMR 90-590-120(2)(33).

⁵ The notion reflected in the Executive Director’s response that because UnitedHealthcare, Harvard Pilgrim, or anyone else can request data from MHDO to view carrier specific information should not be the standard by which MHDO justifies releasing data that includes a party’s confidential and proprietary information, especially disclosures among competitors—this type of tit-for-tat rationale does not align with the protections outlined by the Maine legislature and other applicable state and federal laws.

⁶ 10 M.R.S. § 1542(4).

activities with the confidential, proprietary, and trade secret information of data submitters. For these reasons, UnitedHealth Group's data should not be included in this data release.

In addition to the protection of confidential, proprietary, and trade secret information, an underlying theme of any data release by MHDO is that such release should be done in compliance with other state and federal laws. The Department of Justice (DOJ)/Federal Trade Commission (FTC) Statements of Antitrust Enforcement Policy in Health Care – Statement 6, outlines certain situations in which appropriate safeguards and protections should be in place to ensure that the exchange or release of competitive financial information does not facilitate collusion or anticompetitive behaviors, thereby reducing competition and increasing prices and availability of health care services.

While Harvard Pilgrim has argued that the guidelines contained in DOJ/FTC Statement 6 are decades-old and non sequitur to all-payer claims databases (APCDs), we argue quite the opposite, noting that in the vein of traditional legal practice of following precedent, Federal Courts and the FTC continue to cite to FTC/DOJ Statement 6 as a source of authority regarding the anticompetitive effects of disclosing competitive financial healthcare information.⁷ The FTC's use and reference to Statement 6 indicates that it believes that Statement 6 and the concepts contained therein not only continue to be relevant, but are also applicable to data releases by APCDs such as the MHDO.

DOJ/FTC Statement 6 suggests that upon reviewing each potential disclosure, the entity making the disclosure should consider and weigh any potential anticompetitive effect on the market against the procompetitive justification for the disclosure. Of significant importance in this particular request, Harvard Pilgrim is requesting data that includes competitor payer financial information, which is oft held as confidential and proprietary by each payer. This feed of competitor financial information is certainly the type of information that the DOJ/FTC identified as having the potential to facilitate anticompetitive behaviors. Merely because MHDO is not aware of anticompetitive effects, or anticompetitive effects have not been reported to MHDO, does not mean that anticompetitive effects have not occurred in the Maine marketplace or that such effects could not happen. Furthermore, Statement 6 does not absolve a party releasing data from weighing potential anticompetitive effects against the procompetitive justification simply because the releasing party believes that there is no evidence that past releases of data have resulted in an anticompetitive market. Rather, the FTC/DOJ recommend a weighing of risks with every release. As noted by the FTC, the release of payers' competitive and trade secret information

⁷ See FTC STAFF COMMENT TO THE HON. JOE HOPPE AND HON. MELISSA HORTMAN CONCERNING AMENDMENTS TO THE MINNESOTA GOVERNMENT DATA PRACTICES ACT REGARDING HEALTH CARE CONTRACT DATA (June 29, 2015). In issuing these comments, the FTC indicated that a broad release of payer reimbursement information "may promote a level of transparency that creates a significant risk of anticompetitive harm" and that the "disclosure of competitively sensitive information may enable [third parties] to determine whether their pricing is above or below their competitors' prices, to monitor the service offerings and output of current or potential competitors, and to increase their leverage in future contract negotiations." Furthermore, the FTC noted that "[t]here is a substantial risk that greater price transparency in contracted health care markets may impede, rather than enhance, the ability of [health plans] to selectively contract with health care providers and to negotiate lower reimbursement rates." See also FTC COMPETITION IN THE HEALTH CARE MARKETPLACE—CORE HEALTH CARE COMPETITION DOCUMENTS (<https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>). See e.g., *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 612-42 (E.D. Mich., 2012) (citing to Statement 6 as authority regarding permissibility of exchange of financial healthcare information); *United States v. Chiropractic Assocs.*, 2013 U.S. Dist. LEXIS 141345, No. 13-04030 at * 11 (D. S.D., Sep. 3, 2013) (same); *United States v. Okla. State Chiropractic Indep. Physician Ass'n.*, 2013 U.S. Dist. LEXIS 90485, No. 13-21 at * 11 (N.D. Okla., May 21, 2013) (same); *United States v. Fed'n of Physicians & Dentists*, 2008 U.S. Dist. LEXIS 34873, No. 05-431 at * 9 (S.D. Ohio, Feb 28, 2008) (same).

could allow competitors to determine whether their pricing is above or below their competitors' prices, to monitor the service offerings and output of current or potential competitors, and to increase their leverage in future contract negotiations (potentially leading to higher prices across the market).⁸

Ultimately, the Executive Director's reliance on the opinions and comments of the data requester, (a competitor payer of UnitedHealth Group), to conclude that the release would not have anticompetitive effects, and that Statement 6 is irrelevant, is misplaced. The information sought in the data release is the confidential, proprietary, and trade secret information of UnitedHealth Group and is entitled to protection as such. Further, the disclosure of such information falls squarely within the DOJ/FTC antitrust enforcement guidelines of Statement 6 and creates the risk of anticompetitive harm. For these reasons we request that the MHDO Board of Directors either (1) deny the data release altogether, or (2) withhold any and all UnitedHealth Group data from the data release.

Sincerely,

A handwritten signature in black ink, appearing to read "Katarina Horyn", with a long horizontal flourish extending to the right.

Katarina Horyn
Associate General Counsel

⁸ FTC, *supra* note 7.