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October 21, 2014

The Honorable Janet L. Sanders  
c/o Antitrust Division  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Re: *Commonwealth of Massachusetts v. Partners HealthCare System, Inc., South Shore Health and Educational Corp., and Hallmark Health Corp.*, Superior Court Civil Action No. 14-2033-BLS

Dear Judge Sanders:

As Chair of the Health Policy Commission (HPC), I submit this comment regarding the parties' September 25, 2014 filings with the court. Through information submitted to the court on July 17 and September 4, 2014, the HPC has sought to provide important factual context for the court's and parties' ongoing consideration of the parties' proposed Consent Judgment. I now submit this further comment for the limited purpose of clarifying those materials already provided to the court.<sup>1</sup>

As set forth in Chapter 224 of the Acts of 2012 (Chapter 224) and further described in our reports,<sup>2</sup> the Commonwealth's newly established Cost and Market Impact Reviews (CMIRs) are intended to provide for public assessment of a broad spectrum of potential impacts from health care market changes, ranging from changes in cost, quality, and market performance to

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<sup>1</sup> Silence on a point raised by the parties' filings should therefore not be inferred to signify agreement or disagreement with such point. I direct the court to the HPC's submissions on July 17, 2014 and September 4, 2014 for the HPC's analysis of transactions encompassed by the Consent Judgment in this matter.

<sup>2</sup> MASS. HEALTH POLICY COMM'N, REVIEW OF PARTNERS HEALTHCARE SYSTEM'S PROPOSED ACQUISITIONS OF SOUTH SHORE HOSPITAL (HPC-CMIR-2013-1) AND HARBOR MEDICAL ASSOCIATES (HPC-CMIR-2013-2), PURSUANT TO M.G.L. C. 6D, § 13, FINAL REPORT at Introduction, 3-6 (Feb. 19, 2014), *available at* <http://www.mass.gov/anf/docs/hpc/20140219-final-cmir-report-phs-ssh-hmc.pdf> [hereinafter PHS-SSH-Harbor Final Report]; MASS. HEALTH POLICY COMM'N, REVIEW OF PARTNERS HEALTHCARE SYSTEM'S PROPOSED ACQUISITION OF HALLMARK HEALTH CORPORATION (HPC-CMIR-2013-4), PURSUANT TO M.G.L. C. 6D, § 13, FINAL REPORT at Introduction, 5-7 (Sept. 3, 2014), *available at* <http://www.mass.gov/anf/docs/hpc/material-change-notices/phs-hallmark-final-report-final.pdf> [hereinafter Partners-Hallmark Final Report].

impacts on the availability and accessibility of services.<sup>3</sup> This broad, prospective review is designed by statute to set forth a public record of factual findings to inform and complement the work of other agencies on behalf of health care consumers.<sup>4</sup> For example, where the HPC has found a provider to have certain characteristics, Chapter 224 requires referral of those findings to the Attorney General’s Office (AGO), which may “take action under chapter 93A or any other law to protect consumers in the health care market.”<sup>5</sup> Chapter 224 also provides that a final CMIR report “may be evidence in any such action.”<sup>6</sup> Recognizing that pursuit of law enforcement claims is squarely the province of the AGO, but consistent with our statutory charge, the HPC has submitted its factual findings into the court-ordered comment process for the court’s and parties’ consideration.

This further comment focuses on clarifying two topics raised throughout the parties’ September 25, 2014 filings: the HPC’s market analysis methodology and findings, and the role of unit price in contributing to total medical spending.

### 1. The HPC’s Market Analysis Methodology and Findings

Partners HealthCare System’s (Partners) Further Memorandum in Support of the Modified Consent Judgment (Partners Memorandum) and the Expert Declaration of Robert D. Willig and Margaret E. Guerin-Calvert (Willig and Guerin-Calvert Statement) misrepresent the HPC’s market analysis methodology and findings, largely mirroring assertions set forth in the August 1, 2014 response of Partners and Hallmark Health Corporation (Hallmark) to the HPC’s Partners-Hallmark Preliminary Report and the January 17, 2014 response of Partners and South Shore Hospital (SSH) to the HPC’s Partners-SSH-Harbor Medical Associates Preliminary Report.<sup>7</sup> I direct the court to the HPC’s analyses of those responses,<sup>8</sup> which address Partners’ assertions. In particular, I note the following points.

The Partners Memorandum and the Willig and Guerin-Calvert Statement reflect a fundamental misunderstanding of the HPC’s methodology and findings. The HPC has repeatedly shown that our market analyses, though they do not fully replicate the work of antitrust agencies, are “sound, probative of pricing power, and consistent with applicable guidelines and precedent.”<sup>9</sup> For example, the HPC’s use of Primary Service Areas (PSAs) for its

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<sup>3</sup> Chapter 224 sets forth a broad list of factors which the HPC may examine in a CMIR, including a provider’s size and market share; prices; total medical expenses; quality of services; provider costs; the availability and accessibility of similar services; the impact on competing options for services; methods of attracting patient volume, recruiting health care professionals, and acquiring facilities; a provider’s role in serving at-risk, underserved, and government payer populations; a provider’s role in providing low or negative margin services; consumer concerns; and “any other factors that the commission determines to be in the public interest.” MASS. GEN. LAWS ch. 6D, §13(d) (2012).

<sup>4</sup> MASS. GEN. LAWS ch. 6D, § 13(e) and (h) (2012) (designating the HPC to make factual findings in CMIR reports and to refer such reports to the AGO in support of its work protecting consumers in the health care market).

<sup>5</sup> MASS. GEN. LAWS ch. 6D, §13(f) and (h) (2012).

<sup>6</sup> MASS. GEN. LAWS ch. 6D, §13 (h) (2012).

<sup>7</sup> Partners-Hallmark Final Report at Exh. A; Partners-SSH-Harbor Final Report, at Exh. A-1.

<sup>8</sup> Partners-Hallmark Final Report at Exh. B; Partners-SSH-Harbor Final Report at Exh. B-1.

<sup>9</sup> Partners-Hallmark Final Report at Exh. B, 8-12 and Partners-SSH-Harbor Final Report at Exh. B-1, 6-9.

market analyses is not only consistent with our statute,<sup>10</sup> but also with antitrust guidelines, particularly those designed to test the competitive effect of transactions motivated by greater accountable care for patients (such as Partners’ proposed acquisitions of SSH and Hallmark). Specifically, the Federal Trade Commission (FTC) and Department of Justice (DOJ) have endorsed using analysis of PSA market shares as an initial screen to a full antitrust analysis,<sup>11</sup> explaining that while a PSA does not necessarily equate with “a relevant antitrust geographic market, it nonetheless serves as a useful screen for evaluating potential competitive effects.”<sup>12</sup> Further, the HPC has documented how its definition of a PSA is not impaired by the fact that patients travel outside of the service area to obtain services. To the contrary, the HPC’s analysis focuses on a highly relevant set of consumers in assessing competitive impact, “show[ing] where *residents* in the PSA receive their care, regardless of the location of the provider,” and thus “account[ing] for patients’ willingness to travel outside of the PSA and for the ability of providers located outside of the PSA to constrain local providers’ pricing power.”<sup>13</sup> Such market analysis based on customer locations is also consistent with methods endorsed by the FTC and the DOJ.<sup>14</sup>

The HPC has also detailed extensive support for the principle that increased concentration correlates with higher prices.<sup>15</sup> As described in the Partners-Hallmark Final Report, there are “fundamental economic principles that underlie the widely accepted view that, in a broad set of circumstances, across a rich variety of industries, increased concentration results in higher prices. Indeed, the concentration thresholds and safe harbors in merger enforcement policy, which are used to provide guidance for all mergers (including hospital mergers), are predicated on this view.”<sup>16</sup>

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<sup>10</sup> MASS. GEN. LAWS ch. 6D, §13(d) (directing the HPC to “examine factors relating to the provider or provider organization’s business and its relative market position,” including “the provider or provider organization’s size and market share within its primary service areas” and “the provider or provider organization’s impact on competing options for the delivery of health care services within its primary service areas”).

<sup>11</sup> The FTC and DOJ proposed guidelines for evaluating the competitive impact of accountable care organizations (ACOs) state: “As an initial step in determining whether an ACO is likely to raise competitive concerns, the Agencies will use a streamlined analysis that evaluates the ACO’s share of services in each ACO participant’s Primary Service Area (‘PSA’).” FED. TRADE COMM’N & U.S. DEPT. OF JUSTICE, PROPOSED STATEMENT OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM 5 (2011), *available at* <http://www.justice.gov/atr/public/guidelines/269155.pdf>.

<sup>12</sup> 76 FED. REG. 67026, 67028 (Oct. 28, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27944.pdf>.

<sup>13</sup> Partners-Hallmark Final Report at Exh. B, 8.

<sup>14</sup> Partners-Hallmark Final Report at Exh. B, 8-9, *citing* U.S. DEP’T. OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 14 (2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

<sup>15</sup> Partners-Hallmark Final Report at Exh. B, 10-11, n.32-35 (citing a report by the DOJ and FTC and seven other seminal reviews of economic research regarding the impact of hospital consolidation on prices, many of which themselves summarize multiple empirical studies).

<sup>16</sup> *Id.*

Contrary to Partners' claims, the HPC extensively evaluated market conditions to develop its analyses. This included profiling the parties' contracting relationships;<sup>17</sup> examining measures of price, market share, and concentration over time; conducting diversion analysis; compelling data and documents from market participants; and examining the market experience of major payers and providers vis-à-vis Partners. This inquiry encompassed potential dynamic responses by market participants, such as payer steering, finding that steering through limited and tiered networks is unlikely to defeat price increases anticipated as a result of the transactions.<sup>18</sup> The HPC also considered the multiple elements of the proposed Consent Judgment together in developing its findings.<sup>19</sup>

Finally, the HPC extensively evaluated the potential for the acquisitions to drive quality or access improvements<sup>20</sup> and credited the parties' quality performance wherever supported by evidence. As described at length in our reports, the HPC fully evaluated, but found limited potential for, such efficiencies from these transactions.<sup>21</sup> With regard to the Hallmark transaction, we found a general potential for improved quality and expanded access to services in northeastern Massachusetts,<sup>22</sup> but the parties have not shown whether or how this general potential may be realized, or how ownership is necessary to generate such efficiencies and benefits.<sup>23</sup> Moreover, contrary to Partners' assertions, we did not find that anticipated shifts in volume from non-Partners hospitals to Hallmark post-acquisition would be tied to improved quality or other indicia of value. Our site of care analysis simply shows that patients tend to use Partners hospitals for care more frequently than other hospitals, without indicating this is due to better quality. We note that a variety of factors may influence where patients go for care, including not only quality, but also brand, investments, physician referrals, and others.<sup>24</sup>

## 2. The Role of Unit Price in Contributing to Total Medical Spending

As described in our reports, changes in total medical spending are driven by unit price, as well as changes in utilization, provider mix, and service mix.<sup>25</sup> In our review of the South Shore

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<sup>17</sup> The HPC considered the parties' current contracting relationship throughout its analyses, including its examination of component contracting. As described in the Partners-Hallmark Final Report, the HPC found that "[j]oint contracting and full financial integration embody different structures and bargaining incentives" and that, "[u]pon full financial ownership of Hallmark, Partners would likely have increased alignment of both ability and incentives to command higher rates for Hallmark." Partners-Hallmark Final Report at 45-46. The difference between Partners' current incentives with respect to Hallmark versus its owned providers is evident in the difference in rates between them. *See* Partners-Hallmark Final Report at 25-26 (showing, for example, that Hallmark's hospital rates are 6% to 18% below those of Partners' greater Boston community hospitals). The change in incentives arises because Partners currently does not receive the financial benefit from revenue increases at Hallmark; post-merger, it will. Partners' ownership of Hallmark will also change the contracting relationship for those payers with which Hallmark currently contracts directly. Partners-Hallmark Final Report at 11, n.37.

<sup>18</sup> *E.g.*, Partners-SSH-Harbor Final Report at 43-44.

<sup>19</sup> *See* Partners-Hallmark Final Report at Ex. B, 1-7.

<sup>20</sup> *See generally* Partners-SSH-Harbor Final Report at 46-57; Partners-Hallmark Final Report at 60-77.

<sup>21</sup> Partners-SSH-Harbor Final Report at 53; Partners-Hallmark Final Report at 64.

<sup>22</sup> Partners-Hallmark Final Report at 68-72.

<sup>23</sup> Partners-Hallmark Final Report at 68-69.

<sup>24</sup> Partners-Hallmark Final Report at Exh. B, 19, n.66.

<sup>25</sup> Partners-Hallmark Final Report at 42; Partners-SSH-Harbor Final Report at 29.

and Hallmark transactions, we found impacts across these factors.<sup>26</sup> As described in the Partners-Hallmark Final Report, a separate unit price cap for the Hallmark contracting component should “better constrain, for the life of the cap, how much prices in this region would grow as a result of this transaction,”<sup>27</sup> mitigating one of the drivers of increased spending identified.

Regarding the HPC’s projected impacts to spending, Partners mischaracterizes these impacts by describing a \$15.5 to \$23 million “price increase” resulting from the Hallmark transaction.<sup>28</sup> The HPC specifically described this figure as an increase in *spending*, driven by anticipated increases in unit price as well as anticipated changes in utilization of higher-priced providers (provider mix).<sup>29</sup> For example, the HPC projected increases in spending due to patients of newly recruited physicians to the Partners-Hallmark and Partners-SSH systems being referred to a higher-priced mix of providers. With no increases in unit price, this change in referral patterns (provider mix) is expected to increase spending by \$1.3 million and \$5.8-\$9.0 million per year for the three major commercial payers in connection with the Hallmark and South Shore transactions, respectively.<sup>30</sup>

Thank you for the opportunity to provide these clarifications. We hope you find this information useful in this process and your review.

Sincerely,

Stuart Altman, PhD

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<sup>26</sup> See generally Partners-Hallmark Final Report at 42-67; Partners-SSH-Harbor Final Report at 29-56.

<sup>27</sup> Partners-Hallmark Final Report at 53, n.199 and 52, n.196. We clarify that projected increases in prices from these transactions may still *accumulate* over a period of 6.5 years, depending on the rate of general inflation the market experiences over that time. For example, if Hallmark’s physician prices are permitted to grow at a rate of 1.5% per year (roughly equating to \$1.1 million in additional revenue each year for 6.5 years), this would still allow those physicians, over time, to realize the HPC’s estimated impact of \$6.8 million in additional annual spending for those physicians. See Partners-Hallmark Final Report at 52, n.196.

<sup>28</sup> Partners Memorandum at 14.

<sup>29</sup> Partners-Hallmark Final Report at 2-4, 55-60; see also Partners-SSH-Harbor Final Report at 1-2, 34-36 (describing an anticipated increase in total medical spending of \$23 million to \$26 million each year “as a result of increases in Harbor/SSPHO physician prices *and increased utilization* of Partners and SSH facilities”) (emphasis added).

<sup>30</sup> Partners-Hallmark Final Report at 60; Partners-SSH-Harbor Final Report at 36.