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August 17, 2018

VIA EMAIL AND HAND DELIVERY

Massachusetts Health Policy Commission
Attn. Dr. Stuart Altman, Chairman of the Board
50 Milk Street
8th Floor
Boston, MA 02109

Re: ***Comments of Massachusetts Association of Health Plans on the HPC's Review of the Proposed Beth Israel/Lahey Transaction***

The Massachusetts Association of Health Plans ("MAHP") submits these comments in connection with the review by the Massachusetts Health Policy Commission ("HPC") of the proposed transaction between Beth Israel Deaconess Medical Center, Lahey Health System, New England Baptist Hospital, Mount Auburn Hospital, and Seacoast Regional Health Systems, as well as the creation of a new contracting organization to encompass the existing contracting affiliates of Beth Israel and Lahey, plus affiliate with the Mount Auburn Cambridge Independent Practice Association.[1] MAHP has had the opportunity to review the HPC's Preliminary Cost and Market Impact Review ("CMIR") related to the Proposed Transaction, and submits these comments to register its concerns with the HPC regarding the anticipated increase in medical spending that is likely to result from the Proposed Transaction, if it is permitted to proceed.

[1] For simplicity, we refer to the transaction as the "Proposed Transaction" or "Beth Israel/Lahey" in the remainder of this comment.

A. Introduction and Background on MAHP

MAHP is a non-profit, tax-exempt community welfare organization committed to promoting high quality, affordable health care. MAHP represents Massachusetts health plans that provide health care coverage to more than 2.6 million Massachusetts residents. MAHP's central mission is to promote high quality, affordable, and coordinated health care through advocacy, education, and health policy research. All MAHP members are dedicated to making health care affordable and improving the health of all citizens in the Commonwealth.

MAHP appreciates this opportunity to comment on the Proposed Transaction and the findings set forth in the Preliminary CMIR, as well as issues raised in the HPC's meeting on July 18, 2018. MAHP recognizes that the Preliminary CMIR is the product of an extended and intensive review by the HPC staff, with assistance by the merging parties. We applaud the effort and robust analysis that has gone into the HPC's investigation and Preliminary CMIR. For the reasons detailed below, we urge the HPC to refer the transaction to the Massachusetts Office of the Attorney General for further investigation and enforcement action.

The overriding concern of MAHP – as reflected in the Preliminary CMIR report – is that the Proposed Transaction will significantly increase medical costs in excess of the Commonwealth's goals under Chapter 224 of the Acts of 2012, "An Act Improving the Quality of Health Care and Reducing Costs through Increased Transparency, Efficiency, and Innovation,"[2] ("Chapter 224") thereby also leading to health insurance premium increases in excess of those levels. This

[2] Codified as Mass. Gen. Laws ch. 6D.

significant projected increase in health care spending directly threatens the mission of MAHP to promote affordable health care to residents throughout the Commonwealth.

B. The Preliminary CMIR Findings Raise Significant Concerns Regarding the Effect of the Proposed Transaction on Massachusetts Residents

1. *The Potential Competitive and Consumer Harm is Significant*

The Preliminary CMIR report contains several findings that raise significant questions as to the likely impact of the Proposed Transaction on health care spending in the Commonwealth. In particular, MAHP is troubled by the findings of the HPC staff and the work of Dr. Capps that indicate that the Proposed Transaction will significantly increase medical spending in the Commonwealth. The Preliminary CMIR contains three key findings that raise significant concerns to MAHP. First, the Preliminary CMIR predicts that spend on inpatient services will increase 5–6.7%, or \$38.3–\$51.4 million annually.[3] Second, the Preliminary CMIR predicts that spend on outpatient services will increase 8.4–12.2%, or \$88.4–\$128.4 million annually.[4] Finally, the Preliminary CMIR predicts that spend on adult primary care services will increase 8.7–9%, or \$11.5 million annually.[5] Spending increases of this magnitude – above and beyond inflation increases – would have significant repercussions for MAHP and its members, and all of their constituents, who will have no choice but to face higher prices for their healthcare services.

[3] Preliminary CMIR, at 46.
[4] *Id.*
[5] *Id.*

2. *The Transaction Rationales Warrant Significant Scrutiny*

The parties' raise several potential benefits of the transaction, all of which deserve close examination.

- <u>More Competition with Partners</u>

The parties assert that their increased size will enable the post-merger entity to better compete with the Partners system. The proposed merged entity will be nearly as large as Partners in terms of inpatient and outpatient care and dwarf its next largest competitor, UMass.[6] In addition, the proposed merged entity would have the largest number of adult primary care physicians in the Commonwealth.[7] By creating a second "must have" system, the parties argue that payers will have an alternative to Partners.

This argument was addressed by the Commission's economic consultant Dr. Capps at the HPC meeting on July 18, 2018. There is a dearth of economic literature on the theory that creating a second dominant provider benefits competition and little real-world experience to which to point as a natural experiment. Given the lack of robust data and experience on which to draw, MAHP has concerns that instead of competing more aggressively with Partners, the post-merger entity will instead use its enhanced bargaining leverage to extract higher pricing from payers than it would have been able to in a fully competitive marketplace.[8] This concern is underscored by the work of Dr.

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[6] *Id.* at 40.
[7] *Id.* at 42.
[8] The antitrust laws recognize that it is in the economic interest of a company with market power to exercise that power by raising prices over competitive levels. *See Commentary on the Horizontal Merger Guidelines*, at 1 (March 2006), *available at* https://www.justice.gov/atr/file/801216/download ("The core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power. In the context of sellers of goods or services, "market power" may be defined as the ability profitably to maintain prices above
(Continued…)

Capps, which found that the transaction would not reduce Partners' bargaining leverage, and that the post-merger Beth Israel/Lahey could reap the benefits of a sustained price increase while remaining lower-cost than Partners.[9] Furthermore, Dr. Capps also found that any increase in competition between the post-merger Beth Israel/Lahey system that took patients away from Partners would serve only to increase Beth Israel/Lahey's size and corresponding bargaining leverage.[10]

- Potential for Cost Savings

The parties argue that the post-merger Beth Israel/Lahey system will attract patients from the higher-cost Partners system, resulting in cost savings. This is presumably based on the fact that historically the parties have been lower-cost than Partners and the assumption that they would remain so post-transaction. However, this theoretical cost savings – which Dr. Capps found would not offset the increases from the increased bargaining leverage[11] – does not mean that MAHP members will see cost reductions. As the Preliminary CMIR notes, the combined Beth Israel/Lahey could raise prices over their existing levels and still remain lower-cost than Partners.[12]

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competitive levels for a significant period of time."). Rather than creating a stronger competitor to Partners, the Proposed Transaction simply creates another entity with significant market power, for which it very well may be in the combined Beth Israel/Lahey's economic interest to act as a duopolist with Partners, instead of an aggressive competitor. Even if the economic incentives of the combined system are mixed, this is exactly the type of substantial lessening of competition that Section 7 of the Clayton Act is designed to prevent in its incipiency. As explained by Bill Baer, former Assistant Attorney General of the Antitrust Division of the Department of Justice, "in order to arrest potential restraints "in their incipiency," the [Clayton] Act banned these practices where their effect "may be to substantially lessen competition." The intent was to consider likely future effect—not just palpable impact—in determining whether these practices were illegal." Remarks by Assistant Attorney General Bill Baer at the American Bar Association Clayton Act 100th Anniversary Symposium (Dec. 4, 2014), *available at* https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-bill-baer-american-bar-association-clayton-act-100th.

[9] Preliminary CMIR, at 56-58.
[10] *Id.* at 58.
[11] *Id.* at 53-54.
[12] *Id.* at 57.

The parties also argue that the Proposed Transaction will create significant efficiencies and synergies, including an increased ability to work with insurers to create innovative products and increase quality by patient information sharing, among others. MAHP urges the HPC to closely study whether these benefits are merger-specific, or, rather, if they are activities that the parties could engage in independently, without undergoing the Proposed Transaction.

- Quality and Access to Care Evidence is Lacking

MAHP notes the lack of data regarding the impact of the transaction on quality of care and access to care, critical issues that impact non-price competition and overall health and wellbeing in the Commonwealth. Any review of the Proposed Transaction is not complete without carefully studying the parties' proffered quality and access to care benefits, which at this stage have not been fully developed on the record to an extent that would permit the HPC or the Office of the Attorney General to conduct a full assessment.

C. Difficulty of Crafting Conditions to Remedy Anticompetitive Effects of the Proposed Transaction

The HPC may be considering proposals by the parties to impose potential conditions to the Proposed Transaction to address some of the findings in the Preliminary CMIR. While it is difficult for MAHP to comment on conditions that have yet to be proposed, MAHP notes that imposing behavioral conditions to remedy potential competitive harms posed by a particular transaction historically has not been a successful remedy.

Given the lack of historical experience and data demonstrating that price caps are an effective remedy to an otherwise anticompetitive transaction, MAHP urges the HPC to view any proposed price caps in this matter with significant caution.

D. MAHP Urges Referral to the Office of the Attorney General

For all of the reasons described above, MAHP recommends that the HPC exercise its statutory authority to refer the Proposed Transaction to the Office of the Attorney General, as set forth in M.G.L. ch. 6D, § 13(f).

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Thank you for consideration of these comments, and we are happy to provide any additional information with respect to the overall healthcare environment in the Commonwealth, with a specific emphasis on payer and consumer cost that the HPC may find useful in preparing its Final CMIR and ultimate disposition of this review.

Respectfully submitted,

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On behalf of the Massachusetts Association of Health Plans

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