

Enforcing Reform

By **David Balto** | June 4, 2010

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We have reached a critical juncture in the evolution of the health insurance marketplace: healthcare reform will soon be implemented, and a number of provisions seek to promote competition between health insurers. The Federal Trade Commission and the Justice Department's Antitrust Division each play central roles in protecting competition and, in turn, protecting consumers. For the new reforms to be effective in expanding access to affordable, high-quality health insurance products, these competition regulators must meet the challenge of policing health insurers in the post-reform era.

If there is one undisputed fact from the healthcare debate, it is that health insurance markets are broken. 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. A study released last May by Healthcare for America Now detailed just how concentrated health insurance markets are: at that time, 94% of statewide health insurance markets were considered "highly concentrated" under Justice Department 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.

The Bush administration failed to properly set enforcement priorities, leading to an environment where health insurers thrived in a competition-free zone. During the previous administration, the FTC brought 31 enforcement cases against providers, frequently small groups of doctors. These cases were not based on evidence that physician costs were a significant force in increasing healthcare expenditures. Moreover, none of these cases was followed by a private suit seeking damages for the alleged illegal conduct.

While inexplicably focusing exclusively on healthcare providers, the FTC and the Justice Department let health insurers run amok, increasing market share while flagrantly violating consumer protections. The FTC and the Justice Department took no consumer protection actions against health insurers, and the Justice Department took no enforcement actions against anticompetitive practices by health insurers. State insurance regulators failed to consistently or effectively police health insurers. Meanwhile, there were more than 400 health insurance mergers in the past decade, with only two modest consent decrees.

The new healthcare reform legislation 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 healthcare 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.

The FTC and the Justice Department should support reform by addressing the chronic competition and consumer protection problems in health insurance markets. I propose that the FTC and the Justice Department:

- Marshal competition enforcement resources to focus on anti-competitive 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 healthcare enforcement resources should be redeployed to focus to a far greater extent on health insurance. The FTC in particular should scrutinize anti-competitive conduct and use its powers under Section 5 of the FTC Act. Repealing the McCarran-Ferguson Act, which exempts insurers from federal antitrust law, would eliminate any potential roadblocks to enforcement here.
- Create a vigorous health insurance consumer protection enforcement program at the FTC. The FTC’s healthcare consumer protection enforcement currently focuses on marketers of sham and deceptive products. The FTC should adjust its healthcare enforcement to scrutinize health insurers and address egregious and fraudulent practices.
- Strengthen health insurance merger enforcement. There was massive consolidation in the health insurance marketplace over the past eight years. The Justice Department should scrutinize any future mergers and seriously consider their potential effects on consumers. Moreover, the agencies should conduct a retrospective study of health insurer mergers to clarify the legal standards and economic analytical tools for addressing health insurance mergers.
- Revise the Justice Department and FTC’s joint healthcare guidelines to better reflect the current healthcare market and the proven value of collaboration between providers. The guidelines were issued in 1996 and are out of date. The delivery of healthcare has changed substantially over the past 13 years, and by identifying areas of collaboration that are innovative and efficient, the FTC and the Justice Department may be able to

free up resources now spent enforcing against healthcare providers engaged in collaborative efforts.

The FTC and the Justice Department have, for too long, avoided dealing head-on with competition and consumer protection violations in health insurance markets. Now that healthcare reform is a reality, they must meet the challenge of ensuring that consumers get the full benefit of a robustly competitive marketplace for insurance.

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