



FTC's Workshop Examining Health Care Competition Covers a Variety of Notable Topics

In support of efforts to reduce health care costs while concurrently increasing quality and accessibility in the health care industry, the Federal Trade Commission ("FTC") covered a number of topics relating to competition issues in the U.S. health care system during a special workshop on March 20 and 21, 2014. The topics included licensure of professions, nontraditional delivery models (telehealth, ACOS, and retail clinics), anti-competitive uses of healthcare IT, measuring health care quality, and consumer transparency in pricing and services.

The event followed other recent FTC activities regarding similar topics including (i) the February 26, 2014 remarks of FTC Commissioner Maureen K. Ohlhausen on "Health Care, Technology, and Health Care Technology: Promoting Competition and Protecting Innovation"¹ and (ii) a policy paper on "Competition and the Regulation of Advanced Practice Nurses" released March 7, 2014.

¹ Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, "Health Care, Technology, and Health Care Technology: Promoting Competition and Protecting Innovation," Remarks Before the Connecticut Bar Association Antitrust & Trade Regulation and Consumer Law Sections of the Connecticut Bar Association (Feb. 26, 2014), available at: http://www.ftc.gov/system/files/documents/public_statements/203081/140226healthcAREtechnology_0.pdf.

Representatives from Jones Day attended the two-day workshop and provide the following summary on several key areas of FTC focus:

Professional Regulation of Health Care Providers.

With the goal of striking the best balance between quality of care and barriers to entry, both of which are central to the regulation of health care providers, panelists raised the following points.

There appears to be a connection between the scope of practice limitations for various providers and related reimbursement coverage. As such, scope of practice restrictions can negatively impact reimbursement for these services when performed by lower cost providers. This can result in increased overall costs, instead of lower costs which would be realized by pushing routine procedures to the low-cost provider.

- Research has appeared to dispel concerns regarding differences in the quality of care between different levels of licensees.
- The national licensure compact for physicians supported by the Federation of State Medical Boards could be a positive advancement for cross-state provision of care like telehealth, but

other models (including Department of Veteran Affairs reciprocity structures) were also recommended for review by FTC.

- As to new emerging professions such as oral health, child birth, and lactation consulting, panelists recommended requiring evidence of quality differences before presenting new licensure categories. It was noted that registration or certification structures could achieve similar goals with fewer requirements than licensure.

Innovations in Health Care Delivery Models. Of particular interest to the FTC, as noted in the opening remarks of FTC Chairwoman Edith Ramirez, new forms of healthcare delivery, notably Accountable Care Organizations (“ACOs”), retail clinics and telehealth, were central topics of discussion throughout the workshop. Panelists identified several common themes among these new delivery models, including (i) convenience, (ii) use of technology, and (iii) alternative provider interactions. While participants cited various cost savings and benefits derived from these care models, a number of challenges were identified. Chief among these were reimbursement coverage and integration among health information technology systems. Some panelists acknowledged that reimbursement for telehealth and retail clinic coverage raises unique concerns, including the likelihood of overuse. But others noted that growing research supports the case for potential cost savings benefits from implementing these nontraditional delivery models. One panelist cautioned the FTC about regulations that arbitrarily encourage or require face-to-face encounters with physicians, or prior patient contact, when in certain circumstances patient questionnaires, phone-based care, or other nontraditional models may meet necessary quality requirements. Use of alternative care providers (e.g., pharmacists to provide immunizations or smoking-cessation counseling) and fostering better collaboration among providers was also a topic of conversation.

Advancements in Health Care Technology. Panelists acknowledged the strong federal policy goals of digitizing health care data and making that information accessible to patients and providers through the use of health information technologies like electronic health records (“EHRs”).

Panelists noted two aspects of competition worthy of the FTC’s attention. First, panelists expressed disappointment that certain aspects of implementing EHR systems may frustrate the competitive goals of improved access to patient health data. In particular, participants noted that EHR vendors are charging health care providers to share data outside networks or to create interoperability mechanisms among providers. These activities stall data sharing with non-affiliated providers. An American Medical Association (“AMA”) representative on the panel noted the high costs of changing software providers and also raised concerns about the competitive impact of consolidation activity among EHR vendors. Second, panelists discussed the competitive implications of how EHR data is used. One participant cautioned the FTC to examine how EHRs are used, for example, to identify physician referral trends.

Measuring and Assessing Quality of Health Care. In the context of considering whether the FTC can effectively utilize quality data on health care providers, participants generally contended that, yes, the FTC could and should consider quality metrics of providers in its various evaluations. However, panelists cautioned the FTC also to take account of improvement initiatives, patient-centered measures, and the pace of advancement when judging quality. Several speakers shared observations on how quality measures can occur in silos and how numerous unrelated measures and scoring methods are creating confusion for insurers, providers, and consumers when it comes to quality. Additionally, participants felt that quality measures are most valuable in advancing competition when they are utilized in larger health systems or affiliated organizations, but had little bearing on individual providers.

Price Transparency of Health Care Services. Focusing on how and when to effectively convey health care provider charges to consumers, panelists from the final segment of the workshop recommended the FTC take steps toward promoting broader transparency, meaningful list pricing, and quality information to consumers by, among other things, requiring merger applications to include information on patient outcomes, and data on the total cost, as tracked by the organization.

Participants noted that price transparency and actions by insurers may decrease the number of high-cost providers (such as emergency departments) that continue to treat low acuity cases, like colds and sinus infections. Rather, those cases could be referred to lower-cost retail clinics or telehealth services. Another panelist noted the need for regulators to consider how to assist consumers with insurer portability given that it can be difficult for consumers to change between insurance plans, and acknowledged that price and coverage information are often key factors in consumer decisions to make a change.

In follow-up to the topics discussed during the workshop and as detailed in a notice of public workshop and opportunity for comment with specific questions posed to the health care industry,² the FTC is seeking comments from health care stakeholders through April 30, 2014. Please let us know if we can be helpful in supporting your strategy or discourse with the FTC or others on these important topics.

Additional information on viewing a webcast of the workshop is available at <http://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition>.

² Fed. Reg. 10,153 (Feb. 24, 2014).

Lawyer Contacts

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