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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: MaineHealth ME Data Request Number 2018062601

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 releases of the requested data to MaineHealth because the release will result in the disclosure of UnitedHealth Group confidential and proprietary information, including competitive financial information that MaineHealth is otherwise not entitled to access. Furthermore, because MHDO data contains competitive financial information of UnitedHealth Group, including reimbursement information paid to competitor providers of MaineHealth, the release of such information to MaineHealth has the potential to facilitate collusion or 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 collusion and anticompetitive behaviors in Maine since MaineHealth 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 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 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 meets 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 allows the data recipient to access 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, and other payers, at a competitive economic disadvantage.

A release of a payer’s confidential and proprietary information that a healthcare provider is not otherwise entitled to obtain should be supported by more than a mere counter-argument from the requester that any industry stakeholders can request such information. 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 by placing the data submitter at a competitive economic disadvantage while benefitting 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, 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. This type of information could be used against payers to undermine any

¹ 22 M.R.S. §8703(1).

² 22 M.R.S. §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 MHDO data can be requested, purchased, and used by most industry stakeholders, and therefore MaineHealth is not in any special position by requesting, purchasing, and using this data, should not be the standard by which MHDO justifies releasing data that includes a party’s confidential and proprietary information, especially disclosures of competitive financial information that would disclose reimbursement information of a data requester’s direct 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).

competitive economic advantage and determine whether the healthcare provider's 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 with payers.

Of significant importance with this data request application, MaineHealth has requested data from calendar years 2018 through 2022, which on its face appears to enable MaineHealth with access to a near real-time active feed of current competitive financial information through the next three years. Given the proposed uses of MHDO data to assess reimbursement arrangements with commercial payers and organizational cost improvement activities, this type of access would be an unprecedented breach of competitive financial information to be used for suspect competitive purposes.

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 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 the event that the MHDO Board of Directors rejects these arguments and chooses to release any of the data requested by MaineHealth, we strongly urge the MHDO Board of Directors to exclude competitive financial information from any data release for healthcare providers not associated with the MaineHealth organization since this is the type of information that MaineHealth is not otherwise entitled to. UnitedHealth Group strongly objects to anything less protective. The additional details about MaineHealth's proposed uses of MHDO data provided in the Executive Director's December 27, 2018 response provides no additional justification for the release, and access to, competitive financial information, nor do the additional details support the conclusion that the request meets the "minimum necessary" standard if the competitive financial information is not necessary for the analysis. Furthermore, rather than approving a free flow of MHDO data through the next three years, approval of the releases should be staggered and timed in a fashion that complies with the FTC/DOJ guidelines outlined below and allows for ongoing public dialogue consistent with the data release regulations.

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.

The FTC has unambiguously opined on this very type of data disclosure, where provider organizations are able to access competitive financial information. In one such opinion, the FTC advised that the 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 [healthcare] providers 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."⁷ The FTC went on to note 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

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).

negotiate lower reimbursement rates.”⁸ The Federal Courts and the FTC’s use and reference to Statement 6 indicates that they believe that Statement 6 and the concepts contained therein continue to be relevant today and are applicable to data released by APCDs such as the MHDO.⁹

DOJ/FTC Statement 6 and recent opinions suggest 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 data request is that MaineHealth will not only receive identifiable competitive financial information that reveals the reimbursement information of its competitors, but that it has requested this data for calendar years 2018 through 2022, which would provide it access to a near real-time flow of competitive financial information. The DOJ/FTC Statement 6 states that “exchanges of future prices for provider services...are very likely to be considered anticompetitive.”¹⁰

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 the release of MHDO claims data has 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 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).¹¹

Ultimately, the Executive Director’s reliance on the opinions and comments of the data requester to conclude that the release would not have anticompetitive effects 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.¹²

Sincerely,



Katarina Horyn
Associate General Counsel

⁸ *Id.*

⁹ 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).

¹⁰ See, DOJ/FTC Enforcement Policy – Statement 6(B)

¹¹ FTC, *supra* note 8.

¹² In the event that the MHDO Board of Directors rejects these arguments and chooses to release any of the data requested by MaineHealth, we strongly urge the MHDO Board of Directors to exclude competitive financial information from any data release for healthcare providers not associated with the MaineHealth organization since this is the type of information that MaineHealth is not otherwise entitled to. UnitedHealth Group strongly objects to anything less protective.