



# DEPARTMENT OF JUSTICE

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## Workshop on Examining Health Care Competition Opening Remarks

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Remarks as Prepared for the  
Department of Justice and Federal Trade Commission Workshop on  
Examining U.S. Health Care Competition

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Good morning and thank you for joining us today at the joint Department of Justice (DOJ) and Federal Trade Commission (FTC) workshop examining health care competition. I want to thank the FTC for hosting, and for its partnership in planning, this event.

This workshop is the latest in a series of joint public workshops the agencies have held to advance the development and application of our nation's antitrust laws. For us to act effectively as enforcers and advocates in an area like health care, we need a deep understanding of the changes and challenges the industry is facing. This workshop provides us with an opportunity to learn from experts and engage with stakeholders about current market conditions and evolving industry practices. I thank all of the participants for the time and effort they have made to further our mission to protect consumers, preserve competition and to help us do our job better.

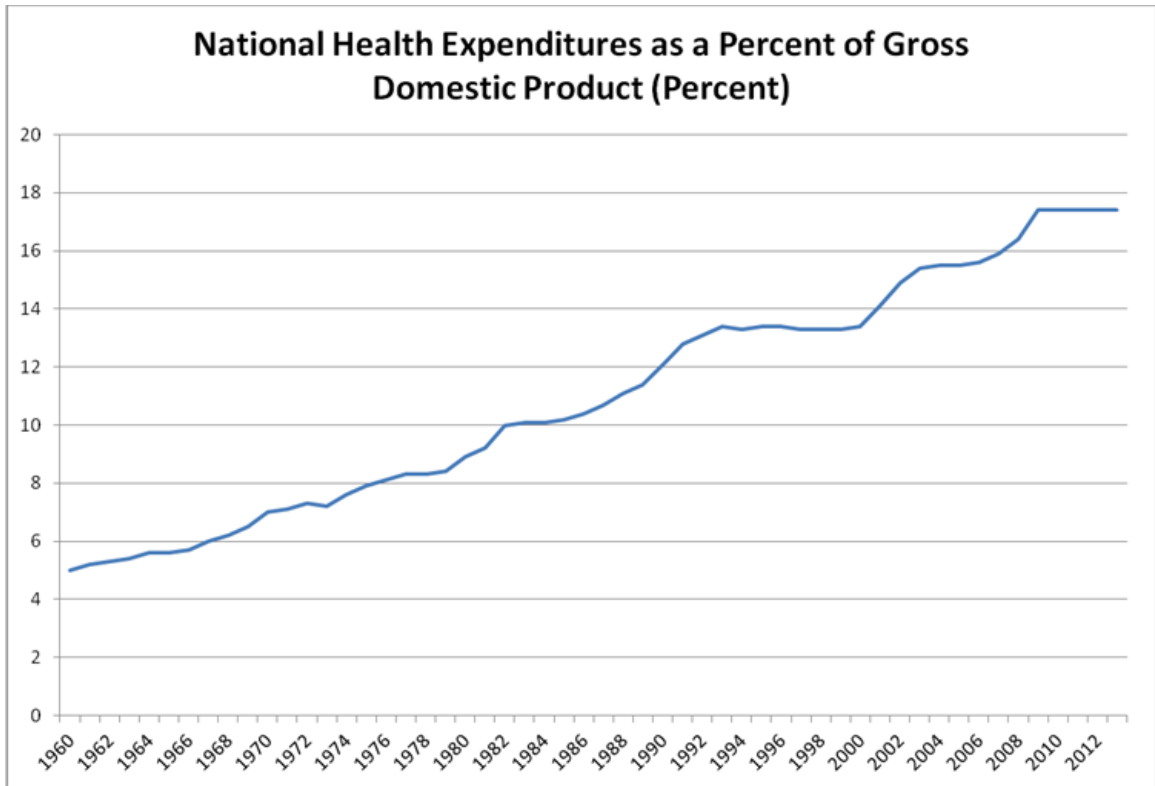
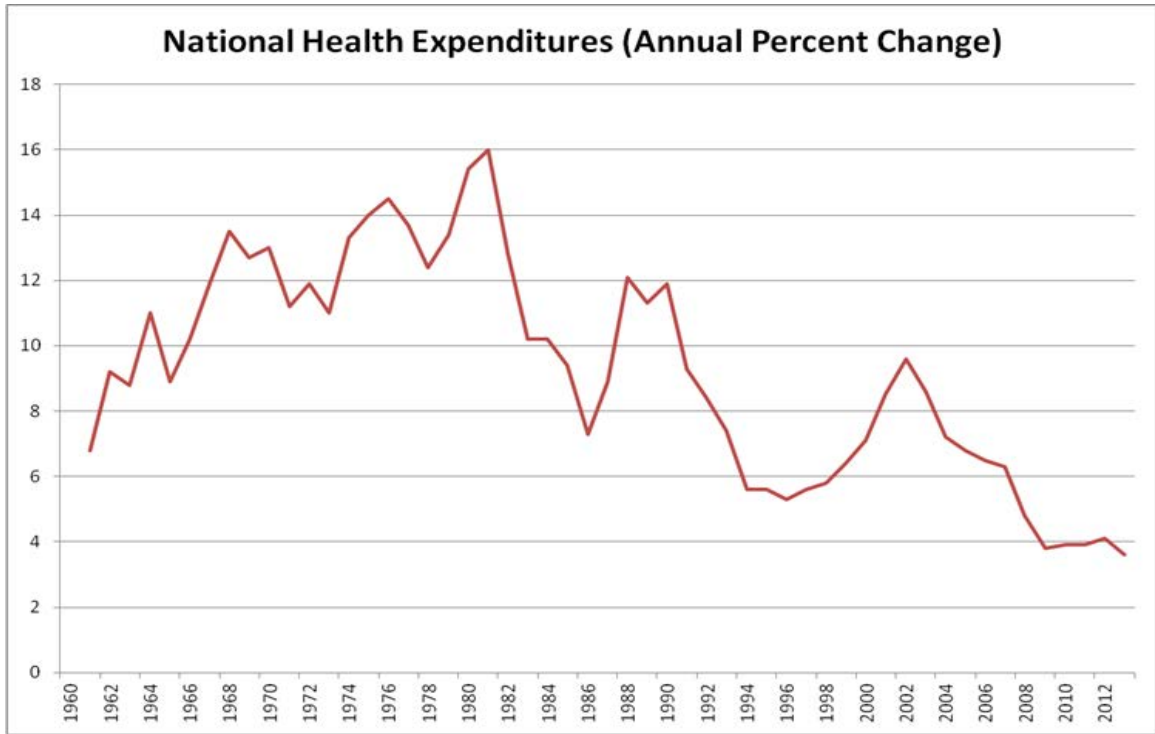
### Importance of Health Care

In 2013, U.S. health care spending by households, businesses and the government reached \$2.9 trillion, that's 17.4 percent of the nation's Gross Domestic Product.<sup>1</sup> The Centers for Medicare and Medicaid Services projects that 2014 spending will top \$3 trillion.

The rising cost of health care affects Americans every time they pay their health insurance premium, visit a doctor, receive hospital care, and fill a prescription. Because health care is fundamental to our lives, we share an interest in maintaining and fostering competitive markets that will keep prices in check, improve quality and spur innovation.

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<sup>1</sup> *National Health Expenditure Data: Historical*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html>.



SOURCE: Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group; U.S. Department of Commerce, Bureau of Economic Analysis; and U.S. Bureau of the Census.

## Insurance

In recent years, the health care industry has seen change and innovation, in part accelerated by the passage of the Affordable Care Act (ACA) in 2010. Stakeholders are working to reduce costs and improve health outcomes. Yesterday we heard about developments in the health insurance market, specifically the marketplaces established by the ACA, that are designed to foster competition among insurers on the price of their plans and strength of their networks. There appear to be some promising developments, with new entrants, expanded choices, and increased competition in some markets.

Insurers have also been working to develop innovative plan designs, including narrow and tiered networks. These developments encourage providers to compete on price and quality in order to be included in plan networks at the most favorable level. According to one report, about half of insurance offerings on the health insurance exchanges would qualify as narrow networks.<sup>2</sup> We learned yesterday that when these plans are well-structured and transparent to consumers these networking practices have the potential to drive competition and benefit patients.

While we understand the need for the health insurance industry to evolve to address new challenges, we will pay close attention to abuse of market power – for example, to contracting practices, such as anti-tiering, anti-steering, and most favored nation clauses, that threaten competitive harm. Earlier in this Administration, the DOJ successfully challenged Blue Cross Blue Shield of Michigan’s efforts to insulate themselves from competition by employing most favored nation clauses.<sup>3</sup> And, last week, we were reminded of the anticompetitive potential of anti-steering practices by the district court decision affirming the Division’s Section 1 challenge to the anti-steering rules imposed by American Express on merchants.<sup>4</sup>

Both agencies remain committed to challenging anticompetitive mergers in health care markets, as DOJ did in 2012 when Humana proposed acquiring Arcadian Management Service.

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<sup>2</sup> MCKINSEY & CO., HOSPITAL NETWORKS: UPDATED NATIONAL VIEW OF CONFIGURATIONS ON THE EXCHANGES 2 (June 2014),

[http://healthcare.mckinsey.com/sites/default/files/McK%20Reform%20Center%20-%20Hospital%20networks%20national%20update%20\(June%202014\)\\_0.pdf](http://healthcare.mckinsey.com/sites/default/files/McK%20Reform%20Center%20-%20Hospital%20networks%20national%20update%20(June%202014)_0.pdf).

<sup>3</sup> Stipulated Motion and Brief to Dismiss Without Prejudice, *United States v. Blue Cross Blue Shield of Mich.*, No. 2:10-cv-14144-DPH-MKM (E.D. Mich. Mar. 25, 2013).

<sup>4</sup> Decision, *United States v. Am. Express Co.*, No. 10-CV\_4496 (Feb. 19, 2015).

The divestitures required by DOJ preserved competition in 45 counties and parishes in five states where the merger would have resulted in the combined company controlling 40 to 100 percent of the market for Medicare Advantage plans.<sup>5</sup>

### Health Care Providers

We also see innovation by health care providers to improve quality and reduce cost through better information and management of patient care. These include reimbursement models designed to align incentives for efficient care across provider groups, such as accountable care organizations, or ACOs. We support these efforts. That’s why the DOJ and FTC issued a joint statement in 2011 explaining our antitrust enforcement policy regarding ACOs participating in the Medicare Shared Savings Program.<sup>6</sup> This statement provides guidance to ensure that ACOs are able to innovate in both Medicare and commercial markets and not run afoul of the antitrust laws. The guidance proved timely as the number of ACOs has grown from fewer than 100 in 2010 to more than 600 in 2013.



<sup>5</sup> Competitive Impact Statement, United States v. Humana Inc., No. 1:12-cv-00464 (D.D.C. Mar. 27, 2012).

<sup>6</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENT OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM (2011), available at [http://www.justice.gov/atr/public/health\\_care/279568.pdf](http://www.justice.gov/atr/public/health_care/279568.pdf).

Source: David Muhlestein, *Accountable Growth in 2014: A Look Ahead*, HEALTH AFFAIRS BLOG (Jan. 29, 2014), <http://healthaffairs.org/blog/2014/01/29/accountable-care-growth-in-2014-a-look-ahead/>.

We provide fact-specific guidance where we can. Similar to the FTC's advisory opinion process, DOJ will work with providers to issue business review letters for those who have other innovative and pro-competitive ideas for improving patient care. We did this in 2013, informing the Greater New York Hospital Association that DOJ did not intend presently to challenge a proposed gainsharing program that was designed to provide a framework by which participating hospitals can measure physician performance against certain benchmarks and award bonuses to physicians for improvements in quality and efficiency.<sup>7</sup>

However, we will challenge provider conduct that enhances market power, stifles pro-consumer innovations, and leads to lower quality, higher cost health care. DOJ has challenged agreements among competing providers that eliminate competition – a chiropractic association contracting on behalf of competing chiropractors<sup>8</sup> – and conduct by a dominant provider to insulate itself from competition, such as United Regional Healthcare Systems' contract provisions that inhibited insurers from contracting with competing providers.<sup>9</sup>

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<sup>7</sup> Letter from William J. Baer, Assistant Att'y Gen., U.S. Dep't of Justice, to Colin R. Kass, Esq., Proskauer Rose LLP (Jan. 16, 2013). Other parties contemplating new ventures in the healthcare space can avail themselves of the business-review process and ask DOJ for a statement of enforcement intentions concerning the proposed conduct. See *Business Reviews*, U.S. DEP'T OF JUSTICE, ANTITRUST DIV., <http://www.justice.gov/atr/public/busreview/index.html>.

<sup>8</sup> Competitive Impact Statement, *United States v. Chiropractic Assoc., Ltd.* of S.D., No. CV 13-04030 (D.S.D. Apr. 8, 2013) (association negotiated contracts on behalf of competing chiropractors with the purpose and effect of increasing fees paid to chiropractors in violation of Section 1; consent decree enjoined the association for negotiating contracts with payers on behalf of chiropractors and from facilitating joint contracting among chiropractors).

<sup>9</sup> Competitive Impact Statement, *United States v. United Regional Health Care Sys.*, No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011) (United Regional, a "must-have" hospital, entered into contracts with commercial health insurers that inhibited the insurers from contracting with United Regional's competitors in violation of Section 2; settlement agreement prohibited United Regional from entering into contracts that improperly inhibit insurers from contracting with United Regional's competitors); see also Complaint, *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155 (E.D. Mich. Oct. 18, 2010) (Blue Cross used most-favored-nation clauses (MFNs) in its contracts with hospitals to inhibit the hospitals from negotiating competitive contracts with Blue Cross' competitors; DOJ dismissed its case after the Michigan legislature and insurance commissioner barred health insurers from using MFNs).

In the provider arena we have also seen a wave of vertical integration as hospitals acquire physician practices. Industry participants and observers have offered varying and sometimes conflicting views regarding these transactions. Proponents believe that this integration enables providers to better coordinate the provision of care, improving the quality and reducing costs. Others raise concerns that these transactions result in conglomerates with the market power and bargaining leverage to adversely affect competition.

Antitrust enforcement of vertical integration among health care providers is best judged on a case-by-case basis. Transactions that promise to improve the delivery of care and that pose no threat of increased prices or other competitive harm should be allowed. But we stand ready to take appropriate enforcement action against transactions that harm competition.

Perhaps most importantly, when the government does challenge anticompetitive activity in the health care arena, consumers are entitled to meaningful relief. Our strong preference, when challenging horizontal mergers in health care, as in any other industry, is for structural remedies that maintain competitive markets and remove restraints to competition. This issue was front and center in the recent Partners Healthcare matter, where a state court rejected a proposed consent decree urged by Partners that would have allowed a worrisome hospital acquisition to proceed in return for behavioral remedies, including price caps and limits on future growth. The subsequent abandonment of the transaction by Partners maintains competition between Partners and South Shore and avoids a challenging regulatory oversight regime.

### Conclusion

In closing, DOJ, the FTC, and our colleagues in state Attorneys General offices play a critical role in protecting and promoting competition in health care during this time of extensive change. Through antitrust guidance and competition advocacy we can help stakeholders direct their creativity towards pro-competitive innovations that benefit patients while preserving competition.

I thank all our distinguished panelists for joining us at the workshop and helping to increase our knowledge of this industry that affects us all so personally. I know many of you had to travel great distances to be here, and we are grateful for your contributions. I also want to

thank the FTC and DOJ staff members who have worked hard to make this event possible. And, importantly, I thank you, the audience, in person and via webcast, for your participation.

With that, let me turn the stage over to the first panel of the day, which will discuss Accountable Care Organizations.