



February 20, 2017

Chairwoman Ohlhausen  
Commissioner McSweeney  
Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, DC 20580

**Re: Public Comments for the record In the Matter of Cooperativa de Médicos Oftalmólogos de Puerto Rico (Oftacoop), File No. 141-0194**

Dear Commissioners:

We appreciate the opportunity to present our comments for the record addressing the proposed consent order In the Matter of Cooperativa de Médicos Oftalmólogos de Puerto Rico (Oftacoop), File No. 141-0194 within the 30 day period. We submit these comments to provide another point of view on what is happening in the Medicare advantage market in Puerto Rico. We believe that a full understanding of the Puerto Rico market will show the Commission that any enforcement action against Oftacoop is unnecessary at this time. The Alianza de Cooperativas de Salud is a trade association of several cooperatives of different types of health care providers. Our primary function is to petition the federal and state governments and their agencies on behalf of our member's cooperatives and the wellbeing of our patients.

**Introduction**

The FTC has a long track record of enforcing Section 5 of the FTC Act in matters pertaining the conduct of health care providers in the Island. The same has been done by the Office of Antitrust Affairs of the Puerto Rico Department of Justice. But regrettably, neither agency, to our knowledge, has done a full investigation of the health insurance market in the Island, including the Medicare Advantage market. The Commonwealth legislature is the only governmental body that has performed such an investigation, and they have concluded that the insurance market in our Island is an oligopoly where four companies dominate about 80% of the



commercial and Medicare Advantage market.<sup>1</sup> More recently, the House of Representatives of Puerto Rico is seeking to enact a legislative resolution to study the health insurance market and its effects on the competition, providers, and insureds/beneficiaries.<sup>2</sup>

While the record shows that insurance plans have and abuse tremendous market power, these abuses have gone unchecked. However, the actions of providers have been intensely scrutinized and subject to vigorous enforcement and prosecution. We believe this is because the FTC has failed to do a proper and comprehensive market analysis of the Puerto Rican health care market, and have only relied on theories of harm based on limited facts. We respectfully ask that the FTC perform such a comprehensive analysis and hear from the providers and insureds/beneficiaries in the Puerto Rican market.

### **Comments of the Overview and Proposed Complaint analysis by the FTC**

The proposed complaint charges that Oftacoop facilitated an agreement among competing ophthalmologists to refuse to deal with MCS Advantage, Inc. (MCS), a payor, and Eye Management of Puerto Rico (Eye Management), MCS's network administrator whose services were requested by MCS to lower its costs after Medicare reduced the premiums it was paying to MCS. We believe that this allegation does not make sense, or is not anticompetitive in the context of the Puerto Rican healthcare market.

Just to illustrate how different the U.S. and Puerto Rico market are, let us provide you with some facts. The Puerto Rico Medicare Advantage market covers approximately 570,000 enrollees.<sup>3</sup> The current penetration rate of Medicare Advantage enrollees in the Commonwealth

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<sup>1</sup> Senate of Puerto Rico, Final Report Resolution 1327.

<sup>2</sup> House of Representatives of Puerto Rico Resolution 57 (2017).

<sup>3</sup> Medicaid and Medicare Advantage Products Association of Puerto Rico, Healthcare in Puerto Rico, <http://www.mmapapr.org/healthcare-in-puerto-rico.html>.



is 75%, the largest in the United States, compared to 31% across the mainland United States.<sup>4</sup> Note that MCS alone has an approximate 36.8% market share with 212,000 enrollees.<sup>5</sup>

Without doing very much analysis, you will find that the insurance premiums regularly increase while the reimbursement to the providers is lowered. The level of dissatisfaction of the coverage by health insurance plans is also significant. The lack of competition among insurers prevents savings from reaching consumers, and the lower payments to providers makes it difficult to provide quality health services. The only winners are the insurance companies, who are engrossed with their accounting books rather than their customers. This can be observed in the annual reports of the Office of the Insurance Commissioner of Puerto Rico<sup>6</sup> and from contracts such as that proposed by Eye Management to the providers.

Also, a market analysis will reflect that the benchmark for commercial and Medicare Advantage plans is at the most a Medicare Fee Schedule or a reduce Medicare Fee Schedule, while in the U.S. that is not the case.

Finally, in Puerto Rico third parties are not regulated, and in some instances you will find a sole third party administrator that provides services to all or most of the insurance companies administering their provider network and compensation. If that is not an antitrust concern, then what it is? As you can see, there are many issues that warrant further consideration and/or action by the FTC.

Regarding the allegations about Oftacoop involvement in the alleged refuse to deal with MCS and Eye Management, we do not believe that anticompetitive use of market power occurred. To our knowledge the only thing that transpired was an email made by an individual and not members of the cooperative; the email was not approved by the cooperative Board of

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<sup>4</sup> Kaiser Family Foundation, Medicare Advantage 2016 Spotlight: Enrollment Market Update (May 11, 2016), <http://kff.org/medicare/issue-brief/medicare-advantage-2016-spotlight-enrollment-market-update/>.

<sup>5</sup> Id.

<sup>6</sup> <http://ocs.gobierno.pr/ocspr/index.php/nuestra-oficina/informe-anual>



Directors, and the cooperative later explained twice in writing that members have to make decisions on their own. This does not amount to a charge that the cooperative facilitated anticompetitive conduct using monopoly power.

It is a practice of the insurance plans to unilaterally cancel their contracts and impose a third-party administrator with significant lower reimbursement rates. It is reasonable that many of the providers individually facing that imposition would not sign with the third-party administrator; this does not mean there is a concerted refusal to deal. Moreover, the contracts are what is known as adhesion contracts in a take it or leaving situation without any room to negotiate, giving providers no recourse but to cancel if they find terms unacceptable.

You may ask why the providers accept that type of contracts and reimbursement. The answer is simple, Puerto Rico is an Island where over 90% of the population is insured with about half insured by a government sponsored program.<sup>7</sup> These government sponsored programs include Medicaid patients and Medicare dual eligible patients that are assigned to be served by an insurance company exclusively in a region of the Island. The health plans also bundle commercial and government health coverages in a single contract. When you analyze the scenario, you will note that the provider faces three options: first, accept the plan impositions; second, face unemployment; or third, leave to continental U.S. because there are no contiguous states. As you can see, the unilateral exercise of market power by the insurance plans in Puerto Rico and its repercussion to the providers' practices and access to health care by the insured/beneficiaries are tremendously concerning.

In analyzing the deal that Oftacoop providers were faced with, the FTC should make sure to look at how many patients will be needed to be seen by a provider every day under the offered reimbursement rates just to cover their office overhead. Even if some insurance companies argue that providers can compensate for lower reimbursement rates with more

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<sup>7</sup> See official government data at [www.ocs.gobierno.pr](http://www.ocs.gobierno.pr) and [www.ases.pr.gov](http://www.ases.pr.gov).



patients, the issue is that at lower rates and operating at maximum capacity providers are faced with having to spend less time for each patient's care to make up for lost income -- a situation that will harm patients and can have medical-legal consequences for providers. Health care cannot be just seen as business without focusing on the well-being of our patients.

### **Impact of new Puerto Rico law on the proposed consent order and inclusion of a proviso**

As the FTC mentions, during the investigation Puerto Rico passed Act 228 of December 15, 2015) permitting health care cooperatives such as Oftacoop to jointly negotiate contracts with payors. Under this new law, health care cooperatives must file their payor agreements with the Puerto Rico Public Corporation for the Supervision and Insurance of Cooperatives (COSSEC). Said Act reaffirmed and clarified a point of heated debate between the FTC, the local antitrust office, and the providers, who supervise the negotiations allowed by other regulation, such as Regulation 8320 of COSSEC of 2013.

We must mention, that the FTC recognition of Act 228 is of great significance and shows that the government recognizes some of the issues faced by providers in their relation with health plans. Notwithstanding, it is important to clarify the FTC's assertion that "Puerto Rico has neither issued any regulations nor do we have any record to evaluate how Puerto Rico will supervise negotiations." Before Act 228 was enacted COSSEC Regulation 8320 was in place. Currently, and until a new regulation is enacted, both Act 228 and Regulation 8320 govern the voluntary negotiations between the health insurance plans and the cooperatives. Both the Act and Regulation 8320 have very important safeguards against illegal conduct and provide COSSEC the faculty to be present, requiring any documentation at any time during the negotiations and to actively supervise the negotiations. Also, COSSEC has the final word in approving, modifying or disapproving the negotiated contract between the cooperatives and the insurance company. Regulation 8320 is a more comprehensive regulation than similar regulations, including the regulation approved in Minnesota Rural Health Cooperative, where the FTC took a different and



more benign course of action. As you can see, no lack of regulation and supervision currently exist in Puerto Rico.

### **Conclusion**

It is up to the FTC to decide how to exercise its prosecutorial discretion, but the differences between the U.S. and Puerto Rico markets, the market power of insurance companies and how the insurance companies exercise their power is instructive. The regulation and law enacted before and during the FTC investigation of Oftacoop activities show that these differences are severe and require government oversight. Because of these differences and the lack of evidence that providers did not act independently, we believe that no action should be taken against Oftacoop.

Sincerely,

Norma Devarie, M.D.  
Spokesperson  
Alianza de Cooperativas de Proveedores de Salud