Health Care Workshop, Project No. P131207

Submission of America's Health Insurance Plans to the Federal Trade Commission and the United States Department of Justice on Health Care Competition

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America's Health Insurance Plans (AHIP) would like to thank the Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DOJ) (collectively, "the Antitrust Agencies" or "the Agencies") for hosting the workshop, *Examining Health Care Competition*, and for the opportunity to provide comments on the important issues covered in the workshop.

We appreciate, and support, the Antitrust Agencies' longstanding efforts to promote competition in health care markets. We commend the Agencies for an outstanding Workshop and for promoting an impressive, thoughtful discussion. We agree with the Agencies that the workshop and comments submitted in conjunction with this effort will support enforcement, competition advocacy, and consumer education efforts related to health care competition.

AHIP members have taken leadership roles in both finding innovative ways to work with providers and health care organizations to deliver high quality, lower cost, and more accessible care to consumers. AHIP and its members also have called attention to the harm posed by anticompetitive provider consolidation and the disharmony between this type of consolidation and durable transformations that will benefit consumers.

We would like to highlight our perspective, and the common themes through our comments, that: (1) consumers benefit from more, not less, competition in health care markets, and (2) the Antitrust Agencies are vital to ensuring that consumers receive such benefits. The Agencies have made important advancements in promoting competition through enforcement activities related to horizontal provider consolidation. AHIP encourages the Agencies to continue these efforts and, when appropriate, challenge other forms of anticompetitive provider consolidation. In particular, greater focus on vertical provider consolidation (e.g., hospital acquisitions of physician practices) and on the growth of multi-hospital systems in metropolitan can help prevent harm to consumers when such transactions are anticompetitive.

The Agencies' enforcement activities have been complemented, and their benefits to consumers amplified, by their efforts in the legislative and regulatory arenas. Such competition advocacy is of great importance given the competitive implications of legislation and regulation at both the state and federal levels. Provider collective bargaining, any willing provider requirements, and overbroad network adequacy requirements can have a similar impact to, or can add to the harm created by, provider consolidation. We encourage the Agencies to continue these competition advocacy and education efforts.

More generally, both competition advocacy and enforcement by the Agencies continue to be of critical importance as health care markets and the regulatory framework that governs these markets go through a period of tremendous change. We support Agency efforts in these areas, appreciate the opportunity to offer comments, and stand ready to assist them in future efforts to more fully deliver the benefits of competition to health care consumers.

I. Efforts to Transform Healthcare to the Benefit of Consumers Involve Health Plans as Leaders and Partners and Depend on Competitive Provider Markets

One justification often offered for anticompetitive provider consolidation is that it is necessitated by the Affordable Care Act (ACA), or the transformation of the healthcare system more generally. The health care system is indeed changing rapidly, both as a result, and independently, of the ACA. Yet, those pursuing anticompetitive consolidations argue that the consolidations are necessary to deliver higher quality care, better use of information technology, and manage the transformation in payment from volume to value. This is far from reality, as both theory and an examination of health care markets demonstrate.

Vigorous competition among providers not only increases incentives to lower costs and improve quality, but also to innovate both independently and in collaboration with health plans. In contrast, in spite of the rhetoric, the reality is that anticompetitive provider consolidation creates a roadblock for those in pursuit of lower costs and higher quality.

In provider markets that are hospitable to such activities, health plans are reducing the cost of care and improving value by transforming their relationships with healthcare providers.[1] Health plans and providers have pursued transformation through: (1) clinical integration of providers; (2) investment in and deployment of technology; and (3) payment reform. The approaches are varied, but the effort is national and has created promising results.

[1] Karen Ignagni, Health Plan Innovations in Delivery System Reforms, *AJMC*, April 16, 2013.

Health plans have enabled and pursued clinical integration in a variety of forms, including accountable care organizations, patient-centered medical homes, and bundled payments. Across these approaches, however, several important similarities can be found. Such efforts include the use of care or case managers to coordinate care for patients; the use of data and information sharing to help providers manage their patients; and the use of infrastructure development assistance to support physician practices with capital constraints. These efforts have led to positive early results.[2]

Health plans also have made data and decision-support tools available to providers in a variety of settings. The data and tools provided include: detailed claims data; hospital and emergency department census reports; analytic reports detailing potential medication interactions, gaps in care, and site of service opportunities; and predictive modeling reports on risk, out-of-network use, comparisons to benchmarks, and progress toward quality and resource use targets. For example, in one state health plans are working together to make patient medical records available to any treating physician or nurse.[3]

Finally, health plans are working with providers to replace fee-for-service payments with a system of paying for value. The goal of such changes is uniform better health outcomes and increased affordability. The approaches to such changes are varied but generally involve prospective models that focus on accountability, shared risk, and population-based care.

[2] Ruth S. Raskas et al., *Early Results Show WellPoint's Patient-Centered Medical Home Pilots Have Met Some Goals for Costs, Utilization, and Quality*, 31 Health Affairs (2012).
[3] Tim Logan & Stuart Pfeifer, *Insurance Giants Creating Massive Database of Patient Records*, LA Times, August 4, 2014.

II. The Harmful Impact of Anticompetitive Consolidation Among Hospitals and Other Health Care Providers

Provider-related costs are a significant portion of total medical costs, and the growth in such costs has had a significant, harmful effect on consumers. Anticompetitive provider consolidation has been a significant driver of this growth. This consolidation replaces a situation in which providers compete to offer lower costs, higher quality services, and better approaches to delivering care, to one in which a provider uses its market power to charge higher prices and faces reduced incentives to innovate or improve quality.

According to Irving Levin Associates, a health care research firm, the number of hospital mergers and acquisitions in the United States more than doubled from 50 in 2009 to 105 in 2012.[4] Moreover, an analysis of provider concentration by Bates White Economic Consulting found that hospital ownership in 2009 was "highly concentrated" in more than 80 percent of the 335 areas studied.[5] Numerous research findings demonstrate that consolidation among providers is resulting in higher healthcare costs for consumers and employers:

- A June 2012 study by the Robert Wood Johnson Foundation (RWJF)[6] found that "increases in hospital market concentration lead to increases in the price of hospital care," and that "when hospitals merge in already concentrated markets, the price increase can be

[4] New Laws and Rising Costs Create a Surge of Supersizing Hospitals, *New York Times*, August 12, 2013.
[5] Market concentration of hospitals, Bates White Economic Consulting, Cory Capps, PhD, David Dranove, PhD, June 2011.
[6] The impact of hospital consolidation-Update, Martin Gaynor, PhD and Robert Town, PhD, Robert Wood Johnson Foundation, June 2012.

dramatic, often exceeding 20 percent." This study further cautions that "physician-hospital consolidation has not led to either improved quality or reduced costs" and, additionally, notes that consolidation "is often motivated by a desire to enhance bargaining power by reducing competition." An earlier RWJF research project[7], focusing on the hospital consolidation that occurred in the 1990s, indicates: "Studies that examine consolidation among hospitals that are geographically close to one another consistently find that consolidation leads to price increases of 40 percent or more."

- An article published in June 2011 by the *American Journal of Managed Care* found that "hospitals in concentrated markets were able to charge higher prices to commercial insurers than otherwise-similar hospitals in competitive markets."
- An issue brief published in July 2011 by the National Institute for Health Care Management Foundation found that one of the factors contributing to higher prices is "ongoing provider consolidation and enhanced negotiating strength vis-a-vis insurers, resulting in an ability to extract higher payment rates from insurers."
- Paul Ginsburg and Robert Berenson, in an article published in the February 2010 edition of *Health Affairs*[8], wrote that "providers' growing market power to negotiate higher payment rates from private insurers is the 'elephant in the room' that is rarely mentioned."
- A September 2013 research brief by the Center for Studying Health System Change[9] reported that "it is clear that provider market power is key in price negotiations and that

[7] How has hospital consolidation affected the price and quality of health care?, William B. Vogt, PhD and Robert Town, PhD, Robert Wood Johnson Foundation, February 2006.
[8] Unchecked Provider Clout in California Foreshadows Challenges to Health Reform, *Health Affairs*, February 2010.
[9] High and Varying Prices for Privately Insured Patients Underscore Hospital Market Power, Center for Studying Health System Change, September 2013.

certain hospitals and physician groups, known as 'must haves' can extract prices much higher than nearby competitors." This study also concludes that "increases in provider prices explain most if not all of the increase in premiums" in recent years.

- A May 2014 article by Laurence Baker, M. Kate Bundorf, and Daniel Kessler in *Health Affairs*, found that when a hospital-owner of a physician group increases its market share, it concomitantly increases its prices.[10]

The problems caused by anticompetitive provider consolidation pre-date health care reform, but their import continues and has perhaps been amplified in its wake. For example, the establishment of exchanges has been a central aspect of health care reform, and the ability of individual consumers to obtain plans from such exchanges has been seen as an important means of expanding coverage. Unfortunately, research has demonstrated that concentrated provider markets are associated with higher priced exchange plans, threatening the ability of consumers to access coverage through the exchanges. Research by Scott Thompson, published in the *Antitrust Healthcare Chronicle*[11], found that more competitive hospital markets in California were associated with a more than 8 percent reduction in exchange premiums. Richard Scheffler presented similar findings from his own work at the workshop, finding both hospital and medical group concentration associated with higher premiums on the California exchange.[12]

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[10] Vertical Integration: Hospital Ownership of Physician Practices is Associated with Higher Prices and Spending, *Health Affairs*, May 2014.

[11] ACA Exchange Premiums and Hospital Concentration in California. *Antitrust Health Care Chronicle*, January 2015.

[12] Covered California: Competition in the Health Insurance Market?, February 2015, available at https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition.

While the record of the cost to consumers from hospital consolidation is well developed, more can and should be done, both empirically and analytically. We were pleased to hear from the impressive array of panelists at the workshop on their work on advancing research and the analytic framework. A better understanding of the impact of vertical consolidation, the creation of hospital systems, and the role of regulatory changes in enhancing and reducing provider market power would help both the Agencies in their missions and other stakeholders in understanding, responding to, and removing impediments to the interests of consumers in receiving high quality, affordable health care.

III. Innovation and Quality are Possible Without Harmful Consolidation

Hospitals seeking to pursue the goals of health reform - higher quality, more efficient care - can achieve these goals without anticompetitive consolidation. Through the appropriate use of technology and care coordination strategies with partners, hospitals can address health care quality without the harmful effects of consolidation that limits competition.

As discussed above, health plans and providers have engaged in a wide range of collaborative efforts to improve the quality and efficiency of health care delivery and these efforts have succeeded without anticompetitive hospital consolidation. In fact, such consolidation has the opposite impact on quality improvement efforts. Just as anticompetitive consolidation has been recognized to have a chilling impact on innovation in many other markets, such consolidation among hospitals is likely to reduce innovative collaborations between health plans and providers.

This would be an unfortunate outcome for consumers who might otherwise benefit from the improvements in quality and efficiency generated by these innovations.

Indeed, the health plan initiatives noted above involve health plans partnering with providers to improve quality and lower costs in a manner that does not depend upon anticompetitive provider consolidation. For example, health plans have been leaders in the adoption of patient-centered medical homes, which attempt to replace episodic care with a sustained relationship between patient and physician.[13] Similarly, health plans have been strong partners in many accountable care organizations, with promising results in reducing preventable readmissions and total inpatient hospital days.[14] The range of such efforts is vast, beginning with the point of contact with the patient and extending all the way to the "back office" interactions between plans and providers. For example, in Ohio, health plans sponsored an information technology initiative to improve efficiency of transactions between plans and physicians by providing a one-stop service in electronic transactions for physicians.[15]

Such initiatives not only are consistent with provider competition, but explicitly or implicitly rely upon it. The false choice--that consumers can have competition among health care providers or innovation by those providers, but never both--should be rejected. Instead, protecting and promoting competition in provider markets will make it possible for providers, plans and others

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[13] AHIP Press Release, AHIP Board of Directors Releases Principles on Patient-Centered Medical Home, June 25, 2008.

[14] Early Lessons from Accountable Care Models in the Private Sector: Partnerships Between Health Plans and Providers, Aparna Higgins et al., *Health Affairs,* September 2011.

[15] AHIP Press Release, Health Plans Collaborate on Landmark Initiative to Reduce Time, Expense for Physician Office Practice "Paperwork," October 5, 2009.

to utilize a wide variety of innovative approaches to improving quality and efficiency. While such a variety of approaches will lead to a variety of results, consumers will benefit as the best approaches are emulated, expanded, and improved upon. Just as surely, consumers will be harmed if such innovation is replaced by anticompetitive consolidation, leading to reduced competition, higher prices, and diminished innovation.

IV. The Importance of Antitrust Agency Enforcement and Competition Advocacy

In a time of rapid change, including consolidation, the role of the Antitrust Agencies in analyzing and, when appropriate, challenging provider transactions is more important than ever. We commend the Agencies for their work in this area and specifically have supported, with *amicus* briefs, the FTC's *ProMedica* and *St. Luke's* cases.[16] It is important for consumers that the Agencies continue their work in challenging anticompetitive provider transactions. As appropriate, this may include challenges to anticompetitive vertical consolidation (hospital acquisitions of physician practices or other entities) and to hospital systems.

Also important with respect to the Agency's enforcement efforts is their continued work to dispel misperceptions about and mischaracterizations of these efforts. Their enforcement with respect to provider consolidation is not an impediment to pro-competitive developments. Only a very small number of transactions are, in fact, challenged. In addition, there are good reasons to believe that the purported justifications of anticompetitive transactions (e.g., higher quality care) will not be

[16] See http://www.ahip.org/AHIPAmicusBrief112112/ (AHIP *amicus* brief in ProMedica) and http://www.ahip.org/AmicusBrief/St-Lukes82014/ (AHIP *amicus* brief in St. Luke's).

achieved through such transactions. Further, there are growing and varied approaches to achieving the same goals that do not come with the cost of higher prices for consumers.

The Agency's competition advocacy efforts are also of vital importance as the regulatory landscape continues to evolve. A number of regulations remain "on the books" that are to the detriment of consumers. Others are being proposed currently or will in the future. Two areas in which the Agencies have provided much needed guidance are provider collective bargaining and any willing provider statutes. Both are bad for consumers and create harms similar to those created by anticompetitive provider consolidation. Those considering such proposals benefit tremendously from the information that the Agencies can provide on such harms and, armed with such information, can make better informed decisions.

Contemplated changes to network adequacy rules pose an emerging, similar set of concerns. Some would push such rules beyond their intended purpose to foreclose consumer-desired high value networks, mandate the inclusion of certain types of providers, or create a "lite" version of any willing provider requirements. All would create harm for the consumers in the form of higher prices and less innovation. We encourage the Agencies to provide their valuable counsel on these issues, as well as on other legislative and regulatory issues that emerge.

V. Conclusion

We appreciate the opportunity to provide the Antitrust Agencies these comments. Sound health care policy and strong competition policy are harmonious, in spite of the suggestion of discord by a few. Quality can be improved, access increased, and the cost curve bent, *not* by allowing anti-competitive provider transactions (or increasing provider market power through regulation) but *instead* by protecting and enhancing competition. That was true prior to health care reform and remains as true, and perhaps even more important, after it.

AHIP and its members stand in favor of, and are actively pursuing, changes to the healthcare system that will lower cost, improve quality, and spur innovation. Such changes depend upon competition. Anticompetitive provider consolidation, whatever the rhetoric surrounding its benefits, in reality promises to prevent this change. Similarly, regulation that cuts off the avenues for plans, purchasers, and consumers to circumvent provider market power leaves only the well-trod avenue of consumer harm. We fully support the efforts of the Antitrust Agencies both to prevent anticompetitive provider consolidation and to advocate for legislation and regulation that is cognizant of competitive consequences for consumers. These efforts will lead health care to the road of beneficial changes for consumers. Unfortunately, consumers know all too well where the other road leads.