



**American Hospital
Association**

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By Hand Delivery and Email

May 11, 2009

The Honorable Christine Varney
Assistant Attorney General for Antitrust
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Dear Ms. Varney:

On behalf of our more than 5,000 member hospitals, health systems and other health care organizations, the American Hospital Association (AHA) is writing to raise concerns about the lack of a robust and coherent enforcement policy on health insurance plan (health plan) mergers and anticompetitive conduct. The absence of such a policy could have increasingly serious consequences as the Administration and Congress embark on a wide-ranging effort to reform the nation's health care system. Therefore, we call on the Antitrust Division to launch without delay a critical examination of competition and enforcement policy as it applies to health plans.

Specifically, we request that the Antitrust Division:

- Undertake a comprehensive study of consummated health plan mergers, perhaps in collaboration with other federal agencies, state attorneys general and/or other state officials, who can develop or already have access to detailed information on health plans operating in their states.
- Convene public hearings to better understand the reasons for the lack of competition among health plans in most markets around the nation and the impacts on consumers, providers (including hospitals) and President Obama's health care reform initiatives.



- Revisit and revise its analytical framework for reviewing health plan mergers and conduct complaints. The areas of scrutiny should include whether:
 - Proposed mergers by plans with preexisting market power should be viewed as presumptively unlawful;
 - Government reimbursement programs with payment rates below cost should be included in the market in determining the competitive effects of a plan merger on hospitals and other providers;
 - Government reimbursement programs are an adequate substitute for health plan competition, factoring in federal regulatory constraints on hospitals' ability to switch to new patients;
 - The presence of several smaller health plans in a market can ever operate as an effective countervailing force to mergers involving larger, more dominant health plans;
 - Payment rates to providers, below competitive levels, can retard innovation in or adoption of even nationally recognized technological imperatives, such as electronic medical records or otherwise adversely impact quality improvement efforts;
 - Hospital services, like those of physicians, are particularly vulnerable to anticompetitive conduct by health plans;
 - The ability of merged or dominant health plans to price discriminate against certain hospitals poses particular concerns about likely competitive harm;
 - Merged or dominant health plans can wreak competitive harm in ways other than reducing prices below competitive levels, such as adversely affecting the development or adoption of quality protocols or technology tailored to meet the needs of hospitals and the patients they serve;
 - Mergers of health plans with service areas that technically do not overlap because of license or other agreements still pose a risk of competitive harm and, therefore, should be challenged; and
 - Limited divestitures are ever likely to be an effective antidote for anticompetitive health plan mergers.

These efforts are firmly in sync with President Obama's expressed views that the former "administration has what may be the weakest record of antitrust enforcement of any administration in the last half century." He cited the impact of this lack of enforcement on competition among health plans as a prime example:

Take health care, for example. There have been over 400 health care mergers in the last 10 years. The American Medical Association reports that 95 percent of insurance markets in the United States are now highly concentrated and the number of insurers has fallen by just under 20 percent since 2000. These changes were supposed to make the industry more efficient, but instead premiums have skyrocketed, increasing over 87 percent over the past six years.

The enclosed paper, *The Case for Reinvigorating Antitrust Enforcement for Health Plan Mergers and Anticompetitive Conduct to Protect Consumers and Providers and Support Meaningful Reform*, highlights some of the important issues that the Antitrust Division should review, including the lack of vigor and transparency in the past administration's enforcement efforts. The paper also summarizes the history of antitrust enforcement relating to health plan mergers and some of the financial and economic implications of this unchecked consolidation.

One overriding theme of the paper is that health plan merger enforcement has not properly accounted for the pervasive market or monopoly power health plans currently enjoy. We urge you to consider those observations in light of the president's commitment to "ensure that insurance...companies are not abusing their monopoly power through unjustified price increases." We also urge you to consider that health plan merger enforcement has given little consideration to the impact of health plan market power and consolidation on the nation's hospitals. Applying the well-established Horizontal Merger Guidelines in light of these considerations demonstrates the likely anticompetitive effects of past and any future health plan consolidation.

Unlike other sectors of the health care field, such as hospitals, health plan mergers have received relatively little antitrust scrutiny. In the last eight years, the Antitrust Division has requested only relatively minor divestitures and other relief in two health plan mergers. In addition, the Antitrust Division has offered no explanation for failing to respond to provider requests for more robust enforcement in the last two major health plan mergers.

In contrast, at the advent of the last administration, the Federal Trade Commission (FTC) launched a major retrospective of the hospital field that was intended to lead to more successful challenges to hospital mergers, apparently in an attempt to overcome losing virtually all of its challenges to those mergers in the federal courts. Following that retrospective, the FTC challenged one long-consummated hospital merger via an internal agency hearing and blocked another outright. The FTC also has aggressively applied the antitrust laws to arrangements between physicians and between physicians and hospitals, all to "protect" consumers from any increase in market power resulting from such arrangements. Where is the comparable focus on health plan abuses of market power?

As described in our attached report, health plan mergers and anticompetitive conduct are clearly a matter of grave public concern. The now abandoned merger of the twin monopoly Blues Plans in Pennsylvania drew congressional scrutiny and even more comprehensive state scrutiny, but no sustained scrutiny and certainly no action from the Antitrust Division. The Antitrust Division brought a technical and partial challenge to an anticompetitive merger of health plans in Las Vegas, but gave no weight to concerns that the merger would harm hospitals and physicians in areas outside the bounds of the Medicare Advantage program, despite the fact that state antitrust and insurance regulators clearly recognized the dangers that the transaction posed to providers. If nothing else, more transparency is called for when the Antitrust Division fails to take action in an area of such public importance to assure the public that possible harm to providers was thoroughly considered.

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Providers are the backbone of our health care delivery system. Protecting them from current and future abuses of market power by health plans has to be a mainstay of any successful health care reform effort. It is essential that the Antitrust Division contribute to that success by taking an active and aggressive role in understanding how health plan market power and consolidation harms hospitals and other providers as well as in challenging conventional thinking and actions about how to approach those problems.

We would like to meet with representatives of the Department of Justice at the earliest opportunity to discuss this important issue and look forward to working with the Antitrust Division on this historic effort. For more information, please contact me at rpollack@aha.org or (202) 626-4625.

Sincerely,

Rick Pollack
Executive Vice President

Enclosure

cc: Eric Holder, United States Attorney General
Jon Leibowitz, Chairman, Federal Trade Commission
Senate Judiciary Committee and Antitrust, Competition Policy and Consumer Rights
Subcommittee Chairman and Ranking Minority Members
House Judiciary Committee Chairman and Ranking Minority Member
Senate Finance Committee Chairman and Ranking Minority Member
Kathleen Sebelius, Secretary, United States Department of Health and Human
Services