



—
Testimony before the Department of Banking and Insurance
Horizon BCBS Reorganization Hearing
October 17, 2022

Good afternoon Commissioner and others:

My name is Renée Steinhagen, Executive Director of New Jersey Appleseed Public Interest Law Center. I submit this testimony on behalf of New Jersey Appleseed and New Jersey Citizen Action, two organizations that have been involved since 1996 in the several efforts of Horizon BCBS over the years to reorganize and effectively become a for-profit insurance company. At each juncture, our respective organizations have advocated for legislation or regulatory actions that would protect both the current policyholders of the nonprofit health services corporation, as well as the charitable assets of the corporation, and its predecessors, which have accumulated since their incorporation in 1932.

We have come here today with the support of our partners to express our serious concerns about the Department of Banking and Insurance's (DOBI's) decision to withhold from the public highly-relevant information that goes to the heart of the proposed reorganization, including information concerning Horizon's proclaimed justifications for the reorganization and possible alternatives considered that would not involve abandoning its current charitable structure. The lack of transparency further includes the failure to release information regarding the proposed use of Horizon's charitable assets, including how the value of those assets will be impacted, monitored and protected going forward. The dearth of such publicly available information, including information as to the potentially adverse impact on millions of current policyholders is unprecedented and raises serious due process concerns. Furthermore, the expedited process of holding of three public hearings, all within a period of two weeks, rather than staggered over the 90-day period permitted by statute, and the failure to conduct and release the health impact study authorized by statute prior to these hearings renders DOBI's actions arbitrary, capricious, unreasonable and contrary to the public interest. Without the critical information, including the proposed business plan, New Jersey Appleseed and NJCA (which is also a policyholder of Horizon), as well as other members of the public, have limited ability to meaningfully engage in this public review process and comment on the specifics of the reorganization that Horizon is proposing and to evaluate the extent to which current policyholders may not be adequately protected. Perhaps most importantly, we need to know whether the publicly subsidized

New Jersey Appleseed
Public Interest Law Center of New Jersey
23 James Street
Newark, New Jersey 07102

Phone: 973.735.0523; Cell: 917-771-8060
Email: renee@njappleseed.org
Website: www.njappleseed.org

assets held by Horizon are protected and preserved for their “charitable and benevolent” use, as required by the governing statute.

Our concerns fall into three buckets, which I and others following me will explain in further detail: Inadequate Process; Protection of the Charitable Assets; and Enforcement of the New Entity’s Charitable Mission.

Truncated Process, Lack of Transparency, and Deficient Record Violating Policyholders’ and the Public’s Due Process Rights

There is a dearth of information about this transaction in the public record, and the public hearing and review process is so extremely truncated that it is anomalous. This is particularly disconcerting given that these regulatory proceedings concern the dominant and only health services corporation in New Jersey, with admitted assets of nearly \$6.72 billion and surplus assets of \$3.13 billion as of 2021. In fact, the process is so palpably defective that it appears intentionally designed to stifle public input; three (3) hearings held only a few business days apart, in rapid succession, with no advance notification that the hearings can be attended remotely. The process should be extended with additional hearings scheduled after the public record is populated with all documents relevant and material to the proposed reorganization. Anything less deprives Horizon’s policyholders and the public of their due process and other rights and will result in an unfair outcome that is not in the public’s interest.

The Application containing Horizon’s plan of reorganization (“Plan”) filed in the public record is grossly incomplete. The full record should be made public. Conspicuously, the business plan, which is Exhibit 5A to the Application, has been withheld, despite the fact that the entire justification for the reorganization is Horizon’s claim they need to invest in businesses and ventures for which they are currently precluded from investing. In order to evaluate the rationale for the reorganization, it is necessary to evaluate these claims and the proposed investments in the business plan. What are the potential investments and is Horizon precluded from investing in them currently? If so, what were the policy reasons for precluding Horizon from making these claimed investments under current law and why should these safety protections be eliminated? Would it have been more appropriate to raise the 2% limit on investments in for-profit companies that is the focus of Horizon’s alleged discontent and would this have achieved its stated purposes? None of these issues, nor Horizon’s deliberations as to them, have been directly or adequately addressed in the Plan or Company testimony.

Moreover, the total amount of assets that Horizon intends to invest in its potential new business ventures remains undisclosed. Is it tens of millions, hundreds of millions or even billions of dollars? We hear about joint ventures with pharmaceutical companies, health service providers, and even vague concepts such as wearable technology, but how will those investments protect or benefit policyholders? And will the nonprofit mutual holding company control such joint ventures, or be a minority shareholder that derives benefit from those investments? The answers to these questions are highly material to the evaluation of the fairness and adequacy of the Reorganization Plan. This is of particular concern given that the potential businesses may, by design, be beyond the reach of DOBI (for example, in a bankruptcy proceeding, the current priority status of policyholder claims over other debtors as to those assets would likely be lost). Also, will these new

ventures be subject to oversight by the Attorney General given that they involve the investment of charitable assets?

Absent the Business Plan and the disclosure of other relevant information related to these issues, and enough time to analyze the documents, this regulatory process will violate the due process rights of Horizon's policyholders and the public. Specifically, New Jersey Appleseed and NJCA sent a letter to Commissioner Caride dated October 11, 2022, asking for specific documents, and filed OPRA requests on October 5, 2022, requesting the same information. (That letter, attached hereto, is incorporated in this testimony as if fully set forth herein). And, again, until such information is released and we and the public have the opportunity to review and comment thereon, no decision should be made as a matter of due process and sound public policy. Similarly, we have serious concerns that although DOBI has committed to undertaking a health impact study (hopefully, as outlined in S. No. 375 (2010), which required additional public participation and a health impact study as conditions of conversion of a health service corporation), the failure to do so prior to the conclusions of these hearings, and possibly before DOBI renders a decision, would deprive DOBI of the meaningful policyholder and public input provided for in the statutory scheme and thus render DOBI's decision arbitrary and capricious, unreasonable and without sufficient support in the administrative record.

Protecting the Charitable Assets: Governance of the New Entity and the Common Law Role of the Attorney General

Horizon BCBS is currently incorporated as a health service corporation, a nonprofit insurer that is regulated by DOBI but also by the Attorney General of New Jersey, due to its status as a nonprofit, charitable and benevolent organization. Upon reorganization, the new Horizon BCBS will be a nonprofit, mutual holding company, also with a charitable and benevolent mission, but one that appears to have all of its assets held indirectly in for-profit insurance and noninsurance subsidiaries and joint ventures. Accordingly, while portions of the reorganized Horizon may be regulated by DOBI (though other subsidiaries may fall outside the authority of DOBI), longstanding New Jersey law provides that the Office of the Attorney General has regulatory authority over non-profit organizations. Thus, the absence of the Attorney General, as protector and enforcer of charitable trusts, from this approval process (which is not addressed anywhere in the Plan – rendering it further defective) is greatly troubling. The Attorney General's office must be brought in to evaluate several open issues regarding governance of the reorganized Horizon, and to impose reporting conditions on the new entity so as to enable the Attorney General to satisfy their common law obligations as protector of charitable trusts.

Governance Issues

It appears that broad accountability and transparency will be severely lacking after the reorganization under the Plan, thus making this public process all the more important. Under the Plan, it appears that thirteen board members (11 from the existing entity and two additional members) will be self-perpetuating, nominating themselves through their control of a majority of the 22 board seats (with the balance being made up of nine public board members). This means that the public members remain a minority and thus subject to the majority of self-nominating

board members. Notably, the relevant bylaws have not been made publicly available,¹ limiting the public's ability to understand how the new Board will operate and select new Board members, and in general, which policyholders, if any, will become members of the mutual holding company.

Under the Plan, there are also significant unanswered questions as to the scope of the new board of directors' fiduciary duties with regards to the policyholders, potential outside investors in subsidiaries and any joint ventures. Though the law requires that 100% of the stock in a subsidiary must be owned by the mutual holding company, this requirement must be reinforced as it is not clear how it may apply to many types of investments like joint ventures and limited partnerships. In addition, a public reporting requirement must be instituted to make sure this limitation can be enforced with regard to its charitable obligations. How will conflicts between these diverse interests be resolved? How will the fiduciary duty, obligations and responsibilities of the board of directors of the new parent mutual holding company (Horizon Mutual Holdings, Inc., or "HMHI") differ from those that currently exist for Horizon's current board with regard to its policyholders and/or its charitable obligations? The Application and Company testimony fail to provide the necessary details or analysis to address these critical issues rendering this process unfair and in violation of the policyholders' and the public's due process and other rights.

Triggering Events

Pursuant to New Jersey Appleseed's, NJCA's and our health coalition partners' advocacy during the legislative process, the legislation was changed to require that the new mutual company hold 100% of the stock (voting and ownership) in any of its for-profit subsidiaries. But, as noted above, there may be alternative methods of investing that do not involve stock subsidiaries, something the Plan fails to address. Our primary concern behind securing such a requirement was that if the new Horizon were to issue stock to private investors in one of its previously 100%-owned stock subsidiaries, this change of ownership would fundamentally alter the fiduciary duty obligations of that subsidiary such that the interest of the minority shareholders would become predominant (thus overriding its prior charitable obligation as to those assets to serve its health care consumers). We now have such concern about the numerous joint ventures that Horizon discussed in its testimony, but for which we have no specifics. As we noted above, the failure to share the business plan (Exhibit 5A), among other documents, does not allow us to know or evaluate Horizon's plans as to the nature of all the proposed for-profit subsidiaries it is planning to create, nor the joint ventures in which they are planning to invest. Simply put, the public record is inadequate as to where the current charitable assets are going to be invested and how the policyholders will be protected from the siphoning off of those assets to ventures that cannot be reached even if those funds were needed to pay policyholders' claims in the future.

It is black letter law that if Horizon were to sell stock in a subsidiary to outside investors, even if it maintains a majority of the voting stock, the charitable nature of the joint venture is fundamentally changed. That is, the company will have to be run in the interests of the minority outside shareholders.² This will be of import to the Attorney General because it converts the

¹ See <https://nj.gov/hschearings/documentation/HorizonBCBSNJApplicationPublicExhibits220928.pdf> at PDF p. 25.

² For a more detailed examination of this general issue, please see "The Feeling's Not Mutual: An Analysis of

company to a purely for-profit mission and thus triggers the right of New Jersey to claim and thus preserve those charitable assets. Similarly, if Horizon invests in for-profit ventures with outside investors, even if Horizon has voting control over those ventures, those outside investors will still have the right to demand the venture is run for their benefit – *i.e.* to maximize profits rather than support policyholders or charitable endeavors. The Application and Plan are devoid of any discussion or analysis of this issue, and contain no safeguards to preclude an abuse of charitable assets.

For the above reason, it is clear that the Attorney General must review the current application and determine whether Horizon plans to invest in any joint ventures that might place Horizon’s charitable assets at risk, thus triggering a charitable trust settlement payment equivalent to the value of those assets proposed to be invested.

Monitoring investments of charitable assets or sale to outside investors and future mergers, acquisitions or consolidations

In addition, it is clear that the Attorney General has an obligation to monitor Horizon’s future investment of its charitable assets after reorganization. Accordingly, it behooves the Commissioner to impose a reporting requirement on the new entity in order to enable the Attorney General to monitor and ensure that the mutual holding company does not issue stock in or through for-profit subsidiaries to private investors, and that charitable assets invested in any outside companies or joint ventures are adequately protected; and if not, to require a charitable trust settlement as to those assets.

Furthermore, pursuant to the statute governing the proposed reorganization, the merger or consolidation of the new nonprofit mutual holding company with one or more mutual holding companies or mutual insurers that are for-profit entities must be approved by the Attorney General. However, consolidation, sale, merger or other transactions involving any of the holding company’s subsidiaries appears to be governed solely by N.J.S.A. 17:27A-1 et seq. that otherwise only applies to for profit insurance holding company systems. It is our position that the Attorney General, not just DOBI, must approve all future transactions involving the nonprofit mutual holding company and any one of its subsidiaries or joint ventures. The requirement to seek the approval of the Attorney General should be explicitly stated as a condition of approval in order to adequately protect the charitable assets.

If the mutual holding company structure is compromised on a larger scale, through the conversion of multiple subsidiaries or a wholesale stock reorganization of the entire enterprise (pursuant to the governing statute, the nonprofit mutual holding company itself is not authorized to convert to a for-profit stock company – but until recently neither was it authorized to reorganize into a mutual holding company), then New Jersey would be entitled to receipt of its charitable assets as measured by its valuation as of the date of the proposed reorganization, if it were to go forward, plus the appreciation of those assets to the time of full conversion. Accordingly, if a valuation is not performed now, then, in such a circumstance, it will have to be performed retrospectively, in the future.

Governor Pataki’s Proposed Mutual Holding Company Legislation,” Alexander B. Grannis, Chair, Assembly Standing Committee on Insurance (March 1998) (<https://assembly.state.ny.us/Reports/Ins/199803/>).

In short, we are requesting that the Attorney General, pursuant to his authority to protect charitable trusts, (i) undertake an evaluation of charitable assets at this time; and (ii) require the nonprofit mutual holding company to regularly report its investments, and those of all its subsidiaries, to the public so as to enable the Attorney General to monitor all future transactions and determine when an investment, due to conflicts of interest with the nonprofit's obligations to its policyholders, would trigger a charitable trust settlement.

Articulating and Enforcing the Charitable Mission of the Nonprofit Holding Company

By statute, the nonprofit holding company has been deemed to be charitable and benevolent. As a result, the seminal question posed by this application is: What will be the charitable activities of the nonprofit mutual holding company? Listening to the testimony of Horizon executives presented on the first day of these public hearings, it appears that the newly funded BCBS grant-making foundation will be the sole entity within the mutual holding company system performing charitable activities. But this cannot be what the Legislature intended, for otherwise, every large corporate enterprise in the United States would be considered charitable and benevolent.

As we know, Horizon BCBS, the health service corporation, was also legislatively deemed charitable. What that meant over the decades has changed. Starting with and continuing until the early 1990s, Horizon served as the insurer of last resort, and more recently, it has meant conducting outreach activities and assisting the state in administering Medicaid. What those activities should include going forward must be articulated now and must be imposed as conditions on this transaction; DOBI has a strong role in determining the nature of such charitable activities and enforcement authority to hold the newly established nonprofit holding company's feet to the fire. From our perspective as health care advocates, charitable activities could include, but are not limited to: a commitment to work in unison with New Jersey to close the coverage gap and advance universal health care access; remain in the Medicaid market, administering the resurrected NJ Family Care Advantage Program that will cover income-eligible children irrespective of immigration status and eventually adults; maintain insurance premiums at a certain level, employing a more rigorous medical/loss ratio than is otherwise imposed on health insurers; and undertake activities equivalent to functioning as the insurer of last resort.

In short, the Attorney General has the obligation to monitor and ensure that nonprofit, charitable organizations satisfy their charitable mission, and we assert that as part of approval of this transaction, DOBI must require Horizon to detail the charitable activities it intends to engage in – activities that are NOT synonymous with the grant-making activities of the Horizon Charitable Foundation (“Foundation”)³ -- and impose conditions on the nonprofit holding company to engage in such activities.

³ Though the Plan fails to disclose any information about the foundation, the Horizon Foundation of New Jersey was created in 2005 and thus has a charitable track record that is not addressed in the Plan. For example, from 2019-2020, the Horizon Foundation had revenues of \$34.6 million, but provided grants of only \$6.9 million.

It should also be noted that under the Plan, the proposed Foundation is to receive \$300 million of Horizon's \$3.13 billion surplus. Several questions arise regarding this proposal:

- a. What is the basis for transferring the \$300 million dollar amount? Why not more?
- b. Conversely, is this amount too large such that it will be unfair to the policyholders by removing assets that would otherwise be available to pay policyholder claims or be used to reduce premiums?
- c. What are the safeguards to ensure that the Foundation's revenue is used to make grants in sufficient amounts? (A concern given its limited grant amounts relative to its income and assets.)
- d. More generally, what will the Foundation's funds be used for?
- e. What are the commitments that these funds will be used primarily to advance health care and coverage for policyholders and consumers in New Jersey?
- f. Will these funds be available to pay the health insurance policyholders' claims in the event the health insurer requires additional funds for claim payments in the future?
- g. What is the role of the policyholders' membership interests in the Foundation? Do the policyholders vote for its board of directors and on matters of governance?

The Attorney General, the policyholders and the public must be able to scrutinize those governing documents and comment on the appropriateness and adequacy of the checks and balances contained therein. Notably, the articles and bylaws of the Foundation have not been made publicly available.

Conclusion

In conclusion, New Jersey Appleseed, NJCA and supporting organizations participating in the presentation of this testimony understand the Legislature's intent, in 2020, to override the State's previous legal and public policy as articulated in N.J.S.A. 17:48E-49 et seq. enacted in 2001, and to authorize the reorganization of Horizon BCBS without requiring a charitable trust settlement at the time of this reorganization. However, such new policy stance neither justifies nor permits DOBI and the Attorney General to abandon their respective roles to protect the current policyholders and to protect the billions in charitable assets accumulated in the health service corporation over the decades. It is therefore our position that DOBI may not approve this transaction until all questions cited herein are answered and they affirmatively find that (i) the current policyholders will not be harmed, (ii) the charitable, health-related activities required of the new nonprofit mutual holding company are clearly defined, and (iii) the nonprofit mutual holding company will be required to regularly report its investments and those of all its subsidiaries to the public so as to enable the Attorney General to monitor all future transactions and determine when an investment, due to conflicts of interest with the nonprofit's obligations to its policyholders, would trigger a charitable trust settlement. The public deserves no less.

<https://www.causeiq.com/organizations/horizon-foundation-for-new-jersey,200252405/> Thus, it is not clear based on the deficient details of the Plan that funds transferred to the Foundation will actually be used to support charitable activities at the level expected of the current health service corporation.