

March 30, 2010

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Christine A. Varney
Assistant Attorney General for Antitrust
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Jon and Christine:

The enactment of comprehensive reform of health insurance markets has brought us to a critical juncture in the evolution of the U.S. health insurance marketplace. As chief enforcers in the federal government's consumer protection and antitrust enforcement agencies, you understand how vitally important it is that health insurance markets work for consumers. We are writing to encourage you to build on these reforms by creating a progressive health insurance enforcement agenda. We request the opportunity to meet with you and your senior staff to discuss these issues further.

We write on behalf of the Center for American Progress Action Fund and Health Care for America Now,¹ organizations that played a central role in the debate over health care reform. We held several conferences on the subject, and were privileged to have you each participate in our events. Now we hope to foster a dialogue on the best ways to promote competition and enhance consumer protection in the market for health insurance in a manner befitting the landmark legislation signed by President Obama last week.

In the past year, we have had the privilege of testifying before Congress numerous times on the need for health care reform. As participants in these hearings, we met with numerous consumers who were harmed by the lack of competition and deceptive practices in the health insurance market. They included:

- Consumers who overpaid for medical care because their health insurers conspired to systematically deflate "usual and customary rates," an action that cost consumers hundreds of millions of dollars in out-of-pocket spending.²
- Individuals who could no longer afford health insurance because of skyrocketing premiums.
- Consumers who did not know about better coverage than their current health insurance because of physician gag clauses.
- Physicians who were prevented from providing adequate service because of egregious reimbursement policies.

¹ HCAN is a national grassroots campaign of more than 1,000 organizations in 46 states representing 30 million people.

² In January of 2009, New York Attorney General Andrew Cuomo announced that United Health, which owns Ingenix, the database used by health insurers to deflate rates, would pay \$40 million to establish an independent, non-profit database. See http://www.ag.ny.gov/media_center/2009/jan/jan15a_09.html.

Like others who testified, we believe a key problem was the last administration's failure to properly set enforcement priorities, an issue set out in detail in testimony before the Senate Commerce committee, "The Effects of Regulatory Neglect on Health care Consumers."³ In the past eight years:

- FTC antitrust health care enforcement has focused almost exclusively on health care providers.⁴
- The FTC and DOJ took no consumer protection actions against health insurers.
- The DOJ took no enforcement actions against anticompetitive practices by health insurers.
- There was massive consolidation of health insurers in markets across the country. There have been more than 400 health insurance mergers in the past decade, with only two modest consent decrees.

In assessing the federal health care antitrust enforcement program, the American Antitrust Institute observed in its transition team report that "[t]he priorities of the health care enforcement agenda need to be realigned to areas with the greatest impact on consumers. Unlike in prior Administrations, there is a significant imbalance in enforcement priorities between anticompetitive activity by health insurance companies and healthcare providers. In the seven years of the Bush Administration, all non-merger enforcement actions have involved health care providers, with no enforcement involving health insurers."⁵

The debate over health care reform focused largely on the lack of competition: in the past year, countless Senators, Congressman and policy advocates detailed the lack of competition in health insurance markets and the harm from this lack of competition. The evidence documented in several Congressional hearings tells us plainly that health insurance markets are fundamentally broken. The number of uninsured has skyrocketed. More than 47 million Americans are uninsured, and according to Consumer Reports, as many as 70 million more have insurance that doesn't really protect them. In the past six years, health insurance premiums have increased by more than 87 percent, rising four times faster than wages. Yet from 2000 to 2007, the 10 largest publicly-traded health insurance companies increased their annual profits 428 percent, from \$2.4 billion to \$12.9 billion.

³ David Balto. "The Effects of Regulatory Neglect on Health Care Consumers." Testimony before the Senate Commerce Committee. July 16, 2009.

⁴ During the Bush Administration, the FTC brought 31 enforcement cases against providers, frequently small groups of doctors, as documented in testimony before the House Judiciary Committee last October. These were not based on evidence that physician costs were a significant force in increasing health care expenditures. Moreover, none of these cases was followed by a private suit seeking damages for the alleged illegal conduct.

⁵ The American Antitrust Institute. "The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States." October 6, 2008. www.antitrustinstitute.org/Archives/transitionreport.ashx.

A study released last May by Health Care for America Now detailed just how concentrated health insurance markets are. At that time, 94 percent of statewide health insurance markets were considered “highly concentrated” under DOJ Guidelines, and in most states only one or two insurers dominate the market. This concentration has been accompanied by rising premiums and health insurer profits.⁶

The health reform legislation signed last week seeks to begin to restore health insurance competition in a number of ways. For example, it creates state health insurance exchanges, which would serve as central marketplaces for consumers seeking individual private insurance plans. The market for these individual plans today is anything but consumer-friendly, and there are egregious examples of rescission, coverage denials and “junk” plans. The exchanges established by health care reform are intended to provide some uniformity to the process of comparing individual health insurance options, inserting direct competition where uncertainty and deception currently reign.

We hope that both of your agencies consider the overwhelming number of consumer protection problems and the lack of competition documented in the numerous Congressional hearings in the past year. We write to ask you to undertake the challenge of fully utilizing the expertise and experience of your agencies in making health insurance markets function effectively. We know your agencies are filled with dedicated professionals who possess tremendous expertise and commitment. Those resources should be marshaled to address the chronic competition and consumer protection problems in health insurance markets.

To begin the discussion about a progressive agenda for health insurance enforcement, we propose that your agencies:

- 1. Marshal competition enforcement resources to focus on anticompetitive and deceptive conduct by insurers.** Health insurance markets are extremely concentrated, and the complexity of insurance products and the opaque nature of their practices provide a fertile medium for anticompetitive and deceptive conduct. The government’s considerable health care enforcement resources should be redeployed to focus to a far greater extent on health insurance.⁷ A repeal of the McCarran-Ferguson Act would eliminate any potential roadblocks to enforcement here.

⁶ Health Care for America Now. “Premiums Soaring in Consolidated Health Insurance Market: Lack of Competition Hurts Rural States, Small Businesses.” May 2009.
http://hcfan.3cdn.net/dadd15782e627e5b75_g9m6isltdl.pdf.

⁷ State health insurance regulation and enforcement has been inadequate to protect consumers. A study for the Center for American Progress last year found that state enforcement of consumer protection violations by health insurers is widely inconsistent across the country and entirely absent in many states where only one or two insurers dominate the statewide market. Only one-third of the surveyed states had brought any consumer protection cases, and the vast majority of cases were brought by only five states. Antitrust enforcement is even rarer: none of the 33 states surveyed had taken a significant antitrust enforcement action in the past five years. This study was instrumental and frequently cited in the floor debate when the House repealed McCarran-Ferguson. See “Don’t Leave It to the States.” October 22, 2009.
http://www.americanprogress.org/issues/2009/10/health_oversight.html.

2. **Create a vigorous health insurance consumer protection enforcement program at the FTC.** The FTC’s health care consumer protection enforcement currently focuses on marketers of sham and deceptive products. The FTC should adjust its health care enforcement to scrutinize health insurers and address egregious and fraudulent practices. In addition, BCP should work with HHS to develop standards for disclosure on health insurance alternatives so there is a sufficient information and choice to enable consumers to make informed decisions.
3. **Reinvigorate enforcement against anticompetitive conduct.** The DOJ and the FTC should revitalize enforcement against anticompetitive conduct by health insurers. The FTC should scrutinize anticompetitive conduct and use its powers under Section 5 of the FTC Act.⁸
4. **Strengthen health insurance merger enforcement.** There was massive consolidation in the health insurance marketplace over the past eight years. We applaud the DOJ for its successful efforts to influence Blue Cross Blue Shield of Michigan to abandon a proposed plan to purchase the Physicians Health Plan of Mid-Michigan. We hope this is an example of far more aggressive scrutiny of health insurance mergers in the future.
5. **Conduct a retrospective study of health insurer mergers.** Critical to restoring merger enforcement would be a study of consummated health insurer mergers. One of the accomplishments of the Bush administration was a retrospective study of consummated health insurance mergers by the FTC. This study led to an important enforcement action in Evanston, Illinois, which helped to clarify the legal standards and economic analytical tools for addressing health insurance mergers. A similar study of consummated health insurance mergers would help to clarify the appropriate legal standards for health insurance mergers and identify mergers that have harmed competition.⁹
6. **Recognize that the insurer does not represent the consumer.** Although insurers do help to control costs, they are not the consumer. The consumer is the individual who ultimately receives benefits from the plan. It is becoming increasingly clear that insurers do not act in the interest of the ultimate beneficiary. They are not the proxy for the consumer interest, but rather exploit

⁸ David outlined several practices that could be challenged under Section 5 in testimony before the FTC, “Reviving Competition in Healthcare Markets: The Use of Section 5 of the FTC Act.” October 17, 2008. <http://www.americanprogress.org/issues/2008/10/pdf/section5testimony.pdf>.

⁹ It should be noted that that FTC is *not* prevented from doing this under the FTC Improvements Act of 1980, which orders the Commission not to conduct any investigation of the business of insurance unless authorized by a vote by either the Senate or the House Commerce Committee. Mergers are clearly outside the scope of the “business of insurance.”

the lack of competition, transparency, and the opportunity for deception to maximize profits.¹⁰

7. **Revise the DOJ and FTC’s joint health care Guidelines to better reflect the current health care market and the proven value of collaboration between providers.** Assistant Attorney General Varney, you stressed the importance of keeping the Guideline up-to-date in 1996, when the Guidelines were last revised: “[t]he health care marketplace is undergoing rapid change, and it is primarily through an open dialogue with all involved in the health care industry that the Agencies can continue to provide appropriate and relevant antitrust guidance.” The delivery of health care has changed substantially over the past 13 years, and we believe revisions of these Guidelines are long overdue.
8. **Work with HHS to ensure that insurers provide enough information to buyers in state insurance exchanges such that consumers can make fully informed decisions.** The FTC can draw on its consumer protection expertise to ensure that a variety of health care reforms are carried out in the most effective manner possible. By making sure that consumers in the exchanges have adequate information about their alternatives, the FTC can promote competition between health insurers, one of the stated goals of creating these exchanges. An example of this type of advocacy was the FTC’s recent comments to HHS on a proposed rule on Medicare Advantage plan information.¹¹

We have specific suggestions on each of these proposals.

Attached is testimony David has provided in the past year describing the critical role federal antitrust and consumer protection enforcement should play in complementing health care reform efforts, along with materials produced by Health Care for America Now on the lack of competition in health insurance markets. We have included:

- “A Progressive Agenda for Antitrust Enforcement at the Antitrust Division.” Testimony before the Senate Judiciary Committee. March 10, 2009.
- “The Effects of Regulatory Neglect on Health Care Consumers.” Testimony before the Senate Commerce Committee. July 16, 2009.
- Testimony before the House Judiciary Committee on H.R. 3596, the Health Insurance Industry Antitrust Enforcement Act. October 8, 2009.

¹⁰ David explored this distinction in testimony before the Senate Judiciary Hearing at the Assistant Attorney General’s confirmation hearing, “A Progressive Agenda for Antitrust Enforcement at the Antitrust Division.” March 10, 2009. See, in particular, page 10.

http://www.americanprogressaction.org/issues/2009/03/balto_antitrust.html.

¹¹ Comments of the Federal Trade Commission before the Department of Health and Human Services, Center for Medicare & Medicaid Services. In the matter of Medicare Program: Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs.

- Health Care for America Now, “Premiums Soaring in Consolidated Health Insurance Market: Lack of Competition Hurts Rural States, Small Businesses.” May 2009.

Building on the new structure of health care reform and creating a new agenda for progressive antitrust enforcement are central initiatives of the Center for American Progress and Health Care for America Now. We would appreciate the opportunity to meet with you and your senior staff to discuss these issues in greater length.

Sincerely,



David A. Balto
Senior Fellow
Center for American Progress



Richard Kirsch
National Campaign Manager
Health Care for America Now

CC: Richard Feinstein, Director, Bureau of Competition, FTC
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