SECOND ADDENDUM TO STAFF SUMMARY FOR
DETERMINATION OF NEED
BY THE PUBLIC HEALTH COUNCIL
October 10, 2018

Introduction

At their meeting on April 4, 2018, the Commissioner and the Public Health Council, acting together as the Department, voted pursuant to M.G.L. c.111 §§51-53 and the regulation promulgated thereunder, specifically, 105 CMR 100.735, to approve with conditions the Determination of Need application for Transfer of Ownership through which CareGroup, Inc., the corporate parent of Beth Israel Deaconess Medical Center, Inc. (BIDMC), New England Baptist Hospital, and Mount Auburn Hospital; Lahey Health System, Inc. (Lahey); and Seacoast Regional Health Systems, Inc., intend to affiliate and create NewCo,[1] which will function as the sole corporate member of each hospital replacing CareGroup Inc., Lahey Inc., and Seacoast Regional Health Systems Inc. as the exclusive parent organization (NewCo DoN or DoN).

The Determination of Need (DoN) regulation provides that, if a proposed transaction is subject to a Cost and Market Impact Review (CMIR) by the Massachusetts Health Policy Commission (HPC), the Notice of DoN shall not go into effect until 30 days following the completion of the HPC's CMIR. In addition, the DoN regulation states that the HPC may provide a written recommendation to the Commissioner that based on the findings of the CMIR, the DoN should not go into effect. If the information in the CMIR causes the Commissioner to conclude that the Holder of the DoN (Holder) may fail to meet one or more of the DoN Factors necessary for approval of a proposed project, the Department may reconsider the matter and may rescind or amend an approved Notice of DoN.

On December 12, 2017, the HPC authorized the initiation of a CMIR to analyze the impact of the proposed transaction on costs and market function, the size and market position of the proposed new entity, and the role of the proposed new health care system, NewCo, in serving at-risk, underserved and government payer populations.[2] The CMIR examined the potential impact of NewCo's plans on quality, costs, and market dynamics. On July 18, 2018, the HPC issued a Preliminary Report presenting the analysis and key findings from its review. NewCo provided a written response to these findings on August 17, 2018 (NewCo Response). On September 27, 2018, the HPC voted to issue its Final Report. In its Final Report, HPC recommended that "the Commissioner of the Department of Public Health reconsider the approval with conditions of the Determination of Need Application NEWCO-17082413-TO and

[1] The DoN Application, Notice of Determination of Need, transaction agreements, notices of material change, and other filings refer to the new corporate entity as "NewCo". We understand that the parties have since named this entity "Beth Israel Lahey Health (BILH)" but to be consistent with the Notice of Determination of Need, we continue to refer to the proposed organization by the name given in its Application.

[2] The CMIR was conducted by the HPC pursuant to M.G.L. c. 6D, § 13 and 958 CMR 7.00. Under its statutory and regulatory authority, the HPC has broad authority to require information from Providers and Provider Organizations and other market participants which may be kept confidential and not disclosed without the consent of the Provider or Payer that produced the information.

assess the need for additional or revised conditions to ensure that the applicable Determination of Need factors are met."

Based upon the HPC's September 27, 2018 recommendation, the Commissioner directed DoN staff to review the Department's Notice of Final Action in the NewCo DoN, in light of the findings in the CMIR. This Addendum to the Staff Report reflects the information in the CMIR Final Report relevant to NewCo's compliance with the DoN Factors.

Additional Information

The CMIR concluded:

- That the NewCo parties have generally had low to moderate prices and spending levels compared to other Massachusetts providers; that as Lahey's and Beth Israel Deaconess' affiliated contracting networks have grown through affiliation or through the acquisition of new community hospitals, their prices have generally not risen; and that while these affiliated contracting networks have had some success at retaining local care at community hospitals, shifts in care to their hospitals following past acquisitions and affiliations have come both from lower priced and higher priced hospitals.
- That following the merger, the market share of the merged entity will result in increased market concentration and that NewCo could have enhanced bargaining leverage with commercial payers; that this creates the potential for an increase in commercial spending that could result in an increase in total medical expenditure that could range from $128.4-$170.8 million annually for inpatient, outpatient and adult primary care.
- That patients are expected to shift to NewCo from higher cost providers, which is estimated to save $5.3 to $9.8 million annually;[3] that NewCo estimates that another $52 to $87 million could be saved through care delivery plans, but has declined to offer commitments to limit future price increases.
- That the NewCo-owned hospitals would have among the lowest payer mix of MassHealth discharges and Emergency Department (ED) visits; that the proportion of inpatient discharges and ED visits for non-white patients is also low; and that it was not clear whether or how the NewCo patient mix would change, though NewCo indicated it did not expect significant changes and did not commit to expand access for MassHealth patients. The CMIR also indicated that BIDMC supports clinically affiliated community health centers which do serve a higher proportion of MassHealth patients.
- That NewCo identified some quality metrics for ongoing measurement post-transaction but did not identify baseline data or, with a few exceptions, transaction-specific quality improvement goals.
- That NewCo has an important role in providing behavioral health services, and asserts that it is critical that the parties maintain and, ideally, expand and enhance these services. The parties have stated that NewCo would undertake a number of activities to increase the accessibility of care within the NewCo service area, including by enhancing their behavioral health care offerings. Although there are still some outstanding

[3] These numbers assume that NewCo achieves the HPC's projected price increases.

questions about the details of these plans, the CMIR notes that if NewCo is able to implement these plans as described, it would increase access to behavioral health services.

NewCo made certain commitments in its DoN, the achievement of which will, based upon annual reporting and other information, allow the Department to determine whether it remains in compliance with the terms and Conditions set out in the Notice of DoN. 105 CMR 100.735(D)(3). In the additional information submitted to the HPC, NewCo offered details on some of the programs which it asserts will improve access, coordination of care, and health outcomes. At a high level, NewCo describes programs to improve access and coordination of primary care; expanding behavioral health integration with primary care; integrating and expanding home health, skilled nursing, palliative, hospice, rehabilitation, and high-risk geriatric care services; a unified approach to claims data integration, data management, analytics, and system-wide care management. The CMIR noted NewCo's lack of specific details describing these predicted improvements; therefore, requiring NewCo to provide additional reporting on these programs supports a continued understanding of the improved public health value impact of this transaction.

Based upon the finding in the CMIR that the transaction might result in enhanced bargaining power for NewCo, allowing it to demand significantly higher prices, the Department is concerned that health care disparities might be exacerbated, and that, more generally, this increased bargaining power might have a negative impact on the NewCo patient panel's access to care. While NewCo has committed to retaining its status as a high value provider, one of the important aspects for retaining that status is cost and, as a consequence, its commitment to staying within the Cost Growth Benchmark (CGB) is necessary. Further, given that the CMIR determined that NewCo has an important role in providing behavioral health services, any access issues could threaten the health outcomes and quality of life of NewCo's patient panel, making it crucial that the NewCo commit to continuing to support behavioral health services throughout its system.

In its response to the CMIR, NewCo articulated an intention to improve access to care for MassHealth members and has identified improving health care access for low income individuals and racial and ethnic minorities in their service areas as priorities in their Community Health Needs Assessments (CHNAs) and Community Health Implementation Plans (CHIPs). As noted in the CMIR, NewCo has not committed to expanding access for MassHealth patients. Thus a specific plan for addressing barriers, and increasing access, will support compliance with the measurable public health value requirement in the DoN regulation.

Recommendation

Based upon the findings in the CMIR, the staff recommends that, pursuant to the provisions of 105 CMR 100.735(D)(1)(c), the Department impose certain additional Conditions upon the Notice of DoN, in order to ensure that NewCo will continue to compete on the basis of price, total medical expenses (TME), provider costs, and other recognized measures of health care spending, as required by 105 CMR 100.210(A)(1)(f), and that the increases in costs

contemplated in the CMIR will not impact NewCo's commitment to health equity as required by 105 CMR 100.210(A)(1)(b). As such, the following changes to the Other Conditions are recommended (New language **bold blue**, language removed ~~in strikethrough~~).

Other Conditions

1. In its first report mandated by 105 CMR 100.310(L), the Holder will provide the following:
    a. A report that details, for each measure set out in the Assessment Tool (Attachment 4):
        i. the baseline measures
        ii. expected benchmarks;
        iii. measure specifications; and
        iv. the anticipated time to meet benchmark.
    b. A description of the current payer mix of NewCo **as well as each of NewCo's subsidiary hospitals, and physician organizations,** reported by each of the health insurance coverage categories reported on by **the Center for Health Information and Analysis (**CHIA**)**.[4]
        i. Private Commercial – Overall
        ii. Private Commercial – MA Health Connector QHPs (Subsidized and Unsubsidized)
        iii. MassHealth – Overall
        ~~iv. MassHealth – Temporary~~
        iv. MassHealth – Managed Care Organizations (MCO)
        v. MassHealth- Accountable Care Organizations (ACO)
        vi. Senior Care Options, One Care, PACE
        vii. Medicare Fee-for-Service (Parts A and B)
        viii. Medicare Advantage
    c. A description of the ~~then-~~current network participation of NewCo **as well as each of NewCo's subsidiary hospitals, and physician organizations,** including but not limited to the number of:
        i. Limited network products;
        ii. Tiered products, including NewCo's **and each subsidiary hospital's and physician organization's** tier level for each of these products;
        iii. Other commercial products;
        iv. MassHealth Fee for Service;

[4] *Enrollment Trends Technical Appendix* (Rep.). (2018, February). Retrieved February, 2018, from CHIA website: http://www.chiamass.gov/assets/Uploads/enrollment/2018-feb/Enrollment-Trends-Technical-Appendix-.pdf

v. MassHealth Managed Care Organizations
vi. MassHealth Accountable Care Organizations
vii. Senior Care Options, One Care, PACE
viii. Medicare Fee for Service; and
ix. Medicare Managed Care Organizations.

d. A description of the measures by which the Holder will define itself as a high-value network**.**
e. **A description of efforts to expand or integrate care delivery; improve population health; address access including for patients with behavioral health needs; and other initiatives that are intended or expected to improve patient care, including the timeframe proposed to implement such efforts and initiatives.**
f. **A description of efforts and the impact of those efforts, including measurable metrics, to reduce community appropriate inpatient volume at academic medical centers within NewCo.**
g. **A description of efforts to identify and address barriers to access, including for patients insured by or through MassHealth.**

2. For the duration of the reporting period mandated by 105 CMR 100.310 (L) **and this Notice of DoN,** the Holder will provide the following:
   a. A report on the measurable achievement toward the measures set out in Attachment 4.
   b. Updates on the payer mix of NewCo, **as well as each of NewCo's subsidiary hospitals and physician organizations** as outlined in 1.b.
   c. Updates on network participation **of NewCo, as well as each of NewCo's subsidiary hospitals and physician organizations** as outlined in 1.c.
   d. Updated information on the measures **and efforts** provided in 1.d**, 1.e, and 1.f.**
   e. Updates on the integration of data management systems to support access to patient records and data across the NewCo system.
   f. A description of the operating efficiencies and savings associated with those operational efficiencies achieved in the past year and cumulatively.
   g. A report on the impact of NewCo's efforts to address barriers to access as described in 1.g and condition 9.
   h. A report detailing the Holder's implementation of and the impact of the plan submitted pursuant to condition 9.

3. For the duration of the reporting period, the Holder will engage in reasonable efforts to inform the public and relevant stakeholders on the status of the affiliation including any service or other changes with likely impact on the patient panel or local communities.

4. With its annual report outlined in condition 2, the Holder shall submit a plan detailing:

a. How the savings reported pursuant to condition 2.f. will be used to improve the quality of patient care and access to services, particularly related to behavioral health and primary care, the portion of those savings going to such initiatives.

b. The Holder shall update this plan and report annually.

5. With its annual report to the Department, the Holder will notify the Department whether the Holder or any of its subsidiary entities has been referred by the Center for Health Information and Analysis (CHIA) to the Health Policy Commission (HPC) pursuant to M.G.L. c. 12C § 18 during the prior calendar year. A violation of condition 5 shall not additionally subject the Holder to the provisions of 105 CMR 100.735(D)(3).

6. In the event that CHIA refers the Holder or any of its subsidiary entities to the HPC, pursuant to M.G.L. c. 12C, §18, and CHIA determines that the weighted average Total Medical Expense (TME) for all subsidiary entities across payers is above the Cost Growth Benchmark (CGB) as determined pursuant to M.G.L. c. 6D, § 9, then the Holder shall notify the Department within 10 days of such determination and within that time shall provide to the Department a copy of any information developed by CHIA related to said determination, including material that identifies or quantifies the amount of TME for each subsidiary entity. In the event of such a determination, the Holder shall develop a community provider investment plan, subject to Department approval, that supports the Holder's behavioral health, and primary care services, and supports the Holder's subsidiary and affiliated community hospitals and community health centers. The Holder shall invest such portion of TME in excess of the CGB, as agreed to by the Department and the Holder, pursuant to the community provider investment plan. A violation of condition 6 shall not additionally subject the Holder to the provisions of 105 CMR 100.735(D)(3).

7. In the event that the Holder is required by the ~~Massachusetts Health Policy Commission (~~HPC~~)~~ to develop and file a Performance Improvement Plan (PIP) pursuant to 958 CMR 10.00, then the Holder shall report to the Department that the Holder has filed the PIP and is engaged in ongoing efforts to implement the PIP consistent with 958 CMR 10.00. The Holder will timely provide all information necessary for CHIA to perform its analysis required by M.G.L. c. 12C § 18 and for the HPC to determine if the Holder must develop and file a PIP. If the HPC finds the Holder has not fully complied with the requirements of the PIP implementation process, as set forth in 958 CMR 10.00, then, notwithstanding the HPC finding, the Holder shall report to the Department on why the Department should find that the Holder is still in compliance with the terms and conditions of this DoN.

8. Other requirements in terms of the form, frequency and content of the reporting may be set out as contemplated in 105 CMR 100.310(L) **and this Notice of DoN,** and this information shall be updated annually in accordance with the Regulation. Pursuant to 100.310(Q) **and this Notice of DoN,** All Standard and Other Conditions attached to the Notice of Determination of Need shall remain in effect for a period of ~~five~~ **ten** years following completion of the project for which the Notice of Determination of Need was issued~~, unless otherwise expressly specified within one or more Condition. The Department reserves the right, based upon its reasonable discretion; to extend the reporting period for up to an additional five years provided notice thereof is provided to the Holder one year prior to the end of the first five year period~~.

9. No later than six months from the date that the transaction is complete, the Holder shall submit a proposal for review by the Department detailing how it will address the low percentage of MassHealth in its payer mix. During the pendency of this DoN, the Holder shall make all good faith efforts to ensure that neither the Holder's MassHealth payer mix, nor that of any of the Holder's subsidiary hospitals, as that payer mix includes, but is not limited to inpatients; patients utilizing behavioral health; and primary care services, shall decrease. For the purposes of this condition 9, the Holder shall not consider the MassHealth payer mix of its contracting affiliates and/or any disproportionate share hospitals. If, during the pendency of the DoN, the Department determines that the MassHealth payer mix of the Holder or any of its subsidiary hospitals has materially decreased, then the Holder shall submit a plan to the Department detailing its plan to increase its MassHealth payer mix. The plan shall be submitted no later than six months after such time as the Department notifies the

Holder that such a plan is required. The Holder shall provide with its annual report to the Department a report on implementation of said plan.

10. **The Holder shall develop a plan for review and approval by the Department through which, within two years of the approval of the DoN, all employed physicians and other licensed providers who are authorized to participate in MassHealth, shall have applied to participate in MassHealth (the Plan). The Holder shall certify annually thereafter its continuing compliance with the intent of the plan that all employed physicians and other licensed providers who are so authorized are participating in MassHealth and its contracted managed care entities.**

11. **In the event the HPC has not, within five years after the merger is completed, conducted or indicated it will conduct a cost and market impact review (CMIR) in accordance with M.G.L. 6D § 13 then the Department will request that HPC conduct, and the Holder shall submit to, a CMIR conducted by the HPC pursuant to its authority under M.G.L. 6D, §§ 2 and 5, to "monitor and review the impact of changes within the health care marketplace" and "protect patient access to necessary health care services". Findings contained within that CMIR shall be used by the Department to assess compliance by the Holder with the requirements of the DoN at the time the report is completed and on an on-going basis for the remainder of the reporting period.**