



POLICY & ACTION FROM CONSUMER REPORTS

April 30, 2014

Federal Trade Commission,
Office of the Secretary, Room H-113
600 Pennsylvania Avenue NW.
Washington, DC 20580

Re: “Examining Health Care Competition” (“Health Care Workshop”) Project No. P13-1207

Consumers Union, the public policy and advocacy division of *Consumer Reports*¹, appreciates the opportunity to provide comment on “*Examining Health Care Competition*” — a public workshop organized by the Federal Trade Commission (FTC) to study certain activities and trends that may affect competition in the health care industry. We thank the FTC for organizing this informative workshop, and for the agency’s leadership on the role of competition in health care markets and how this affects consumers.

We believe it is important to consider the appropriate role of competition in health care markets, and what it can achieve from all stakeholder perspectives – consumer, payer, clinician, and provider. Competition helps promote a well-functioning health care marketplace that delivers benefits to consumers, but by itself does not solve every challenge. It is important to examine the role of competition in conjunction with other important regulatory objectives, to ensure that they work in tandem to result in better access to care, lower costs, higher values, and a manageable number of good choices for consumers, as well as other important consumer protections.²

It should be recognized that, for many parts of our health care system, the conditions that enable competition to produce good consumer outcomes do not fully exist. Consumers in the health care market generally do not have special training and knowledge, or, in many cases, the time or ability to research the services they are going to purchase. Simply stated, asymmetry of information between consumers and providers is a defining characteristic of health care markets.³ Further, many consumers view health care as a

¹ Consumers Union is the public policy and advocacy division of *Consumer Reports*, an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. *Consumer Reports* is the world’s largest, independent product-testing organization with more than 50 labs, auto test center, and a survey research center.. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² Lynn Quincy and Julie Silas, “The Evidence is Clear: Too Many Health Insurance Choices Can Impair, Not Help, Consumer Decision Making”. *ConsumersUnion Health Policy Report*. November, 2012.

³ Arrow, Kenneth J. “Uncertainty and the Welfare Economics of Medical Care”. *The American Economic Review*, vol. 53, issue 5, December 1963, 941-973.

social good and not a market commodity⁴ leading them to rationalize their purchases in different ways. Third party payers shield many consumers from the full cost of care, and, in many areas of the country, communities lack the population density necessary to support multiple, competing providers.⁵ For all these reasons, there are limits to ways in which we can harness competition in the health care marketplace.

With regards to the role of competition in health care markets, **Consumers Union recommends that the Commission:**

- Provide a clear and appropriately detailed statement that explains to stakeholders the benefits of competition in the health care marketplace and also its limitations. This statement should address the role of each of the stakeholders – consumers, providers, and payers – as well as the Commission’s role. The statement should address both “horizontal” issues pertaining to competition among insurers, hospitals, and other providers offering the same product or service, and “vertical” issues pertaining to the potential for collaboration and integration among those at different points in the health care product and service chain to obstruct or limit the choices available to consumers.
- Study and provide guidance on regulatory measures for improving quality and reducing costs in rural areas and other markets, consistent with promoting competition where possible, but recognizing that the possibilities for competition may be more limited.

With these broad recommendations and concerns firmly in mind, we provide our views on the topics being studied by the FTC below.

Measuring Health Care Quality

All sound efforts to promote health care competition will benefit from a robust ability to measure the quality of doctors, hospitals and health plans, as well as how alternative treatments compare. For example, reliable quality information for providers is necessary for health plans to design tiered networks or reference pricing to steer consumers towards high-value providers or treatments. Robust quality information also allows providers to know how they are performing and to improve; and it enables consumers to make informed decisions among alternative treatments and providers.

Consumers Union agrees with Dr. Romano’s comments that quality measures in health care are hard to develop and validate, and that it is currently unclear which of the many

⁴ Health care is a form of social insurance and is viewed by many as a right, not a market good. Katherine Baicker and Amitabh Chandra. “Myths and Misconceptions About U.S. Health Insurance. *Health Affairs*, 27, no.6 (2008):w533-543.

⁵ Ha T. Tu and Johanna R. Lauer. “Impact of Health Care Price Transparency on Price Variation: The New Hampshire Experience”. *Center for Studying Health System Change*. Issue Brief no. 128, November 2009.

quality measures are best. Further, the current effectiveness of measures needs to be better understood. Many consumers are not aware of the quality measures that do exist.⁶ Consumers that do attempt to use such measures are barraged with different sources of quality information⁷ from a wide range of outlets, and frequently do not have access to, let alone understand the methodological approach underlying, the quality ratings.⁸ This makes it difficult for consumers to use quality ratings successfully. We agree with Dr. Sofaer that more attention needs to be paid, throughout the process of developing and improving quality metrics, to how consumers think and make decisions.

Consumers Union supports wide-spread, multi-stakeholder efforts to improve quality measures, especially those that meet consumers where they are. In other words, these measures should reflect the aspects of quality most important to consumers, and should be demonstrated to be trusted and usable by consumers.⁹ We support the standardization efforts of the various CMS Compare websites, as mentioned by Dr. Goodrich in her workshop comments, and encourage the development of targeted measures that will be easy for consumers with specific conditions to understand and use.

Consumers Union recommends that the Commission:

- Work across agencies to develop more robust provider quality measures, including tested, consumer-facing measures.
- Incorporate the role of quality measures within FTC recommendations or efforts, including those that address price transparency.

Regulation of Health Care Practitioners

The regulation of which health care practitioners can provide which services has important implications for consumer access to health care services, and the quality and cost of these services.¹⁰ The removal of unnecessary regulatory, statutory, insurance, and

⁶ A 2008 poll from the Henry J. Kaiser Family Foundation found that 30 percent of Americans said they saw information comparing the quality of different insurance plans, hospitals, or doctors, but only 14 percent reported having used such information. *Health Affairs Brief*, Public Reporting on Quality and Costs, March 8, 2012.

⁷ Robert A. Berenson, Peter J. Provnovost, and Harlan M. Krumholz. "Achieving the Potential of Health Care Performance Measures", *Robert Wood Johnson Foundation, Urban Institute*, May 2013.

⁸ Certain for-profit quality standards consider information regarding standards determination to be proprietary and thus withhold it from the public, leaving consumers unaware of how the ratings were developed and what factors were considered. Robert A. Berenson, Peter J. Provnovost, and Harlan M. Krumholz. "Achieving the Potential of Health Care Performance Measures", *Robert Wood Johnson Foundation, Urban Institute*, May 2013.

⁹ Bardach, Naomi S., Judith H. Hibbard, and R. Adams Dudley, *Users of Public Reports of Hospital Quality: Who, What, Why, and How?*, Agency for Healthcare Research and Quality, December 2011.

¹⁰ In his article examining licensing for dentists, Dr. Kleiner and his colleagues found that tougher licensing laws did not improve clinical outcomes. They did, however, raise prices for consumers and earnings for

institutional barriers that prevent nurse practitioners (NPs), Advanced Practice Nurses (APNs) and other physician extenders from practicing to the full extent of their education and training in many states and practice settings could serve as a critical tool to improve access to primary care.^{11 12} This could be especially beneficial for the many Americans who live in areas with primary care provider shortages,¹³ as research has shown that non-physician clinicians like NPs are more likely to practice in underserved areas.^{14 15}

Consumers Union agrees with Professor Safriet’s panel comments that every state-level scope-of-practice restriction should be reviewed to determine if it is based on legitimate public safety concerns. We also support Professor Safriet’s recommendation that the Commission should actively monitor state laws and regulations designed to put delivery models using APNs or other providers at a disadvantage, and the FTC should urge states to revise anti-competitive laws and regulation as appropriate.¹⁶

Consumers Union applauds the Commission’s March 2014 policy paper, “Competition and the Regulation of Advanced Practice Nurses” and supports its conclusion that expanded APN scope of practice is good for health care competition and American consumers.

Consumers Union recommends that the Commission:

- Monitor state laws and regulations to determine the extent to which state-level scope-of-practice restrictions are in the best interests of consumers and based on protecting patient safety, and are therefore appropriately-tailored restrictions on competition.

practitioners. Moris M Kleiner, and Robert T Kurdle. “Does Regulation Affect Economic Outcomes? The Case of Dentistry”, *Journal of Law and Economics*, vol. XLIII, October 2000.

¹¹ Only eighteen states currently allow APNs to practice to the full extent of their training. 2013 Nurse Practitioner State of Practice Environment Map. American Association of Nurse Practitioners, downloaded on April 2, 2104 from <https://www.aanp.org/legislation-regulation/state-legislation-regulation/state-practice-environment>.

¹² “Kaiser Commission on Medicaid and the Uninsured”, *Kaiser Family Foundation*, March, 2011.

¹³ There are currently 6,000 primary care Health Professional Shortage Areas (HPSA), 4,800 dental HPSAs, and 3,900 mental health HPSAs. Health Resources and Services Administration, .U.S. Department of Health and Human Services. Data as of January 1, 2014 downloaded on April 8, 2014 from <http://www.hrsa.gov/shortage/>.

¹⁴ Safriet, Barbara J. Appendix H of October 5, 2010 IOM report, *The Future of Nursing: Leading Change, Advancing Health*. “Federal Options for Maximizing the Value of Advanced Practice Nurses in Providing Quality, Cost-Effective Health Care”.

¹⁵ The majority of NPs practice in the primary care area. NPs also comprise the fastest growing segment of the primary care workforce. “Kaiser Commission on Medicaid and the Uninsured”, *Kaiser Family Foundation*, March, 2011.

¹⁶ Safriet, Barbara J. Appendix H of IOM report, *The Future of Nursing: Leading Change, Advancing Health*. “Federal Options for Maximizing the Value of Advanced Practice Nurses in Providing Quality, Cost-Effective Health Care”.

- Conduct a comparative analysis, in consultation with other relevant agencies, that looks across states and countries to identify the broadest scope-of-practice considerations that appropriately protect patient safety while allowing qualified professionals to practice up to the full extent of their training, and thus offer potentially more affordable competitive alternatives.
- Monitor marketplace activities with regard to physician extender clinics and other innovative delivery models, involving all types of physician extenders, for potential anticompetitive behavior, and take enforcement action where warranted to ensure competitive choice for consumers consistent with appropriate safety protections.

Making Price Information for Health Care Services More Transparent

Health care prices are almost completely opaque in today’s health care marketplace. At the same time, consumers are very concerned about their personal health care costs, and even those with insurance worry about their continued ability to afford care.¹⁷

Consumers Union agrees with several of the panelists’ comments that price transparency has different audiences – consumer, provider, employer, and policy-maker-- and that each has its own distinct needs.

Price transparency for consumers

Consumers Union agrees with multiple panelists that simply providing price information without quality information is not sufficient, and may even be counterproductive for consumers.^{18 19 20} We agree with Dr. Landman that quality and safety information must be included for consumers along with price data, and that consumer testing to improve the usability of this data, as well as outreach efforts to promote the improved data, are crucial.²¹

¹⁷ Only 30% of Americans are confident that they can afford the health care they need without suffering economic hardship. “Curbing Health-Care Costs: Are Citizens Ready to Wrestle with Tough Choices? A Report from Public Agenda and the Kettering Foundation”, *Public Agenda and the Kettering Foundation*, 2014.

¹⁸ Without quality information, patients will rely on costs as a proxy for quality. Sinaiko, Anna D. and Rosenthal, Meredith B. “Increased Price Transparency in Health Care – Challenges and Potential Effects”, *NEJM*, 346:10: March 2011.

¹⁹ Hibbard et al. “Experiment Shows That A Well-Designed Report on Costs and Quality Can Help Consumers Choose High-Value Care”. *Health Affairs*, March 2012, vol. 31, no. 3, 560-568.

²⁰ Many consumers believe that high-quality care is necessarily expensive and that low-cost care signifies that care is being withheld or provided by less competent providers. “Value Judgment; Help Health Care Consumers Use Quality and Cost Information.” *California HealthCare Foundation*, December 2012.

²¹ In her study of consumer behavior in choosing high-value health care, Judith Hibbard and her colleagues found that 80-90% of consumers will shop for higher-value care defined as the lowest price with the best quality, when given easy-to-understand price and quality information. Hibbard et al. “Experiment Shows

We are pleased that Dr. Romano raised the issue regarding the creation of composite measures of quality and price. It may be that further research is needed to understand when a composite measure is most useful to consumers, and when disaggregated information is better. For medical care that is more like a commodity (for example, drugs), it may be that consumers would find a composite measure very useful.²² For other services, perhaps a composite measure would obscure the true meaning of the underlying measures.

On a closely related note, we agree with Dr. Sofaer's comments regarding the importance of transparency in the health plan benefit design process. It is important that independent entities have information regarding how networks and tiered reference pricing are developed, in order to assess their validity and make this information and their assessments available to consumers.

Further, consumers must have better transparency with respect to what they pay to use out-of-network providers. For example, an insured consumer may have a plan that pays a small amount towards out-of-network bills (for instance, 40% of Medicare or 40% of "usual and customary"), but this gives the consumer very little information about what their bill will actually look like once balance billing is added in. This is an area where consumer-friendly best practices should be identified and promoted, with the goal of allowing consumers to know their cost of care before incurring the service.^{23 24}

We agree with Dr. Sofaer's comments that – in the absence of improved quality information – consumers have a difficult time believing a low-price provider can be of

That A Well-Designed Report on Costs and Quality Can Help Consumers Choose High-Value Care". *Health Affairs*, March 2012, vol. 31, no. 3, 560-568.

²² For example, *Consumer Reports* operates the Best Buy Drug program. These reports help consumers identify which drugs best meet their medical needs *and* provide the best value for their health care dollar. We found that heavily advertised drugs are often the most expensive ones but aren't always necessarily the best first choice.

²³ New York recently passed a law to restrict out-of-network balance billing. Under the new law, all medical providers will have to notify patients before treatment if they do not take the patient's insurance. If patients are not notified, they will only have to pay a co-pay as they would to an in-network provider. Chen, Caroline. "Surprise Medical Bills Lead to Protection Laws: Health", *Bloomberg*, April 4, 2014, <http://www.bloomberg.com/news/2014-04-04/surprise-medical-bills-lead-to-protection-laws-health.html>.

²⁴ A participant in a New Jersey focus group described a past experience in which he was "lying on the operating table when he asked the anesthesiologist if his services were covered by his insurance, to which the anesthesiologist reportedly replied, 'Well, do you want me to do this or not?'" The anesthesiologist was out-of-network and the hospital took the man to court when he was unable to pay his bill. "Curbing Health-Care Costs: Are Citizens Ready to Wrestle with Tough Choices? A Report from Public Agenda and the Kettering Foundation", *Public Agenda and the Kettering Foundation*, 2014.

high quality.²⁵ As Dr. Hibbard and colleagues have shown, this can be addressed through thoughtful measures that have been tested with consumers.²⁶

Importantly, Consumers Union shares Dr. Sofaer's caution expressed during the panel workshop that we must be careful not to overestimate how effective consumers will be in moving this market even once they have better information.²⁷ Because only a minority of health care services are easily shoppable by consumers,^{28 29 30} there are limits to how much we can expect doctors and hospitals to compete for consumers' dollars based on value. Further, many consumers have low health insurance literacy. Comparing insurance options can be challenging, and consumers do not understand how their health insurance and competing plans affect them financially.³¹

Price transparency for providers

Providers need price information to best serve their patients. Studies show that peer comparisons are extremely effective in changing practice patterns.³² We agree with Dr. Berenson's comments that the process through which primary care doctors refer patients to specialists is an excellent focus area, albeit often overlooked, for price transparency initiatives.³³ Because of increased cost-sharing in benefit designs, consumers will

²⁵ "Lessons learned: Consumer Beliefs and Use of Information about Health Care Cost, Resource Use, and Value", *Aligning Forces for Quality*. Robert Wood Johnson Foundation, October 2012.

²⁶ Hibbard et al. "Experiment Shows That A Well-Designed Report on Costs and Quality Can Help Consumers Choose High-Value Care," *Health Affairs*, March 2012, vol. 31, no. 3, 560-568.

²⁷ In her March 2012 article in *Health Affairs*, Judith Hibbard stated that communicating information for consumers to use in making decisions based on quality and price is more complicated than it may seem. A substantial minority of consumers shied away from low-cost providers, even when that meant personally assuming a greater share of their health care costs. Hibbard et al. "Experiment Shows That A Well-Designed Report on Costs and Quality Can Help Consumers Choose High-Value Care," *Health Affairs*, March 2012, vol. 31, no. 3, 560-568.

²⁸ When faced with an emergency situation, it is virtually impossible for consumers to compare prices.

²⁹ Consumers who have a non-urgent, non-severe condition are more likely to use cost information. "Lessons learned: Consumer Beliefs and Use of Information about Health Care Cost, Resource Use, and Value". *Aligning Forces for Quality*. Robert Wood Johnson Foundation, October 2012.

³⁰ Geography is an important factor in the ability of consumers to shop around for health care. In the rural areas of New Hampshire, each hospital controls a distinct geographic area, meaning consumers in those areas do not have provider choices and provider competition cannot be relied upon to control costs or improve quality. Ha T. Tu and Johanna R. Lauer, "Impact of Health Care Price Transparency on Price Variation: The New Hampshire Experience", *Center for Studying Health System Change*, Issue Brief no. 128, November 2009.

³¹ L. Quincy, "What's Behind the Door: Consumers' Difficulties Selecting Health Plans", *Consumers Union*, January 2012.

³² Lamb, Geoffrey C et. al. "Publicly Reported Quality-Of-Care Measures Influenced Wisconsin Physician Groups to Improve Performance", *Health Affairs*, vol. 32, no. 3, March, 2013.

³³ "PBGH Policy Brief: Price Transparency". *Pacific Business Group on Health*, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf407306.

increasingly need to know the cost of different treatment options and specialist visits.³⁴ Most physicians are not currently equipped with the relevant information patients need to help guide these decisions.^{35 36} We agree with Dr. Ginsburg's comments that physicians must have both price and quality information to effectively make specialist referrals. At the same time, it is important that the Commission monitor the marketplace to ensure that these benefits of increased transparency for providers are achieved in ways that do not lead to anticompetitive price coordination among competing providers.

Price transparency for enforcers and policy-makers

Price transparency is an important tool for enforcers and policy-makers, as price information is necessary to support market approaches, identify market failures, and take action to address overly concentrated markets and protect consumers. From the consumer perspective, price transparency for policy-makers is of crucial importance because policy-makers have a greater capacity to expose artificially high prices, notify employers, alert the public, and remedy problems.³⁷

Consumers Union agrees with Dr. McClellan's comment during the panel that an important role for the Commission with regards to price transparency is to identify and address places where provider organizations have concentrated market power.

In certain areas, prestigious, name-brand providers have significant market power that they are able to leverage to negotiate much higher rates than their counterparts.^{38 39} The recent trend of provider consolidation will likely increase provider bargaining power to demand higher prices.⁴⁰ Policy-makers and enforcers, as well as the public, should have access to information about these inflated rates and the providers who charge them.

³⁴ As of January 1, 2014, Massachusetts physicians and hospitals are required by law to provide price information to patients who ask for it. <http://blog.massmed.org/index.php/2014/01/mass-medical-price-transparency-law-rolls-out-physicians-must-be-able-to-estimate-costs-for-patients/>.

³⁵ Okie Susan, "Teaching Physicians the Price of Care". *The New York Times*, May 3, 2010.

³⁶ Cooke, Molly. "Cost Consciousness in Patient Care – What is Medical Education's Responsibility?" *NEJM*, March 31, 2010. <http://www.nejm.org/doi/full/10.1056/NEJMp0911502>.

³⁷ "PBGH Policy Brief: Price Transparency". *Pacific Business Group on Health*, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf407306.

³⁸ The Massachusetts Attorney General report found significant price variation in aggregate prices and in the prices insurers paid to providers. These varying prices were not explained by differences in quality. "Examination of Health Care Cost Trends and Cost Drivers." Office of Massachusetts Attorney General, Martha Coakley, March 16, 2010, p 15.

³⁹ Dr. Ginsburg looked at eight health care markets, and four large insurers, and found that prices for inpatient hospital care ranged from 147% of Medicare in Miami to 210% in San Francisco. In extreme cases, some hospitals commanded five times Medicare payment for inpatient and seven times Medicare payment for outpatient services. Ginsburg, Paul. "Wide Variation in Hospital and Physician Payment Rates Evidence of Provider market Power", *Center for Studying Health System Change Research Brief*, No. 16, November 2010.

⁴⁰ Academy Health, "Integration, Concentration, and Competition in the Provider Marketplace," Research Insights, 2010, https://www.academyhealth.org/files/publications/AH_R_Integration%20FINAL2.pdf.

Consumers Union supports the many panelists' comments regarding the elimination of gag-clauses from provider contracts, and we believe that payers, employers, and individuals should be able to access price data for specific physicians and hospitals. Policy-makers play an important role enacting reforms such as prohibiting gag-clauses; while these reforms may potentially be unpopular with certain stakeholders, they will increase price transparency throughout the health care markets and help benefit consumers.

As noted earlier, the Commission should monitor the marketplace carefully to ensure that increased price transparency provides the intended benefits and does not lead to collusive price coordination among providers and inflated prices for consumers. In both California and Massachusetts, for example, lower-cost hospitals raised their prices after data was published showing that other providers were charging higher rates.^{41 42}

Consumers Union recommends that the Commission:

- Perform a state-by-state analysis of payer claims datasets to identify areas where market power is resulting in excessively high prices, poor consumer choice, or other market failures.
- Conduct a study to understand the current status of state gag-clauses and their effects on prices in health care markets.
- Closely monitor the marketplace to ensure that greater price transparency provides the intended benefits to the marketplace and does not lead to price collusion or other anti-competitive behavior among providers, and take enforcement action where warranted.
- Provide a clear and appropriately detailed statement explaining the appropriate goals of price transparency measures, along with any specific FTC recommendations that address price transparency.

⁴¹ "Patients Would Lose In Blue Cross-Tufts Medical Center Dispute." NPR/WBUR, *All Things Considered*, November 15, 2011. <http://www.wbur.org/2011/11/15/blue-cross-tufts-health-dispute>.

⁴² "PBGH Policy Brief: Price Transparency". *Pacific Business Group on Health*, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf407306.

Conclusion

We support the Commission's continued leadership in focusing on the role of competition in health care markets. As the Affordable Care Act is implemented, there will be numerous market responses, along with new regulatory initiatives, in a health care marketplace already undergoing constant evolution. The Commission's engagement is as essential for consumers as ever.

We appreciate the opportunity to comment on these important issues.

Sincerely,

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Consumers Union