

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK

Assurance No. 16-003

In the Matter of the

**Investigation by Eric T. Schneiderman,
Attorney General of the State of New York, of
the Business Practices of UnitedHealth Group,
Inc.**

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“the NYAG”) investigated, pursuant to Section 343 of the New York General Business Law and Section 63(12) of the New York Executive Law, potentially anticompetitive conduct by UnitedHealth Group (“United”) in connection with the placement of its Institutional Special Needs Plan (“I-SNP”) health insurance plan in New York State skilled nursing facilities (“SNFs”). As part of its investigation, the NYAG, among other things, reviewed complaints from market participants, interviewed numerous SNF operators throughout New York State, and spoke with other health insurers that offer I-SNP insurance plans in the state. The NYAG also gathered and analyzed relevant market data, and reviewed documentation produced by United at the NYAG’s request. The foregoing activities, and NYAG’s review of the practices described in the Attorney General’s Findings, are collectively referred to herein as the NYAG’s “Investigation.”

This Assurance of Discontinuance (“Assurance”) contains the NYAG’s factual findings and contentions, and the relief agreed to by the NYAG and United (collectively, “the parties”).

THE ATTORNEY GENERAL'S FINDINGS

United's Presence in New York State

1. United, a corporation organized under the laws of Minnesota with headquarters in Minnetonka, Minnesota, is a diversified health and well-being company with two main divisions, UnitedHealthcare and Optum. Its UnitedHealthcare division offers health care benefit plans to various consumers and markets. In New York State, UnitedHealthcare offers employer and individual commercial insurance plans; Medicare Advantage plans for Medicare beneficiaries and retirees; and Medicaid managed care plans for New York State Medicaid participants.

2. UnitedHealthcare is the largest provider of Medicare Advantage health insurance plans in several counties in New York, and has a significant market presence in many other counties. UnitedHealthcare also maintains a significant share of the business of commercial employer-based health insurance in New York. UnitedHealthcare also offers Medicaid managed care plans or Medicaid long term care plans in most New York State counties and has a significant market presence in some counties.

Institutional Special Needs Plans

3. The I-SNP is a health insurance plan designed to provide targeted care to individuals with special needs. The Medicare Modernization Act of 2003 authorized the establishment of three types of special needs plans, including the I-SNP, that are available to individuals with certain chronic health conditions. The I-SNP is available to individuals who, for a period of 90 days or longer, need or are expected to need the level of services provided in a long term care ("LTC") SNF, a LTC nursing facility ("NF"), an SNF/NF, an intermediate care facility for the developmentally disabled, an in-patient psychiatric facility, or an assisted living facility.

4. The aim of an I-SNP is to improve the care provided to nursing home patients by treating patients in place (*i.e.*, not transferring the patient from the nursing home to a hospital), thereby reducing the need for hospital admissions. Providing both short-term and long-term care at a single SNF can benefit patients by improving coordination and continuity of care. To adequately manage patient care so as to reduce hospital admissions, insurers that implement an I-SNP at an SNF are required to provide I-SNP enrollees with appropriate access to clinical staff including physicians, nurses, nurse practitioners, and care coordinators.

5. A health insurer that intends to offer an I-SNP is required to obtain the approval of the U.S. Department of Health and Human Services' Center for Medicare and Medicaid Services ("CMS") for the insurer's Model of Care ("MOC") for patients enrolled in its I-SNP. MOCs, which identify target patient populations and outline how patient care will be coordinated by the I-SNP, are vital quality improvement tools designed to ensure that the unique needs of each beneficiary enrolled in an I-SNP are identified and addressed. If an I-SNP MOC satisfies

CMS's requirements, CMS may license the I-SNP to do business in a particular geographic area for up to three years.

6. If an insurer has been licensed by CMS to offer an I-SNP in a particular geographic area, it will typically then reach out to SNFs in that geographic area to persuade those SNFs to contract with the insurer to implement the insurer's I-SNP in the SNF. Once the insurer has contracted with an SNF to implement the insurer's I-SNP in a particular facility, it may, subject to CMS regulations, market the plan to the facility's residents.

United's Conduct Concerning Its I-SNP Plan

7. UnitedHealthcare offers an I-SNP insurance plan to eligible residents of participating SNFs in New York. UnitedHealthcare is by far the largest provider of I-SNP plans in New York State, with over 10,000 covered lives and a share of the business that approaches 70%. UnitedHealthcare's I-SNP competitors in New York State include ArchCare, Independent Health, Centerlight, Elderplan, Inc., and Healthfirst.

8. United sometimes seeks to contract for all of UnitedHealthcare's plans with an SNF in its network, allowing care at that SNF for patients with short-term stays covered by UnitedHealthcare commercial insurance, Medicare Advantage and Medicaid plans and, in some cases, patients needing longer-term care covered by I-SNPs.

9. In seeking relationships covering multiple plans with SNFs, United has, in some instances, conditioned an SNF's access to commercial or Medicare Advantage plans on the SNF's participation in UnitedHealthcare's I-SNP. In other words, United has required SNFs to accept the United I-SNP in their facilities as a condition of securing a contract, and the desired in-network status, for other United insurance plans. UnitedHealthcare has significant market

shares in commercial or Medicare Advantage plans in certain New York counties, and the Attorney General is concerned that United may have used its clout to induce certain SNFs to contract for the United I-SNP, thereby harming competition in New York by limiting its competitors' ability to compete in connection with the sale of I-SNP products in New York State.

10. The refusal of a health insurer to contract with an SNF for the plan in which the health insurer has substantial market power unless the SNF agrees also to contract for other plans may unlawfully harm competition. Competition may be diminished if the ability of a facility to contract for a desired health insurance plan is conditioned on that facility's acceptance of a contract for another of the insurer's plans that is not desired by the facility. For example, it may be extremely important for a facility to contract for, and be able to serve members of, a certain health insurance plan if that plan covers a substantial proportion of the population in a facility's geographic area. Where an insurer conditions a contract for this plan on the facility's acceptance of a second plan, this behavior may adversely affect competition.

11. The NYAG believes that United has used its significant market share in other insurance products to pressure SNFs to contract for United's I-SNP plan. The NYAG is concerned that United's contracting practices with SNFs in the State of New York may have unlawfully harmed competition in violation of the Donnelly Act, Gen. Bus. Law Sec. 340 *et. seq.*

PROSPECTIVE RELIEF

WHEREAS, United neither admits nor denies the NYAG's Findings 1-11 above;

WHEREAS, the NYAG is willing to accept the terms of this Assurance pursuant to New York Executive Law § 63(15) and to discontinue its Investigation;

WHEREAS, United and the NYAG each believe that resolution of the Investigation through this Assurance is prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties, that:

1. This Assurance shall apply to United and any of its successor entities doing business in New York State, whether acting through their principals, directors, officers, shareholders, employees, representatives, agents, assigns, successors, parents, subsidiaries, affiliates, or other business entities, whose acts, practices, or policies are directed, in part or in whole, by United or any successor. By signing this Assurance, United stipulates that it foregoes any legal defenses to, or assertions against, the enforceability of this Assurance.

2. Following the date of execution of this Assurance, United agrees to comply with the following guidelines, with regard to New York SNFs.

Restrictions on United's Conduct

3. United may not (a) require participation in the United I-SNP as a necessary condition for participation by an SNF in United's network for any non-I-SNP insurance plan, (b) terminate or decline to renew the contract for non-I-SNP United insurance plans on such basis, or (c) penalize an SNF for declining to participate in United's I-SNP by offering the SNF lower reimbursement rates than those offered to similarly situated SNFs who do not participate in United's I-SNP.

4. Subject to the restrictions set forth above:

(a). United need not enter into or renew a contract with any SNF that seeks to contract with United for any particular United plan, but rather, upon its discretion, United may independently decide which SNFs to contract with for any of its plans;

(b). United may seek a broad relationship with an SNF, including agreeing to contract for United's I-SNP and all (or some) of its other insurance plans, may consider an SNF's willingness to participate in I-SNP as one factor in deciding whether to enter into or renew a contract with an SNF, and may decline to enter into or renew or may terminate a contract that does not include I-SNP with any SNF so long as United considers independently in good faith the business case for a non-I-SNP contract on a stand-alone basis. For the avoidance of doubt, a purpose of impeding competition does not constitute a good faith business reason for terminating or refusing to enter into a non-ISNP contract with an SNF.

(c). United need not enter into contracts for all of its insurance plans when it contracts with an SNF for its I-SNP.

5. Within 30 days of execution of this Assurance, United shall, in writing, communicate with all personnel involved in United's New York State SNF networking operations to (i) inform them that United has executed this Assurance and (ii) outline the conduct prohibited by this Assurance.

6. In consideration of the making and execution of this Assurance, and within ten (10) business days thereafter, United agrees that it will pay by wire transfer payable to the State of New York \$100,000.

7. All correspondence related to this Assurance must reference Assurance # 16-003.

OTHER PROVISIONS

8. NYAG has agreed to the terms of this Assurance based on, among other things,

NYAG's own factual investigation as set forth in Findings 1-11 above and the representations made to NYAG by United and its counsel. To the extent that any material representations made to NYAG by United and its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the NYAG in its sole discretion.

9. If the Assurance is voided or breached, United agrees that any statute of limitations or other time-related defenses applicable to the subject of the Assurance and any claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event the Assurance is voided or breached, United expressly agrees and acknowledges that this Assurance shall in no way bar or otherwise preclude NYAG from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Assurance, against United, or from using in any way any statements, documents or other materials produced or provided by United prior to or after the date of this Assurance.

10. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by United in agreeing to this Assurance.

11. United represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. United shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects United's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which NYAG is not a party. This Assurance is not intended for use by any third party in any other

proceeding and is not intended, and should not be construed, as an admission of liability by United.

12. This Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance.

13. This Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than NYAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of NYAG.

14. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the NYAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

15. To the extent not already provided under this Assurance, United shall, upon request by NYAG, provide all documentation and information necessary for NYAG to verify compliance with this Assurance.

16. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to United, to: General Counsel
 UnitedHealth Group Incorporated
 9900 Bren Road East
 Minnetonka, MN 55343

If to the NYAG, to: Chief, Antitrust Bureau
 New York State Office of the Attorney General
 120 Broadway, 26th Floor
 New York, NY 10271

17. Acceptance of this Assurance by NYAG shall not be deemed approval by NYAG of any of the practices or procedures referenced herein, and United shall make no representation to the contrary.

18. Pursuant to Executive Law § 63(15), evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of Gen. Bus. Law Sec. 340 in any action or proceeding thereafter commenced by NYAG. Except as otherwise provided in this paragraph and paragraphs 9, 11, and 19 of the Other Provisions section of this Assurance, United shall not be prevented from taking factual and legal positions contesting any such action.

19. If a court of competent jurisdiction determines that United has breached this Assurance, United shall pay to NYAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

20. The NYAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. The NYAG is willing to accept this Assurance pursuant to Executive Law § 63(15) in lieu of continuing the Investigation or commencing a statutory proceeding. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

21. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

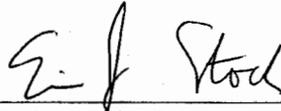
22. This Assurance will terminate, without any further action by the Parties, seven (7) years from the last date signed by the Parties.

23. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

IN WITNESS WHEREOF, this Assurance is executed by the parties hereto on January 6,

2016.

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: 
Eric Stock, Esq.
Chief, Antitrust Bureau

UNITEDHEALTH GROUP INCORPORATED.

By: 
Matthew M. Shors
Senior Deputy General Counsel