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The FTC's Ongoing Efforts to Promote Competition and Choice in Our Health Care System

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The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor, Keith Klovers, for assisting in the preparation of these remarks.

As many here can attest, health care is also a significant priority for our citizens and their elected officials. For example, a 2019 poll by RealClear Opinion Research found that more respondents (36 percent) identified health care as the "top issue facing America today" than any other issue, and a majority of respondents (52 percent) ranked it as either their first or second most-pressing issue.[5] Similarly, a Gallup poll found that 24 percent of respondents were "very worried" about paying "medical costs for normal healthcare" and only 17 percent of respondents were "very satisfied" with the quality of medical care.[6] In fact, studies show that even as health care costs are increasing, the quality of outcomes is falling.[7]

In the aggregate, the health care industry also accounts for a large chunk of our economy. The Centers for Medicare and Medicaid Services (CMS) estimate that health care spending accounted for 17.9 percent of U.S. GDP in 2017, the most recent available year.[8] CMS also projects that health care will continue to grow almost 1 percentage point faster than the economy as a whole.[9] By 2027, CMS projects that health care spending will account for $6 trillion dollars, or 19.4 percent of U.S. GDP.[10]

Given these figures, it is not surprising that the topic attracts significant attention up and down Pennsylvania Avenue. Just over one year ago, the Trump Administration released a report

[5] Carl M. Cannon, New Poll Shows Health Care Is Voters' Top Concern, May 15, 2019, https://www.realclearpolitics.

II. PAST FTC EFFORTS

During recent decades, the FTC has developed a laudable track record of protecting health care consumers and promoting competition in the industry. For example, under Chairman Muris we revamped the way we analyze hospital mergers, an approach that remains effective today. During the past 15 years, we have successfully sued to block several problematic hospital mergers, including recent transactions in Illinois and Pennsylvania.[13] We have also used the approach to block significant mergers involving physician practices, including recent victories in Idaho and North Dakota.[14]

Similarly, the Commission has long battled anticompetitive patent litigation settlements in the pharmaceutical industry. Chairman Leibowitz in particular championed this effort, filing a number of new cases. These efforts culminated in the Commission's landmark Supreme Court victory in the *Actavis* case, which held that patent litigation settlements can violate the antitrust laws and must be evaluated under traditional antitrust rules.[15]

Since then, the use of so-called reverse payments has plummeted, from an estimated 40 to 50 percent of all pharmaceutical patent litigation settlements in fiscal years 2006 and 2007 to less than 1 percent – one settlement out of 232 – in fiscal year 2016.[16] Although problematic new

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[13] *See*

lower-cost generic drugs.[20] Reckitt Benckiser agreed to pay $50 million, to be used for consumer redress, as part of the settlement.[21]

On the merger side, I'll likewise limit myself to two cases. First, in June 2019, the

competition into health care markets by lowering barriers to entry, limiting excessive concentration, and preventing abuses of market power."[25]

Pursuant to that Executive Order, in 2018 the Department of Health and Human Services (HHS), in collaboration with the Department of the Treasury, the Department of Labor, and the FTC, issued the Administration Report that I mentioned at the beginning of my remarks.[26] The report is packed with recommendations for increasing competition in the sector, including numerous proposals to expand competition among health care providers,[27] pare back state policies that restrict entry into provider markets,[28] reform insurance markets in ways that lower barriers to entry,[29] and arm consumers with better information about their health care options.[30] I agree with these recommendations, and I believe implementing them will empower consumers, reduce costs, and improve health care outcomes.

IV. THE FTC WILL CONTINUE TO PLAY A KEY ROLE

Finally, looking ahead, I believe the FTC has a key role to play in executing the vision set out in the Administration Report. To succeed in this role, we will need to double down on existing efforts and expand our work to address new practices and new markets.

I'll start with the easier task, doubling down on existing FTC efforts. I am proud to say that several of the recommendations included in the Administration Report build upon longstanding FTC initiatives. In the interests of time, I'll limit myself to two.

[25] Exec. Order No. 13,813 § I(c)(2), 82 Fed. Reg. 48,385, 48,385-86 (Oct. 12, 2017).
[26] ADMINISTRATION REPORT, *supra* note 11.
[27] *Id.* at 30-41 (for example, recommending that state governments reduce scope-of-practice requirements and increase licensure reciprocity).
[28] *Id.* at 50-63 (for example, recommending the repeal of "certificate of need" laws).
[29] *Id.* at 63-93 (for example, recommending the repeal of "any-willing-provider" laws).
[30] *Id.* at 94-105.

First, the Administration Report recommends that state governments take action "to repeal or scale back Certificate of Need [CON] laws."[31] As set out in a 2015 analysis by then-FTC Commissioner Maureen Ohlhausen, the FTC has advocated for the repeal of CON laws since at least 1987,[32] sometimes alone[33] and sometimes in conjunction with our counterparts at the Antitrust Division of the U.S. Department of Justice.[34] Most recently, in March 2019 FTC staff submitted testimony to the State of Alaska regarding a proposal to repeal that state's CON laws.[35]

Second, the Administration Report "recommends policies that will broaden providers' scope of practice while improving workforce mobility . . . to encourage innovation and to allow providers more easily to meet patients' needs."[36] The Commission has long advocated for rules that do not unduly restrict a licensed doctor or nurse's ability to provide medical care that they are medically trained and certified to provide. For example, the Commission has issued 17 letters to state actors over the past 10 years addressing state laws that artificially restrict the kinds

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[31] *Id.*, cover letter, at 3.
[32] Maureen K. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, ANTITRUST, Fall 2015, at 50, 54 & n.14 ("The FTC has tirelessly advocated for the repeal of these laws for many years, with strong support from Commissioners of both parties." (*citing, inter alia*, Federal Trade Commission, FTC Staff Comment Before the Virginia Commission on Medical Care Facilities, Certificate of Public Need, Concerning Reform of Certificate of Public Need Regulation or Health Facilities (Aug. 6, 1987), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-virginia-commission-medical-care-facilities-certificate-public-need-concerning/af-35.pdf)).
[33] *See id.* (citing the 1987 FTC staff comment to Virginia).
[34] *See id.* (*also citing* Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group (Oct. 26, 2015), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn-1.pdf).
[35] *See* Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1, Mar. 27, 2019, *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-alaska-senate-committee-health-social-services-certificate-need/v0800007_commission_testimoney_re_alaska_senate_committee_032719.pdf.
[36] ADMINISTRATION REPORT, *supra* note 11, cover letter, at 3.