HANYS™
Always There for Healthcare

Marie B. Grause, RN, JD • President
Headquarters
One Empire Drive, Rensselaer, NY 12144
518.431.7600
Washington, D.C. Office
499 South Capitol Street SW, Suite 405
Washington, D.C. 20003
202.488.1272

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Honorable Maria Vullo
Superintendent
New York State Department of Financial Services
One State Street
New York, New York 10004

Submitted via email: mlmicdemutualization@dfs.ny.gov

Re: Comment on Implementation of MLMIC Plan of Conversion

Dear Superintendent Vullo:

The Healthcare Association of New York State (HANYS), the statewide hospital and continuing care association representing non-profit and public hospitals and other healthcare organizations, respectfully submits the following comments on the proposed Plan of Conversion [i] ("Plan") of Medical Liability Mutual Insurance Company (MLMIC) from a mutual to a stock insurance company.[ii]

HANYS fully supports the Plan and the related transaction between MLMIC and National Indemnity Company and urges the Department of Financial Services ("DFS") to approve the proposed Plan without amendment or modification.

However, HANYS has identified a concern with the implementation of the proposed Plan that requires DFS' assistance. Specifically, HANYS requests that DFS issue clarifying language in its final order to make clear that the "Objection to Recipient of Cash Consideration" procedure set forth in Schedule I of the Plan ("Objection Procedure")[iii] is implemented according to its express terms, such that it is accessible to all entities that functioned as policy administrators during the relevant time period. Proposed language for DFS' consideration is included below.

By way of background, HANYS has learned that certain hospitals and health systems may not be permitted to access the Plan's Objection Procedure because they have been advised that such process is limited solely to entities that have been formally designated as Policy Administrators on the declarations page of the policy. Absent this formal designation, such entities may not be able to utilize the Objection Procedure, regardless of whether they functioned as the policy's administrator and have a good faith belief of their legal right to receive a Cash Consideration.

HANYS asserts this interpretation is at odds with the express language of the Plan, which defines Policy Administrators in a much broader manner to include individuals or entities "designated on the declarations page of the Policy **or otherwise** as the

administrator of the Policy on behalf of the applicable Policyholder, or any successor to such Person …" [emphasis added].

The "or otherwise" language is critical. By its terms, "or otherwise" evidences a recognition that form should not override substance. Specifically, it establishes that entities that performed the functions of a Policy Administrator (a "*de facto* Policy Administrator") but neglected to have a box checked on the declarations page of the Policy should not be denied access to the Objection Procedure.

HANYS therefore requests that DFS issue the following clarification to the Plan, which will not result in delay or require an amendment or modification:

> "The Objection Procedure will be open to any Person who is a Policy Administrator based on having been listed on the declarations page or other MLMIC policy document, or by its having performed the functions of a Policy Administrator, provided the Person details such functions, and the time periods in which they were performed, in a writing submitted with its objection."

This clarification is critical for two reasons. First, it would ensure that the Objection Procedure is open to the full group of Policy Administrators. Entities that performed the functions associated with being a Policy Administrator, such as paying the Policy premiums, receiving dividends in the form of premium credits, discussing and processing renewals and rate quotations, and interacting with MLMIC regarding claims, among other actions, should not be denied access to the Objection Procedure simply because they do not have a formal Policy Administrator designation.[iv]

Second, this clarification would have no impact on the ultimate recipient of the Cash Consideration. It will only ensure that the allocated Cash Consideration will be held in escrow until MLMIC receives joint written instructions from the parties or an order setting forth the payment distribution terms. This is a fair and equitable result, especially for financially-distressed hospitals that need every opportunity to pursue the Objection Procedure so they can maintain access to high-quality essential services in under-served communities.

For these reasons, HANYS requests that DFS issue the proposed clarification to ensure that any entity that is a Policy Administrator, regardless of designation, will have access to the Objection Procedure.

Thank you for the opportunity to comment.

Sincerely,

Marie B. Grause

Marie B. Grause, RN, JD
President

[i] All capitalized terms shall have the same meaning as in the Plan, as applicable, and except where otherwise noted.

[ii] HANYS also supports the testimony offered by the Greater New York Hospital Association.

[iii] The full text of the Objection Procedure is as follows:

> If a Policy Administrator or EPLIP Employer has not been specifically designated to receive the Cash Consideration allocated to an Eligible Policyholder, but nevertheless believes that it has a legal right to receive such Cash Consideration, such Policy Administrator or EPLIP Employer may send MLMIC a letter (return receipt requested) or an e-mail (preferably an e-mail) that sets forth such position, along with a statement to the effect that it has provided a copy of such letter or e-mail to the applicable Eligible Policyholders, at any time prior to the date of the Superintendent's public hearing. If sent by mail, the objection will be considered to be received by MLMIC only when actually received. If MLMIC receives a properly filed objection, the allocated Cash Consideration will be held in escrow by the Conversion Agent until MLMIC receives joint written instructions from the Eligible Policyholder and the Policy Administrator or EPLIP Employer as to how the allocation is to be distributed, or a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator or EPLIP Employer or the Eligible Policyholder.

[iv] Notably, courts have determined that the lack of a formal designation does not limit the rights of parties who perform the functions or take on the responsibilities of an administrator. See, e.g. Coulter v. Morgan Stanley & Co., 753 F.3d 361, 366 (2d Cir. 2014) (holding a person is a "*de facto* fiduciary" of an ERISA plan, even if not named as a fiduciary in the plan, where the person exercises discretionary responsibility and control over the plan); Estate of Djeljaj, 38 Misc. 3d 618, 620 (N.Y. Sur. Ct. 2012) ("[P]ersons who undertake duties and responsibilities ordinarily performed by a fiduciary, even though they are not a court appointed fiduciary, may be classified as the *de facto* fiduciary of an estate or trust.") (citing Breslau v. Sakow, 219 A.D.2d 479, 482-83 (1st Dep't 1995) (finding party was *de facto* executor of estate based on his assumption of authority over estate decisions, signing of estate account checks, and disposition of estate property).