



DC ConsumerRightsCoalition.org

March 10, 2014

VIA ELECTRONIC SUBMISSION

Federal Trade Commission/Office of the Secretary

600 Pennsylvania Avenue, N.W.

Room H-113 (Annex A)

Washington, DC 20580

Re: Comments for Public Workshop “Examining Health Care Competition,”
FTC Health Care Workshop, Project No. P131207

Dear Sir or Madam:

The DC Consumer Rights Coalition appreciates the opportunity to submit comments on competition in the health care industry. The DC Consumer Rights Coalition is a group of consumer rights advocates who serve the District of Columbia’s consumers and its consumer advocate community. See www.dccconsumerrightscoalition.org. Health care services are generally provided to consumers in local markets. For this reason, issues of competition in the provision of health care services must necessarily be examined from both a local and a national perspective. As local champions of consumer interests in the District of Columbia, our organization is well positioned to provide unique insights into the beneficial effects of competition on local health care markets. We appreciate the opportunity to add our comments to the national forum presented by the FTC’s Workshop.

The purpose of these comments is to highlight competition-related policy issues likely to arise in emerging technology markets that are subject to “network” effects, such as the growing markets for Health Information Technology (“HIT”) products, including Electronic Health Records (“EHR”) products. By “network” effects we mean the phenomenon whereby a good or service becomes more valuable when more people use it. In particular, we believe that the FTC should be cognizant of the potential danger to competition should healthcare providers adopt software and other technology that incorporates exclusionary proprietary standards. The danger is that the company that offers such technology may use it to disadvantage competitors by denying them

access to the proprietary standards. Such problematic situations have arisen in the past. Companies utilizing such proprietary technologies have achieved a dominant position in a developing market and then have sought to preserve their market position and disadvantage their competitors by limiting access to their proprietary technology.¹ Later we discuss government action against Microsoft that made such allegations.

Antitrust issues raised by such exclusionary conduct may be addressed through antitrust enforcement after the fact, of course. But we believe that a preferable approach is proactive government engagement that avoids the antitrust problem by facilitating and encouraging interoperability among products of competitors in the HIT markets. By “interoperability” we mean the extent to which HIT systems can exchange data, and interpret that shared data.

In markets in which competing HIT systems are interoperable, there is less danger that network effects will lead to the dominance of the market by a single large firm. The type of government participation that promotes interoperability in the interest of encouraging competition need not be intrusive, nor put companies in a regulatory straightjacket that limits competition or innovation. The goal is the opposite: government participation that effectively encourages interoperability and open competition, and avoids restrictive regulation that may inhibit innovation.

Interoperability in HIT Markets is an Important Component of Federal Healthcare Policy

The use of HIT, including the market for EHR, is expanding. According to the National Center for Health Statistics (“NCHS”), the number of physicians using some form of EHR system grew by 26% in 2012 alone. Among office-based physicians, at least 40% use a “basic” electronic health record system.² The U.S. Government is actively involved in both promoting the use of HIT and encouraging the interoperability of HIT products. Specifically, the use of HIT is incentivized by the Health Information Technology for Economic and Clinical Health (“HITECH”) Act³ as well as the Affordable Care Act and federal “meaningful use” reimbursement incentives.

The goal of the HITECH Act is to foster the “development of a nationwide health information technology infrastructure” to promote “a more effective marketplace, ***greater competition . . . [and] increased consumer choice.***” The HITECH Act seeks to achieve these goals of greater consumer choice, in part, through the promotion of interoperability. Section 3011, et. seq., entitled “Incentives for the Use of Health Information Technology,” calls for the Secretary of Health and Human Services (“HHS”) to invest in: “(1) Health information technology architecture that will support the nationwide electronic exchange and use of health information in a secure, private, and accurate manner. . . .” and “(5) Promotion of the ***interoperability*** of clinical data repositories or registries.”⁴

The U.S. Department of Health and Human Services (“HHS”) has an active role in developing interoperability standards.⁵ Farzad Mostashari, MD, formerly HHS’s National Coordinator, Office of the National Coordinator for Health Information Technology (“ONCHIT”) has in his

former National Coordinator role discussed the ways that federal health care policy has sought to promote interoperability:

Improving care coordination through secure and private health information exchange among hundreds of thousands of providers using disparate systems already in place, while accommodating changes in technology, is a daunting task. The escalating stages of the Medicare and Medicaid EHR Incentive Programs and EHR certification criteria and standards are a critical component of our interoperability strategy. Stage 1 supported the systematic conversion of key medical information into structured digital format, while we forged consensus on initial national standards for secure communication between systems. We are working with industry to ensure that EHR technology will be significantly more interoperable when Stage 2 begins in 2014. Guided by two Federal Advisory Committees, we have viewed the EHR Incentive Programs as an escalator that moves progressively upward toward greater interoperability and improved outcomes.”⁶

Avoiding another “Microsoft” Situation.

Experienced antitrust observers have counseled about the danger that HIT companies may follow in the footsteps of other technology companies, such as Microsoft, that attracted antitrust law enforcement. Microsoft’s behavior raised competitive concerns when the company achieved a strong market presence early in the development of particular software markets, and then sought to protect its dominant position in those markets by withholding access to its proprietary technologies from competitors and potential competitors.⁷ Microsoft achieved its dominant position in the marketplace in large part by offering a product that consumers valued. But its behavior raised competition concerns when it began to appear to make strategic decisions with an eye towards thwarting competition, instead of competing by simply continuing to improve its technology in ways that would benefit consumers.

HIT has network characteristics that could all too easily tip markets toward settling on the use of one particular proprietary technology and abandoning other technologies. In the absence of interoperability, such a development might have the effect of foreclosing competitors to a dominant firm from being able to enter a market and offer competition. It might also create difficulties for health care providers in seeking access to information needed to effectively offer their services to consumers. And finally, it might open the door to strategic use of proprietary technology in ways that cause competitive harm. Such use of proprietary technology can be especially anticompetitive when the cost of switching to another software vendor is high. In the case of Microsoft, the problematic strategic behavior was Microsoft’s effort to hold on to market ascendancy by protecting its proprietary platform technology in a manner perceived by government enforcers as improperly foreclosing competition. Blocking competition in HIT markets through strategic use of proprietary standards is, of course, the opposite of facilitating interoperability.

The State of Current HIT Markets

Currently, companies providing HIT products already exist that have a strong market position that may have resulted, at least in part, through reliance on proprietary standards and network

effects. One company that has drawn attention because of its strong market position is Epic Systems. Some have suggested that about 40% of the U.S. population has its medical information stored in an Epic EHR system.⁸ Other data suggests that Epic market shares in various segments of the EHR market vary from about 15% to 30%,⁹ substantially less than the market shares of Microsoft when it aroused strong government antitrust concerns. Some federal data suggests that Epic has the most customers receiving federal electronic health record system incentive payments in a key category, complete EHRs. Of 2,950 hospitals receiving federal payments for using complete EHRs in the inpatient environment, Epic has 578, a 19.6% market share, in this segment.¹⁰ It appears that for large physician practices and hospitals, Epic is currently the company with the greatest market presence. Evidence of this presence can be found in, among other sources, the result of annual year-end rankings published by the research firm KLAS.¹¹ Epic has long been a very large player in EHR for “jumbo” group practices. One industry expert suggests that Epic dominates inpatient EHR among large hospitals and health systems, and increasingly, physician practices: “Even if physicians prefer another vendor, they're forced to go on the hospital's system.”¹²

Epic Systems is not without competitors in various segments of the EHR market. They include Meditech, Computer Programs and Systems, Cerner, HCA Information & Technology Services, and Athenahealth.¹³ Some competitors arguably have superior technology which could increase their market position in the future. For example, advocates for competitor Athenahealth argue that its strong showing among smaller physician groups and hospitals is due to the company’s delivery of its EHR and practice management software to physicians through the use of “cloud computing.”¹⁴

A number of Epic’s competitors have formed the Commonwell Health Alliance (“Alliance”), ostensibly for the purpose of promoting interoperability, and possibly to serve broader competitive motives. Some have criticized the Epic company for its reliance on proprietary standards. The position of the Alliance is that any vendor should be able to send or query data about any patient, but that Epic does not permit that. According to physician-scientist David Shaywitz, “If Epic (already based on an antiquated technology, MUMPS) decides to maintain an essentially closed system, and to drive all innovation internally, this could prove stultifying, limiting development of novel ideas, and forcing the many high-profile adopters of Epic to accept stagnation or pay the staggering costs of switching.”¹⁵ Epic’s CEO vehemently disagrees with those who say that its system impedes interoperability.¹⁶

We do not assert that any particular company or companies currently are using proprietary standards in a manner that excludes competition in violation of the antitrust laws, or are otherwise violating the antitrust laws. We merely wish to call attention to the importance of the issue of how proprietary standards are used in HIT markets where network effects are important. Also, the questions about interoperability that have been raised with great vehemence suggest that government antitrust scrutiny may be warranted in the future, depending, of course, on industry facts.

We also wish to comment on what we believe is the appropriate government response to a large company using proprietary standards and network effects to discourage competition. In our view, early government competition advocacy and engagement that heads off over-reliance on

proprietary standards by facilitating and encouraging use of interoperability standards is preferable to relying solely on after-the-fact antitrust enforcement. We are aware that the suggestion of proactive government involvement raises the specter of government regulation that is too intrusive, and squelches innovation, which suggests giving short shrift to those who argue for stronger government involvement. We think that concerns about the intrusive and counterproductive aspects of government regulation should be a part of the discussion.

But the views of those who urge a stronger government role also should be a part of the discussion. Members of the Alliance have expressed dissatisfaction with the pace of U.S. government activity in support of interoperability, and want more. The Office of the National Coordinator for Health Information Technology is responsible for setting basic standards, but the Alliance members believe the ONCHIT isn't moving quickly enough. During a press conference held to announce the launch of the Alliance, an Alliance representative said that "government is not going to deal with this problem."¹⁷ Jonathan Bush, CEO and chairman of Athenahealth has stated that "the government goofed a little" by creating incentives for companies to create proprietary technology and "use opacity" to hold onto their customers.¹⁸ Richard Elmore, senior vice president of strategy for HIT vendor Allscripts Healthcare Solutions Inc. was only somewhat less critical. He remarked that ONCHIT had created a standard vocabulary and data transport specifications "we think can be useful." Later in the discussion he added that "not everything on the government side is a total waste. Some of this is going to stick to the wall."¹⁹

Parallel Developments in the European Union

We note that issues of interoperability have been addressed by European government officials as well as U.S. officials. On both continents, interoperability has been framed in terms of improving the quality of health care for consumers rather than in terms of avoiding antitrust concerns,²⁰ but the essential point is the same. A European study on an eHealth Interoperability Framework provides two particularly useful recommendations. The first recommendation states that "Member States and the European Commission shall encourage standardisation bodies to enhance their strategic and operational cooperation – in a coordinated approach. Furthermore, co-operation between standardisation organisations and competent national authorities in Member States shall be fostered." The second recommendation, entitled "Consider incentivisation of healthcare providers," states that "Providing medical records that can be semantically shared incurs costs for healthcare professionals. Member States should therefore identify and calculate the value proposition of healthcare providers with regard to interoperability and consider sustainable incentivisation schemes to encourage healthcare providers."²¹

These modest suggestions of the European study illustrate an important point: The government participation that encourages interoperability in order to encourage competition need not be intrusive, nor put companies in a regulatory straightjacket that limits competition or innovation. The goal is the opposite, government participation that effectively encourages interoperability and open competition, and avoids restrictive regulation that may inhibit innovation.

Conclusion

For the reasons we have identified, we suggest that the FTC be aware and responsive to the potential danger to competition and harm to consumers should healthcare providers adopt software and other technology that incorporates exclusionary proprietary standards. The danger is that the proprietary standards could be used by the marketers of that technology to disadvantage competitors by denying them access to the standards. Antitrust issues that may arise because of such conduct may be addressed through antitrust enforcement after the fact. But we believe that a preferable approach is proactive government engagement that avoids future possible antitrust problems by facilitating and encouraging interoperability among the products of competitors in the HIT markets.

Credits: Authors are Don Allen Resnikoff and Katherine Jones. Thanks to Tyler Patterson and Elizabeth Carrier for editorial comments and helpful information.

Respectfully submitted,

Don Allen Resnikoff

¹ In the past, certain markets characterized by network effects have had a tendency to become dominated by a single firm. Examples of this phenomenon can be found, for example, in the dominance of AT & T in the market for telephone service or in the dominance of IBM in the market for mainframe operating systems, and later Microsoft in the markets for operating system software and internet browsers.

² NCHS Data Brief, Number 111, December, 2012, *Use and Characteristics of Electronic Health Record Systems Among Office-based Physician Practices: United States, 2001-2012*, Chun-Ju Hsiao, Ph.D., and Esther Hing, M.P.H.

³ Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the [American Recovery and Reinvestment Act of 2009 \(ARRA\)](#), Pub. L. No. 111-5, 123 Stat. 226 (Feb. 17, 2009), *codified at* 42 U.S.C. §§300jj *et seq.*; §§17901 *et seq.*

⁴ USC Title 42, Chapter 6A, Subchapter XXVIII, Part B, §300jj–31(a) (Emphasis added.)

⁵ Statement by Farzad Mostashari, MD, ScM, National Coordinator, Office of the National Coordinator for Health Information Technology, U.S. Department of Health and Human Services (HHS) on Health IT before the Committee on Finance, U.S. Senate, Wednesday July 17, 2013.

⁶ Ibid.

⁷ See the perceptive antitrust observations of authors Mark Botti & Anthony Swisher, *Health Information Technology and Antitrust: Those Who Forget about the Past are Destined to Repeat it*, Bloomberg Law, available at: <http://about.bloomberglaw.com/practitioner-contributions/health-information-technology-and-antitrust-those-who-forget-the-past-are-destined-to-repeat-it/>

⁸ See, Brandon Glenn, *Why Epic's Market Domination Could Stifle EHR and Health IT Innovation*, Medical Economics, 3/8/14, at http://medicaleconomics.modernmedicine.com/medical-economics/news/why-epics-market-dominance-could-stifle-ehr-and-health-it-innovation?utm_source=feedly

⁹ The Advisory Board Company, *Four Vendors Duing it Out Over Hospital EHR Market* <http://www.advisory.com/daily-briefing/2013/04/01/four-vendors-duking-it-out-over-hospital-ehr-market>.

¹⁰ Joseph Conn, *Epic, Meditech Lead Federal Stats for Hospitals Receiving EHR Payments*, May 28, 2013, <http://www.modernhealthcare.com/article/20130528/NEWS/305289954>

¹¹ Epic Systems received the company's "Best of KLAS" Award for EHRs for medical practices with from 11 to 75 physicians and for those with more than 75 physicians. Its product also took top position in the category of inpatient EHRs. KLAS awards for practice management software that automates scheduling, billing, and collections similarly put Epic as the number 1 practice management system for groups with more than 75 physicians and the highest-rated program for patient accounting and management in hospitals. KLAS named Epic the number 1 overall software vendor and the number 1 overall physician practice vendor. See, Robert Lowes, *EHR Rankings Suggest 'Epic' Shakeout*, December 17, 2012 at www.medscape.com/viewarticle/776269.

¹² See, Statement of Jeffrey Daigrepoint, Senior Vice President of the Coker Group, a consulting firm in Alpharetta, Georgia, *Ibid.*

¹³ *Ibid.*, note 9.

¹⁴ Advocates for Athenahealth point out that with cloud computing, the software and patient data reside on Athenahealth's computers, not the practice's, reducing hardware and network administration costs. See, Zina Moukheiber, *Can Cloud Computing Take on the Health Care Establishment?*, *Forbes Magazine*, June 11, 2012, available at: See <http://www.forbes.com/sites/zinamoukheiber/2012/06/11/can-cloud-computing-take-on-the-health-care-establishment/> According to an industry expert referred to in a *Medscape* article, Athenahealth also brings value to medical practices by performing billing and collection services that were once done in-house. In addition, the company mines its billing data to analyze how third-party payers are processing claims and then shares that information with clients, a practice that arguably gives Athenahealth an advantage. See Lowe, note 11.

¹⁵ See Glenn, note 8.

¹⁶ According to Epic CEO Judy Faulkner, "We put in exit after exit [openings in the source code] so that people wouldn't find the system closed. We give the source code to our customers so they can use these programming exits to write their own code. For example, one customer put something in there that asks the check-in person to smile if it's a new patient. They have the source code and we train them to make those changes. It's not easy, because it's complex software, but it's probably easier than many other systems because of all the exits." *Forbes*, 5/15/2013, URL <http://www.forbes.com/sites/zinamoukheiber/2013/05/15/a-chat-with-epic-systems-ceo-judy-faulkner/>

¹⁷ Mike Millard, *Six HIT Heavy-Hitters Announce Interoperability Organization*, *Healthcare IT News*, March 4, 2012 available at: <http://www.healthcareitnews.com/news/six-hit-heavy-hitters-announce-interoperability-organization>

¹⁸ Michael Hickens, *New Health Alliance Missing Major Vendor*, *WSJ*, March 5, 2013, available at: <http://blogs.wsj.com/cio/2013/03/05/new-health-alliance-missing-major-vendor/>

¹⁹ *Ibid.*

²⁰ A study on an eHealth Interoperability Framework, financed by the European Commission, issued recently, and can be found at <http://ec.europa.eu/digital-agenda/en/news/ehealth-interoperability-framework-study>.

²¹ *Ibid.*