

HEALTH CARE FOR AMERICA NOW!

May 19, 2009

The Honorable Christine Varney
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: The Need to Enact a Comprehensive Antitrust Health Insurance Program

Dear Ms. Varney,

Health Care for America Now (“HCAN”) is a national grassroots campaign of more than 1,000 organizations in 46 states representing 30 million people dedicated to winning quality, affordable health care for all Americans. HCAN believes that everyone in this country should have accessible, quality health care they can afford. Our goal is to have comprehensive reform that will guarantee coverage, improve health care payment and delivery systems, assure comprehensive benefits, protect consumer choice, and eliminate the enormous inequities in the health care system.

We write to urge the Antitrust Division of the Department of Justice to conduct a comprehensive investigation of the health insurance market, focusing on both consummated mergers and anticompetitive and fraudulent conduct by these insurers.

For the past several months, HCAN and its affiliated organizations have gathered data on health insurance markets throughout the United States. HCAN has prepared a report detailing how these markets have become increasingly concentrated, with tremendous adverse results to individuals, small businesses, health care providers, and the overall quality of health care.¹

¹ Health Care for America Now, “Premiums Soaring in Consolidated Health Insurance Market: Lack of Competition Hurts Rural States, Small Businesses,” May 2009.

The facts about this tsunami of consolidation are clear. In the past 13 years there have been more than 400 mergers in the health insurance industry. All of these mergers have been permitted by the Antitrust Division with a modest divestiture in only three of the mergers. There were no actions taken against anticompetitive conduct by health insurers in the last administration, in spite of the fact that cases by state attorneys general have secured massive fines against these insurers.² What has been the result of this approach to health insurance competition?

- More than 94 percent of all insurance markets in the United States are highly concentrated.
- The number of insurers has fallen by 20 percent.
- Premiums increased by more than 87 percent from 2000 to 2007.
- Private insurance spending is increasing at a rate 37 percent greater than spending for Medicare.
- The number of uninsured has increased to more than 47 million, or more than one out of seven Americans, as premiums are simply out of reach for increasing numbers of individuals and small businesses.
- The number of underinsured Americans is now at 25 million, excluding the tens of millions of Americans without adequate insurance who have yet to test the level of security their insurance offers.^{3,4}
- In 2008, employer health insurance premiums increased by 5 percent – twice the rate of inflation.⁵
- Since 1999, employment-based health insurance premiums have increased 120 percent, compared to cumulative inflation of 44 percent and cumulative wage growth of 29 percent during the same period.⁶
- Profits of the 10 largest publicly traded insurers increased 428 percent from 2000 to 2007, from \$2.4 billion to \$12.9 billion.

Simply put, the private insurance companies have secured monopolies or tight oligopolies and exercised that power to put profits ahead of patients.

Unfortunately, this toxic market structure has a profound effect on the nation's ability to achieve the goals of health care reform. HCAN believes that it would be a mistake to rely solely on this broken insurance market to generate increased value in our health care system. Almost all metropolitan markets are too concentrated to be able to rely on market forces to assure that individuals receive the benefits of increased health care expenditures. Competition between health insurance companies in each local market is critical to controlling costs. The states that will prosper during the forthcoming health reform challenges are the ones with meaningful insurance competition. Reform will falter in those states with few insurance rivals.

² Karen Freifeld, "WellPoint Pays \$10 Million to Settle Investigation," Bloomberg News, Feb. 18, 2009. Accessed at <http://www.bloomberg.com/apps/news?pid=conewsstory&refer=conews&tkr=CI%3AUS&sid=aymgrXM2y82w>

³ "How Many Are Underinsured? Trends Among U.S. Adults, 2003 and 2007," Cathy Schoen, M.S., Sara R. Collins, Ph.D., et.al., Health Affairs Web Exclusive, June 10, 2008 <http://www.commonwealthfund.org/Content/Publications/In-the-Literature/2008/Jun/How-Many-Are-Underinsured--Trends-Among-U-S--Adults--2003-and-2007.aspx>

⁴ Consumer Reports, "Are You Really Covered? Why 4 in 10 American's Can't Depend on their Health Insurance," September 2007, http://www.consumerreports.org/cro/health-fitness/health-care/health-insurance-9-07/overview/0709_health_ov.htm?resultPageIndex=1&resultIndex=1&searchTerm=Are

⁵ <http://www.nchc.org/facts/cost.shtml>.

⁶ Ibid.

A lack of antitrust enforcement has enabled insurers to acquire dominant positions in almost every metropolitan market. The failure to attack anticompetitive practices has enhanced the dominant positions of these insurers. This must be reversed.

We call upon the Antitrust Division to:

- Conduct a thorough investigation of consummated health insurance mergers with the goal of challenging those mergers that harm competition or create an anticompetitive market structure. This could be similar to the FTC's recent retrospective review of several consummated hospital mergers to both identify mergers that had led to anticompetitive effects and "to update [the FTC's] prior assumptions about the consequences of particular transactions and the nature of competitive forces in health care."⁷ Based on the review, the DOJ should challenge those mergers with the potential to harm competition and report to Congress on the impact of the recent consolidation.
- The DOJ should initiate investigations of anticompetitive conduct by dominant insurance companies and challenge that conduct where appropriate. Many dominant insurers limit the ability of providers to choose rival insurers or inform patients about more efficient and comprehensive coverage. The DOJ should investigate tools used to stifle competition such as physician gag clauses, most favored nations provisions, all-products clauses, and silent networks, which prevent providers and consumers from having the full range of competitive alternatives. To the extent the DOJ cannot pursue this conduct under the Sherman Act it should refer this conduct to the Federal Trade Commission, which has broader consumer protection and competition enforcement powers.⁸
- The DOJ and the FTC should submit a report to Congress on the state of competition in health care markets, based on these investigations.

The country relies on competition to bring the public the full benefits of our free enterprise system. Essential to the functioning of the free market is choice and transparency, both of which are clearly lacking in insurance markets. We call on the Antitrust Division to help promote competition in health insurance markets by initiating a comprehensive enforcement program.

⁷ Timothy J. Muris, FTC Chairman, "Everything Old is New Again: Health Care and Competition in the 21st Century" Prepared Remarks before 7th Annual Competition in Health Care Forum, Chicago, Illinois, November 7, 2002.

⁸ For a description of how many of these practices can be challenged under Section 5 of the FTC Act see "Reviving Competition in Healthcare Markets," available at <http://www.americanprogress.org/issues/2008/10/section5.html>.

We look forward to hearing from you. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Kirsch', with a large, stylized flourish at the end.

Richard Kirsch
National Campaign Manager
Health Care for America Now

A handwritten signature in black ink, clearly legible as 'David A. Balto'.

David Balto
Senior Fellow
Center for American Progress;
Former Policy Director,
Federal Trade Commission

cc:

Jon D. Leibowitz
Chairman, Federal Trade Commission
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