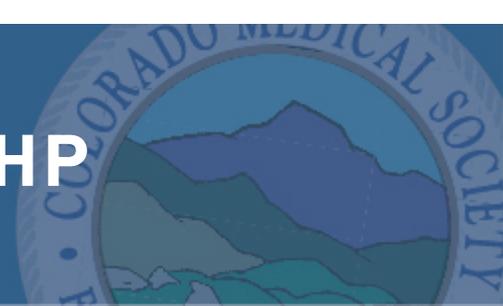


United Acquisition of RMHP

CMS Recommendations to DOI



January 3, 2017

The Honorable Marguerite Salazar
Insurance Commissioner
Department of Regulatory Agencies
Division of Insurance
1560 Broadway, Suite 850
Denver, CO 80202

Re: UnitedHealth Group, Inc. proposed acquisition of Rocky Mountain Health Organization, Inc., and Rocky Mountain Health Care Options, Inc.

Dear Commissioner Salazar,

Thank you for holding the hearing on January 10 in Grand Junction and for giving stakeholders an opportunity to participate. CMS takes mergers and acquisitions very seriously. We evaluate them individually and take positions based on the research and findings. We are here today strongly encouraging you to include conditions on this acquisition should you decide to approve it.

Background

We examined the acquisition for its real-world impact on physicians and patients with the goal of determining opportunities to enhance the agreement and expand collaboration with the merged companies if approved by state regulators. This evaluation has included consultation and input from Western Slope physician leaders and with United and RMHP and other stakeholders.

Over the years CMS and RMHP have enjoyed a unique relationship, most likely because the company was formed by physicians, physicians have held leadership positions within RMHP and the company collaborates with physicians in ways that we believe are unique in the health plan world. Thus, continuing and growing a broader health plan culture of partnership with physicians is vital to improved care delivery, increased quality and cost containment. Given the well-documented problems facing the multi-payer system, we believe more than ever that physicians and health plans should be working together (Attachment 1).

RMHP's collaborative culture extends beyond working with physicians at the practice level. They have been outstanding partners with CMS on public policy over the years. When health plans were refusing to provide physicians with fee schedules before



signing a contract and the Colorado General Assembly decided to prohibit this practice, the Colorado Association of Health Plans brought a RMHP senior executive to the table to work the details with CMS and the bill sponsors. When Colorado Association of Family Physicians and CMS were working with the Ritter Administration helping to incubate what is now the Medicaid Accountable Care Collaborative Program, RMHP was constructively in the mix. As compared to other health plans in the Colorado market, we receive far fewer complaints from our members about RMHP.

CMS and mergers

CMS has been tenacious about proposed mergers over the past 12 years, not only because they are often anti-competitive, but also because they often enhance the negotiating leverage of an insurance company and are harmful to physicians and patients alike. CMS was outspoken on United's 2005 acquisition of PacifiCare and CIGNA's 2008 acquisition of Great West Healthcare of Denver. Most recently CMS is vigorously opposing the current mega-mergers – Anthem's proposed acquisition of CIGNA and Aetna's proposed acquisition of Humana. The Colorado Division of Insurance placed conditions on the earlier mergers and the US Department of Justice forced divestiture of PacifiCare in Boulder County. The latter two mergers are currently being litigated in federal court.

CMS approach to evaluating the acquisition

- (1) Discussions and direction from the CMS board of directors;
- (2) Multiple meetings and information exchange with RMHP executives and United's attorneys who are handling the regulatory aspects of the acquisition;
- (3) Learning the perspective of Western Slope physicians and other stakeholders;
- (4) Consulting with attorneys who specialize in antitrust law; and,
- (5) Reviewing literature and survey data.

We wish to compliment and thank both RMHP and United for their transparency and on-going dialogue and cooperation during the acquisition process.

Western Slope outreach:

A discussion by the CMS board of directors on September 16 resulted in a consensus that CMS should continue to investigate the acquisition. In response:

1. Listening sessions were initially held with physicians in Delta and Grand Junction;
2. Subsequently, CMS jointly convened with RMHP and United a meeting in Grand Junction that allowed both in-person and conference call participation by physicians. The meeting was designed to allow physicians to learn about the proposed acquisition, to ask questions and to better understand what the acquisition means to them and to their patients;
3. Conducted an in-person physician meeting in Montrose;
4. Met with the Mesa County Medical Society board of directors;
5. Communicated with all CMS members on the Western Slope, educating them on the proposed acquisition and seeking their perspective; and,
6. Numerous individual calls and emails with CMS members.

Findings

1. **RMHP brand, mission and executive team:** RMHP's brand and mission, along with the current management team and corporate headquarters in Grand Junction will remain intact – a vital component of the proposed transaction.
2. **RMHP Foundation:** A second key aspect of the proposed transaction is the infusion of significant financial dollars from United into a foundation with a focus on the health delivery systems in Western and rural Colorado. The challenges doctors face in these communities are different from those in the metro areas of the Front Range, and the proposed board for the foundation will have a strong physician presence with members from Grand Junction, Montrose and the Roaring Fork Valley. Upon the closing of the transaction, the foundation's permanent governing board will be independent; RMHP and United will have no power to remove, appoint or approve the appointment of foundation board of director members, or any other power or authority over the affairs or activities of the foundation.
3. **Community support:** United will, or will cause RMHP to, continue to support the community in Western Colorado for three years at RMHP's current level of community benefit support up to \$500,000 per year, including Quality Health Network, Hope West, Hilltop Community Resource, Marillac Clinic, Strive and the Colorado Mesa University Nursing Program.
4. **Medicare cost contract:** For 40 years, RMHP has negotiated reimbursement rates for physicians that provide access for seniors in the 25 rural counties in Colorado where RMHP is the only Medicare managed care option for Medicare beneficiaries. In the Form A documents filed with DOI, United has committed to maintain the Medicare cost contract for at least three years on the Western Slope and other parts of rural Colorado.
5. **Medicare withhold lawsuit:** RMHP and Western Slope IPAs believe that the federal government has wrongfully withheld more than \$20 million federal dollars from RMHP and many physicians in their network. Two hearing officers have ruled in favor of RMHP and the physicians, but a federal officer reversed that decision, and the situation continues to be litigated. It is significant that United is supportive of RMHP's efforts to recoup these dollars. In addition, if RMHP prevails in the litigation, United has agreed that the proceeds (less costs and expenses) will be paid to the Foundation and, pursuant to withhold provisions of providers' contracts, to a number of Western Slope physicians.
6. **Grand Junction economic impact:** RMHP has approximately 400 employees and is considered a major employer on the Western Slope. From a community and economic development perspective, maintaining RMHP's home office in Grand Junction is an important aspect of the agreement.
7. **Service maintenance:** RMHP employees will continue serving members, providers and partners with no decrease in service.

8. **Provider collaboration:** RMHP will remain true to its commitment to collaborate with provider partners and work to maintain, enhance and re-develop relationships with rural communities.
9. **Technology upgrades:** RMHP gains state-of-the-art technology and additional resources through United's portfolio.
10. **Study, learn and apply:** United expresses a desire to "study and learn" RMHP's way of doing business with physicians and "applying" what they learn to other parts of the country and the Front Range.
11. **Medicaid:** This has been described as a critical component of the transaction. RMHP is Western Slope Medicaid and is implementing a Medicaid payment reform for primary care physicians called Medicaid Prime. United has a significant Medicaid line of business and views RMHP's Medicaid innovations as a laboratory for improvement in their system. The two companies view Medicaid as a growth and innovation opportunity. Physicians on the Western Slope and in other areas of Colorado could benefit if RMHP's Medicaid payment reforms were expanded and additional innovations were developed and introduced into the Medicaid market.
12. **Western Slope physician perspectives:**
 - a. Overall assessment of physician perspective: Although CMS did not survey Western Slope members, our assessment from listening sessions, individual phone conversations, and email exchanges, is a sense of a combined feeling of disappointment and trepidation. Many physicians have spent years developing solid working relationships with RMHP and while they recognize that RMHP is doing what it has to do, and that things are likely to be "okay" for now, the long-term prospects of United's influence over Rocky are worrisome.
 - b. Delta County Medical Society: This medical society is not supportive of the acquisition.
 - c. Mesa County Medical Society: The Executive Committee of the Mesa County Medical Society supports the proposed acquisition with the following caveats:
 - i. UnitedHealthcare will continue to support RMHP's collaboration with physicians and with organized medicine.
 - ii. RMHP will continue with the same leadership they currently have in place for the near-term.
 - iii. There will be continued oversight of the management of RMHP/United by a local physician committee appointed to monitor their behavior in Mesa County. In addition, a task force could be formed to include local and state medical society leadership and RMHP/United.
 - d. Montrose IPA: In a communication to CMS, the following points were made:
 - i. The IPA is not in any way seeking to block the acquisition and is communicating with RMHP about the transaction. They value their working relationship with RMHP and want it to be continued uninterrupted.

- ii. The transition of RMHP from a non-profit to a for-profit has its pros and cons. They note that health care in Western Colorado was shaped in large measure by the non-profit nature of RMHP as the dominant carrier and provider partner.
- iii. Given the large Medicare and Medicaid populations on the Western Slope, continued provider support from RMHP for Medicare and Medicaid patients will be a key ingredient to maintaining access to care in the future.
- iv. The funding of the RMHP Foundation to support health care in Western Colorado is a crucial part of the transaction.
- v. The promise of enhanced data analytics could be very helpful provided it produces accurate data and it is made available without charge to providers.

13. United's acquisition of Sierra Health Services and PacifiCare:

- a. Sierra Health: Two studies have examined the effects of past health insurance mergers on premiums. A study of the 1999 merger between Aetna and Prudential found that the increased market concentration was associated with higher premiums.¹ A second, more recent study examined the premium impact of the 2008 merger between UnitedHealth Group Inc. and Sierra Health Services. The study indicates that the merger led to a large increase in concentration in Nevada health insurance markets and concluded that in the wake of the merger, premiums in Nevada markets increased by almost 14 percent relative to a control group.² The studies suggest that greater consolidation leads to price increases, as opposed to greater efficiency or lower health care costs and that that the merging parties exploited their resulting market power to the detriment of consumers.
- b. PacifiCare: United acquired PacifiCare in 2005.

U.S. Department Of Justice: DOJ successfully filed suit that forced divestiture of PacifiCare in Boulder County warning that the acquisition as originally proposed would have given United the ability to lower the reimbursement rates of physicians in Boulder that would likely have resulted in a reduction in the quantity or quality of physicians services provided to patients.³

¹ Leemore Dafny et al, "Paying a Premium on your Premium? Consolidation in the US health insurance industry," *American Economic Review* 2012; 102: 1161-1185.

² Jose R. Guardado, David W. Emmons, and Carol K. Kane, "The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra" *Health Management, Policy and Innovation*, 2013; 1(3) 16-35.

³ See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007) (explaining reasons to challenge monopsony power even where there is no immediate impact on consumers); Marius Schwartz,

California: Insurance Commissioner Dave Jones cited the effect in California of United and PacifiCare's 2005 merger in a June 16, 2016, letter to the United States Department of Justice recommending that the mega-merger of Anthem and Cigna be blocked, as follows:

The effect in California of the UnitedHealthcare (UHC)/PacifiCare merger in 2005, the last acquisition of a smaller health insurer by a large insurer in our state, provides an insightful "natural "experiment" of the effect of health insurer mergers and how the claimed benefits ultimately are illusory. Notwithstanding commitments to maintain quality service and expand its markets in California, UHC instead failed to honor its commitments, and services deteriorated significantly for both policyholders and providers. UHC justified its acquisition of PacifiCare by touting increased efficiencies and cost savings. Indeed it was able to exceed its three-year cost cutting goal of \$350 million dollars 18 months after the merger, but at a significant negative impact on quality of service. I ultimately found a pattern of unfair claims practices, totaling 908,547 violations, as the quality of its services decayed.⁴

Colorado: The Colorado Division of Insurance was the last of ten states to approve the acquisition. Then DOI Commissioner David Rivera imposed a set of conditions that included, among others:

- Merger costs will not be passed on to Colorado consumers in the form of higher premiums; and,
- United was required to meet certain performance goals, including:
 1. Faster resolution of provider calls appeals, complaints, claims
 2. Better training of physician service center personnel
 3. Overpayment recoveries required advanced notice and were limited to 12 months; and
 4. Creation of a Physician Advisory Council (PAC) and use of an ombudsman for three years.

The PAC and ombudsman were immediately instituted. United's CEO was elegant following regulatory approval in asking CMS to submit names to

⁴ *Buyer Power Concerns and the Aetna-Prudential Merger*, Address before the 5th Annual Health Care Antitrust Forum at Northwestern University School of Law 4-6 (October 20, 1999) (noting that anticompetitive effects can occur even if the conduct does not adversely affect the ultimate consumers who purchase the end-product), available at: <http://www.usdoj.gov/atr/public/spceches/3924.wpd>.

⁵ See June 16, 2016 letter of California Insurance Commissioner Dave Jones to The Honorable Loretta E. Lynch, Attorney General of the United States and Ms. Renata B. Hesse, Principal Deputy Assistant Attorney General, United States Department of Justice, regarding proposed merger of Anthem, Inc. and Cigna Corporation.

populate the PAC and to pick the ombudsman. The PAC produced robust engagement between United and the practicing physician appointees. PAC updates were routinely reported to CMS members and featured at CMS meetings. Because the PAC was viewed by CMS and United as mutually beneficial, it was extended voluntarily for three additional years once the mandatory three year period expired (Attachment 2). The relationship and interaction between United and CMS were significantly enhanced during this time.

In 2015 CMS conducted a retrospective survey, designed to determine the effect of the UnitedHealth Group acquisition of PacifiCare on physicians practicing in Colorado. The survey results were limited to CMS members who are currently practicing and who were practicing in Colorado prior to 2006. While the survey responses were not certified for margin of error or confidence level, they illustrate why U.S DOJ forced divestiture of PacifiCare in Boulder County (lowering the reimbursement rates of physicians in Boulder that would likely have resulted in a reduction in the quantity or quality of physicians services provided to patients). This data lends strong support for conditions and oversight of United's acquisition of RMHP should it be approved (Attachment 3).

CMS Recommendations: Given the findings outlined above and the need to restore a fair and workable balance between the business interests of investor-driven health plans and economically viable medical practice, CMS strongly encourages DOI to include the following conditions on the acquisition if a decision is made to approve it.

1. **Protect patients:** Acquisition costs should not be passed on to Colorado consumers in the form of higher premiums.

Rationale: (a) Studies on the effects of past health insurance mergers on premiums; (b) DOI's condition on United's acquisition of PacifiCare that prohibited merger costs from being passed on to Colorado consumers in the form of higher premiums.

2. **"Study, learn and apply":** There are no metrics or timelines associated with this narrative. We recommend: (1) That a clear definition for "study, learn and apply" be created; (2) Identification and a report to DOI of what specifically will be studied within the first six months of the acquisition; (3) Updates to DOI over the following 30 months regarding what United is learning and whether and how what has been learned will be applied within United's system.

Rationale: (a) An important and welcome acquisition narrative advanced by United is its desire to "study and learn" RMHP's way of doing business with physicians and "applying" what they learn to other parts of the country and the Front Range once the acquisition has been approved. CMS applauds and compliments United for publicly stating this goal because there is a great deal of room for improvement in United's dealings with physicians in Colorado.

(b) Over the years CMS and RMHP have enjoyed a unique relationship. In addition, RMHP, CMS and component societies on the Western Slope have shared and lived by the common value of collaboration. As a result, physicians throughout the state admire the real-world accomplishments that physicians and RMHP together have attained across Colorado, such as:

- Medical Practice Review Committees (to achieve best practices),
- Pharmacy & Therapeutic Committees (to develop formularies),
- Quality Health Network (a community-wide health IT exchange),
- One of the 17 Beacon Communities in the country (to transform physicians' practices with technology),
- The Medicaid Prime pilot to integrate physical and behavioral health, and
- Practice transformation and quality improvement programs (e.g. CPC and CPC+).

These accomplishments are models of what carriers and physicians can accomplish when they work together as partners. CMS strongly endorses this type of partnership. United's commitment to "study, learn and apply" represents a tremendous opportunity for improved, coordinated care in the future not only in United's Colorado markets but also across the country.

(c) Attachment 1

3. **Employment contracts:** Guaranteed five-year employment contracts immediately after the acquisition is approved for RMHP's management team, specifically for those executives that are involved in medical policy and physician relations, both at the practice level and those that routinely interact with CMS in Denver.

Rationale:

- (a) Continuity in leadership is vital during the transition of RMHP from a non-profit to a for-profit entity. Western Slope physicians want assurances that the management team will not be forced out post acquisition and that certain promises made during the acquisition process will be realized.
- (b) Mesa County Medical Society voted to support the proposed acquisition of Rocky Mountain Health Plans by United Health Care with the following two caveats:
- a. United Health Care will continue to support RMHP's collaboration with physicians and with organized medicine.
 - b. RMHP will continue with the same leadership they currently have in place for the near-term.

(c) Maintaining the RMHP brand and mission, along with the current management team, and corporate headquarters in Grand Junction is referenced in the Form A.

(d) United expresses a desire to “study and learn” RMHP’s way of doing business with physicians and “applying” what they learn to other parts of the country and the Front Range. This is a highly laudable and welcome goal of United. If the experienced RMHP executives working are released or forced out post acquisition, then the laudable acquisition goal of “study, learn and apply” is most likely to be a failure.

(e) See findings; California experience, UnitedHealthcare (UHC)/PacifiCare 2005 merger.

4. **Physician Advisory Committee (PAC):** A condition should be placed on the acquisition that mandates a PAC for a minimum of three-years to: (1) Provide input to the merged companies during the transition; (2) Be advised of, and review and comment on, any management or medical policy changes proposed at RMHP that would impact customer service, physician relations, patient care or senior management authority; (3) Be composed primarily of Western Slope physicians in active practice of patient care and at least one physician nominated by CMS from the Front Range who has experience in practice transformation and negotiating with health plans.

Rationale: (a) Prior negative experience with the United PacifiCare merger in California underscores the need for accountability; (b) The documented positive experience with the Colorado United PAC (PacifiCare merger).

5. **Physician outreach and support:** A condition should be placed on the acquisition that requires the merged companies to offer each Western Slope and mountain region IPAs currently served by RMHP professionally facilitated dialogue within six months of the acquisitions approval for the purpose of enhancing mutually beneficial patient and community benefits.

Rationale: (a) The Mesa IPA recently held a professionally facilitated conference in part related to the acquisition that physician IPA leaders found invaluable; (b) Widespread concerns about the acquisition by physician communities across the Western Slope.

6. **Technology upgrades:** The acquisition narrative emphasizes that RMHP gains state-of-the-art technology and additional resources through United’s portfolio. These upgrades should be identified before the acquisition is finalized and reported to DOI. DOI should subsequently monitor the acquisition over a three-

year period to ensure that the upgrades are realized without cost to patients or providers.

Rationale: Western Slope physicians recognize that enhanced data analytics could be very helpful provided they produce accurate data and it is made available without charge to providers.

- 7. Delta County:** A condition should be placed on the merger requiring RMHP to outreach to the Delta County medical community to open dialogue on Medicaid and other issues within the first six months of the acquisition.

Rationale: Historically negotiations between RMHP and Delta County IPA have ended poorly. Currently Delta County does not have a Medicaid contract with RMHP. With the proposed acquisition it is prudent that all Western Slope communities are engaged with the company in order to effectively promote regional collaboration to help reduce health care costs and improve quality. Delta County physicians have expressed: (1) A desire for greater rapport and mutual understanding in their relationship with RMHP; (2) Great concern that the transition to a for-profit company will make health insurance costs entirely unaffordable for their community because, among others, the cost of the acquisition could easily be passed to consumers in the form of increased premiums or decreased services/networks.

Thank you once again for the opportunity to provide comments and suggestions. We stand prepared to assist DOI in any way and pledge to work with the companies to throughout this process.

Respectfully submitted,



Katie, Lozano, MD, FACR
President

Copies to:

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