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BY E-MAIL (https://ftcpublic.commentworks.com/ftc/healthcareworkshop)

Federal Trade Commission
Office of the Secretary, Room H-113 (Annex X)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Health Care Workshop, Project No. P131207

Dear Sir or Madam:

I commend the leadership of the Federal Trade Commission ("**FTC**") for holding its recent workshop, "Examining Health Care Competition," on March 20-21, 2014. I asked my staff to attend and I believe that the session provided stakeholders with the opportunity to provide federal regulators with important information on the topics included in the *Federal Register* notice. The effort at transparency is to be commended and I look forward to similar sessions in the future.

Even though there was no particular session on the potential intersection between the increase in health care consolidation and the Affordable Care Act ("**ACA**"), this issue was the underlying foundation of many sessions that were held, including the session on "**Price Transparency**." Illustratively, whether consumers or insurers pay a "facility fee" when a previously independent physician practice is purchased by a hospital, is a price transparency issue but we seem apt to see more of this behavior as we see more consolidation in the health care industry. Thus, I believe the overarching session on "**Innovations in Health Care Delivery**" could have addressed the specific issue of consolidation in newly emerging health care delivery models more directly. My comments therefore center on this important topic.

I know that the FTC is examining the issue of the intersection between health care consolidation and certain delivery system reforms promoted by the ACA. Whether it is hospital consolidation, consolidation among insurance companies, or among physicians, the issue of consolidation in the

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health care industry is of increasing importance. As you know, the FTC recently successfully challenged the acquisition of a multispecialty physician practice by a hospital. I read excerpts from the "Findings of Fact and Conclusions of Law" in the *St. Alphonsus Medical Center* case with great interest, in part, because we know that St. Luke's Health System is a participant in the Medicare Shared Savings Program ("**MSSP**"), which is a concept created by the ACA. As you are aware, the court in finding that the plaintiffs had established a prima facie case that the acquisition of a physician practice was anti-competitive, made the following points:

- "One reason – perhaps the principal reason – for the extraordinary cost of the U.S. health care system is our fee-for-service reimbursement system." (at 30)

- "[The defendants] believed that the best way to create the unified and committed team of physicians required to practice integrated medicine was to employ them [and the defendants] followed this strategy to improve the quality of medical care." (at 47)

- "This period of change [involving models that move providers away from fee for service medicine] might be best described as being in an experimental stage, where hospitals and other providers are examining different organizational models, trying to find the best fit…[The acquisition of the multispecialty physician practice] is an attempt by the defendants to improve the quality of medical care." (at 50)

- "In a world that was not governed by the Clayton Act, the best result might be to approve the [acquisition of the multispecialty physician practice] and monitor its outcome to see if the predicted increases actually occurred. In other words, the [acquisition of the physician practice] could serve as a controlled experiment. But the Clayton Act is in full force, and it must be enforced. The [Clayton] Act does not give the Court discretion to set it aside to conduct a health care experiment." (at 51)

This case is interesting in that it represents the first litigated instance of government regulators challenging a physician practice acquisition. The case was also interesting to me because the court took great effort to emphasize that the goals of the defendants were noble – greater efficiencies through economies of scale, the ability to share an electronic health record, among others – but the noble goals of the transaction and potential benefits of the transaction could not overcome the fact that the FTC established a prima facie case that the acquisition of the multispecialty physician practice by the defendants was anticompetitive. As a result, the arrangement was still problematic under the federal antitrust laws.

Much has been written about the intersection between health care models that encourages providers to move towards the not well-defined model of "population health" and whether increased consolidation is a prerequisite to being able to effectively balance financial risk associated with managing population health. There are arguments on both sides: some experts

believe that moving towards population health does not necessarily require greater consolidation –that arrangements short of mergers and acquisitions can work in a manner that allows participants to successfully mitigate risk in this context.[1] However, other experts (including a cadre of actual providers) have suggested that the ACA is shepherding them towards mergers and acquisitions: in order to be responsible stewards to the organizations that they serve, they must move towards full integration. I certainly recognize that these arguments often differ depending upon the local market; each market is unique. I do believe that most believe that we will continue to see increased consolidation – whether such consolidation is truly necessary or not.

Thus, I strongly believe federal regulators must address this issue in a far-reaching, tangible manner to allow providers and suppliers greater certainty to make business choices in this new era we are all navigating and to preempt litigation in this regard. I also believe that by setting forth comprehensive, nuanced guidance, more stakeholders would choose to participate in models designed to move them away from fee for service and towards new models that Congress established through the ACA. We do not want providers sitting on the sideline waiting to "take the plunge" because they are concerned that there will be regulatory challenges; instead, they should be aware of what the rules are at the front end and regulators must be equipped to challenge conduct that does not meet the rules. There is some guidance out there. For example, I certainly commend federal regulators – the FTC and the DOJ – for issuing guidance on enforcement policy for those participating in the MSSP.[2]

However, I still have several concerns. First, I am concerned that even with the outstanding expertise that FTC and DOJ have in this area, budget constraints equate to limited staffing: staff will be called on to do more oversight in this area with few to no additional resources. We know that consolidations are increasing – whether among hospitals, physician practices, or insurers. As previously discussed, I firmly believe that we will generally see an increase in activity across the health care system. While regulators may challenge the arrangement after they have had the opportunity to carefully review all merits of the arrangement, it is difficult to "un-ring the bell" and when divestiture is ordered as the remedy, it is usually disruptive to the patients and local community (most importantly) as well as the health care stakeholders involved. So, I wonder whether any additional actions will be taken to closely monitor consolidation given limited resources and more swiftly take action to prevent consolidation where it would have a deleterious impact on consumers.

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[1] *See e.g.* L. Dafny, "Hospital Industry Consolidation – Still More to Come?," N. Engl. J. Med 370;3 (January 16, 2014) (in which the author sets forth the idea of Medicare experimenting with reimbursement strategies that incent newly forming accountable care organizations to pursue structures that stop short of mergers or acquisitions).

[2] Federal Trade Commission and Department of Justice, "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program," available at http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27944.pdf, last visited April 14, 2014.

Second, I wonder whether the FTC is considering providing additional guidance to stakeholders than the guidance that has been provided to date. As you know, much of what has been issued as of late relates to participation in the MSSP. However, as you are aware, many stakeholders are not necessarily participating in this program and may be working with commercial payors to structure similar arrangements; the concept of the "accountable care organization" has so many permutations at this point. I wonder whether you are considering providing additional guidance in this area for the benefit of those outside of the parameters of the MSSP.

Finally, with the push by other agencies (i.e., specifically, the Department of Health and Human Services) towards greater use of analytics and other large data sources, I wonder if there are tools that could be used to conduct increased oversight and review of transactions at the front end. As you know, in many instances the agencies have been able to let potential participants in a transaction know that certain activity would be concerning to regulators and this has led to participants proactively abandoning plans for mergers in some instances; perhaps using expanded data sources would allow for greater use of administrative complaints to put potential participants on notice that pending behavior would be of concern to regulators.[3]

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I appreciate the opportunity to comment. I am largely focused on this issue in my role as Ranking Member of the Ways and Means Subcommittee on Health. You may be aware that I have requested the Government Accountability Office ("**GAO**") to conduct a study related to consolidation in the health care industry. As I have said before, the ACA has done more to improve health care on several levels than any law since the creation of Medicare and Medicaid. It has correctly identified that the fee for service reimbursement model is problematic and we must move beyond payment for volume to payment for value. However, as we embrace new models of care, we must be vigilant in identifying unintended consequences to ensure we protect health care consumers by addressing such unintended consequences swiftly. Should you have any questions about this comment, please contact Tiana Korley of my staff at tiana.korley@mail.house.gov or at (202) 225-3106.

Regards,

Jim McDermott
Member of Congress

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[3] *See e.g.*, "FTC Challenges OSF Healthcare System Proposed Acquisition of Rockford Health System as Anticompetitive," available athttp://www.ftc.gov/news-events/press-releases/2011/11/ftc-challenges-osf-healthcare-systemproposed-acquisition-rockford, last visited April 14, 2014.