If additional information is required contact: Jerri Murray, *http://www.DOJ.PRA@usdoj.gov,* Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, 2 Constitution Square, Room 2E–808, 145 N Street, NE., Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States et al. v. United Regional Health Care System; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States and State of Texas* v. *United Regional Health Care System,* Civil Action No. 7:11–cv–00030–0, which was filed in the United States District Court for the Northern District of Texas, Wichita Falls Division, on June 6, 2011, together with the response of the United States to the comment.

Copies of the comment and the response are available for inspection at the U.S. Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481); on the Department of Justice's Web site at *http://www.usdoj.gov/atr;* and at the Office of the Clerk of the United States District Court for the Northern District of Texas, Wichita Falls Division. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

In The United States District Court for the Northern District of Texas, Wichita Falls Division

United States Of America And State Of Texas, (RCO) Plaintiffs, V. United Regional Health Care System, Defendant.

Case No.: 7:11–cv–00030

Response Of Plaintiff United States To Public Comment On The Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (''APPA7 or ''Tunney Act''), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case. The single comment received agrees that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the Federal Register, pursuant to 15 U.S.C. § 16(d).

On February 25, 2011, the United States and the State of Texas filed a civil antitrust lawsuit against Defendant United Regional Health Care System (''United Regional'') challenging United Regional's contracts with commercial health insurers that effectively prevented insurers from contracting with United Regional's competitors (''exclusionary contracts''). The Complaint alleged that United Regional had unlawfully used those contracts to maintain its monopoly for hospital services, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. By effectively preventing most commercial health insurers from including in their networks other inpatient and outpatient facilities, the Complaint alleged that United Regional (1) delayed and prevented the expansion and entry of its competitors, likely leading to higher health-care costs and higher health insurance premiums; (2) limited price competition for price-sensitive patients, likely leading to higher health-care costs for those patients; and (3) reduced quality competition between United Regional and its competitors. The Complaint sought to enjoin United Regional from entering exclusionary contracts with insurers.

Simultaneously with the filing of the Complaint, the United States and the State of Texas filed a proposed Final Judgment and Stipulation signed by the plaintiffs and United Regional consenting to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. Pursuant to those requirements, the United States also filed its Competitive Impact Statement (''CIS'') with the Court on February 25, 2011; published the proposed Final Judgment and CIS in the Federal Register on March 10, 2011, see 76 Fed. Reg. 13209; and had summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, published in The Washington Post and Times Record News for seven days beginning on March 9, 2011, and ending on March 15, 2011. The sixty-day period for public comment ended on May 14, 2011. One comment was received, as described below and attached hereto.

I. THE INVESTIGATION AND PROPOSED RESOLUTION

The proposed Final Judgment is the culmination of an investigation by the Antitrust Division of the United States Department of Justice (''Department'') of United Regional's contracting practices with commercial insurers. As part of its investigation, the Department issued more than fifteen Civil Investigative Demands for documents. The Department reviewed the documents and other materials received, conducted more than 80 interviews, and took oral testimony of United Regional personnel. The Department carefully analyzed the information obtained and thoroughly considered all of the issues presented.

The Department found that beginning in 1998, United Regional responded to the competitive threat posed by the entry of a competing hospital, Kell West; and other outpatient-surgery facilities by systematically entering into exclusionary contracts with commercial health insurers. The precise terms of these contracts varied, but all shared the same anticompetitive feature: a significant pricing penalty if an insurer contracts with competing facilities within a region that is no larger than Wichita County. In general, the contracts offered a substantially larger discount off billed charges (e.g., 25%) if United Regional was the only local hospital or outpatient surgical provider in the insurer's network; and the contracts provided for a much smaller discount (e.g., 5% off billed charges) if the insurer contracted with one of United Regional's rivals.

Within three months after Kell West opened in January 1999, United Regional had entered into exclusionary contracts with five commercial health insurers, and by 2010, it had exclusionary contracts with eight insurers. In each instance, United Regional-not the insurer-required the exclusionary provisions in the contract. The only major insurer that did not sign an exclusionary contract with United Regional was Blue Cross Blue Shield of Texas (''Blue Cross''), by far the largest insurer in Wichita Falls and Texas.

Because United Regional is a ''must have'' hospital for any insurer that wants to sell health insurance in the Wichita Falls area, and because the penalty for contracting with United Regional's rivals was so significant, most insurers entered into exclusionary contracts with United Regional.

Consequently, United Regional's rivals could not obtain contracts with most insurers, except Blue Cross, which substantially hindered their ability to compete and helped United Regional maintain its monopoly in the relevant markets, to the detriment of consumers.

After reviewing the investigative materials, the Department determined that United Regional's conduct violated Section 2 of the Sherman Act, 15 U.S.C. § 2, as alleged in the Complaint. The proposed Final Judgment is designed to restore competition between health-care providers in the Wichita Falls MSA. Section IV of the proposed Final Judgment prohibits United Regional from using exclusivity terms in its contracts with commercial health insurers. In particular, United Regional is prohibited from (1) conditioning the prices or discounts that it offers to commercial health insurers on whether those insurers contract with other health-care providers, such as Kell West; and (2) preventing insurers from entering into agreements with United Regional's rivals. United Regional is also prohibited from taking any retaliatory actions against an insurer that enters (or seeks to enter) into an agreement with a rival health-care provider.

In addition, the proposed Final Judgment prohibits United Regional from offering other types of ''conditional volume discounts'' that could have the same anticompetitive effects as the challenged conduct. ''Conditional volume discounts'' are prices, discounts, or rebates offered to a commercial health insurer on condition that the volume of that insurer's purchases from United Regional meets or exceeds a specified threshold. Similarly, United Regional may not offer market-share discounts, e.g., discounts conditioned on an insurer's purchases at United Regional meeting a specified percentage of that insurer's total purchases, whether they apply retroactively or not, because such discounts can also be a form of anticompetitive pricing. Finally, United Regional may not use provisions in its insurance contracts that discourage insurers from offering products that encourage members to use other in-network providers (besides United Regional).

The proposed Final Judgment does, however, allow price discounts that are likely to be procompetitive. Section V of the proposed Final Judgment permits United Regional to offer above-cost incremental volume discounts. By permitting such discounts, the proposed Final Judgment ensures that United Regional can engage in procompetitiye efforts to compete for additional patient volume, while preventing United Regional from offering 'discounts that have the potential to exclude an equally efficient competitor.

II. STANDARD OF JUDICIAL REVIEW

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995); see also United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); United States v. InBev N.V./S.A., No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' United States v. BNS Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; InBev, 2009 U.S. Dist. LEXIS 84787, at *3; United States v. Alcoa, Inc., 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[1] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' SBC Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); United States v. Archer-Daniels-Midland Co., 272 F. Supp. 2d I, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' ''prediction as to the effect of proposed remedies, its perception of the

[1] Cf BNS, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); see generally Microsoft, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

market structure, and its views of the nature of the case'').

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see also United States v. Akan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459; see also InBev, 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. Microsoft, 56 F.3d at 1459–60. As the United States District Court for the District of Columbia confirmed in SBC Communications, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[2] Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: ''Mlle court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' SBC Commc'ns, 489 F. Supp. 2d at 11.[3]

III. SUMMARY OF PUBLIC COMMENT AND THE UNITED STATES' RESPONSE

During the sixty-day comment period, the United States received only one comment, submitted by the American Medical Association (''AMA''), which is attached to this Response. In its comment, the AMA expressed its support for the United States' and the State of Texas's analysis as well as the remedy articulated in the proposed Final Judgment, stating that the action, against United Regional ''represents an important step towards [reining] in hospitals that use their monopoly power to force exclusive dealing arrangements onto health insurers.'' AMA Comment at 1. The United States has carefully reviewed the comment and has determined that the proposed Final Judgment remains in the public interest.

The AMA is the largest association of physicians and medical students in the United States. The AMA's comment states that it concurs with several central points made in the Complaint and CIS. First, the AMA agreed with the Department's conclusion that the relevant product markets should be limited to inpatient hospital and outpatient surgical services sold to commercial health insurers. Although hospitals serve patients covered by both commercial health insurers and the government plans (Medicare, Medicaid, and TRICARE), the AMA agreed that a market limited to hospital services sold to commercial health insurers is well defined because ''[i]ndividuals who have commercial health insurance cannot switch over to Medicare or Medicaid because of price increases or output reductions in the commercial market.'' AMA Comment at 3. Thus, health-care providers can target a price increase to commercial health insurers because the insurers cannot shift to government rates.

Second, the AMA agreed that while the relevant product markets are limited to hospital services sold to commercial health insurers, the competitive-effects analysis should account for the ability of health-care providers to serve patients covered by other sources of payments—including the government plans. The AMA agreed that Medicare and Medicaid pay providers substantially less than commercial health insurers in the Wichita Falls MSA. Thus, as the Complaint and CIS make clear, the appropriate method to assess the contracts' effect on competition is to assess the degree to which the contracts have foreclosed access to payments for commercially insured patients and account for the foreclosed percentage of profits from all payers.

Third, the AMA agreed with the method used by the Department to determine whether United Regional's discounts tied to exclusivity were procompetitive or anticompetitive. According to the AMA, in this case ''the Antitrust Division correctly looked at United Regional's costs, as opposed to its rivals' costs.'' AMA Comment at 5. In this case, the Department applied the total discount United Regional offered to health insurers to the patient volume that United Regional would actually be at risk of losing if an insurer were to choose non-exclusivity (the ''contestable volume''). In applying this ''price-cost'' test, which was similar to the ''discount-attribution'' test adopted in Cascade Health Solutions v. PeaceHealth, 515

[2] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[3] See United States v. Enova Corp., 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); United States v. Mid-Am. Dairymen, Inc., 1977–1 Trade Cas. (CCH)11 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298 at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

F.3d 883, 906–909 (9th Cir. 2008), the Department determined that the prices charged by United Regional in exchange for exclusivity were below any plausible measure of United Regional's incremental costs.

Finally, the AMA endorsed the proposed Final Judgment, noting that it strikes the right balance between preventing United Regional from engaging in anticompetitive conduct while assuring that United Regional's rivals must still provide their services in an efficient manner in order to compete.

IV. CONCLUSION

After reviewing the AMA's public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the AMA's comment and this response are published in the **Federal Register.**

Dated: June 6, 2011.

Respectfully submitted,

s/Scott I. Fitzgerald

Scott I. Fitzgerald (WA Bar #39716)

Amy R. Fitzpatrick (DC Bar #458680)

Attorneys for the United States, U.S. Department of Justice, Antitrust Division, Litigation I, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530, (202) 353–3863, Scott.Fitzgerald@usdoj.gov

CERTIFICATE OF SERVICE

On June 6, 2011, I, Scott I. Fitzgerald, electronically submitted a copy of the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system for the court. I hereby certify that I caused a copy of the foregoing document to be served upon Defendant United Regional Health Care System electronically or by another means authorized by the Court or the Federal Rules of Civil Procedure.

s/Scott I. Fitzgerald

Scott I. Fitzgerald (WA Bar #39716)

Attorney for the United States, U.S. Department of Justice, Antitrust Division, Litigation I, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530

April 20, 2011.

BY E-MAIL

Mr. Joshua H. Soven, Chief of the Litigation I Section, Antitrust Division, United States Department of Justice, 450 5th Street, N.W., Suite 4700, Washington, D.C. 20001.

Re: Comments to Proposed Consent Judgment in U.S. v. United Regional Health Care System

Dear Mr. Soven:

The action by the Antitrust Division of the Department of Justice (''Antitrust Division'') against United Regional Health Care System (''United Regional'') represents an important step towards reigning in hospitals that use their monopoly power to force exclusive dealing arrangements onto health insurers in order to prevent entry by firms that would compete against the monopoly hospital.[1] In *United States, et al.,* v. *United Regional Health Care System,* 7:11-cv-00030 the Antitrust Division alleged that United Regional offered discriminatory bundled price discounts to health insurers in order to obtain exclusive dealing arrangements that prevented or delayed entry into the market. Specifically, health insurers agreeing to an exclusive arrangement with United Regional would received a large discount on all of the services purchased from United Regional. Health insurers that did not agree to an exclusive arrangement would receive a significantly smaller discount from United Regional. Not surprisingly, every commercial health insurer operating in United Regional's market (except for Blue Cross Blue Shield of Texas (''Blue Cross'') chose an exclusive dealing arrangement with United Regional. The Antitrust Division alleged that these exclusive dealing arrangements played an important role in maintaining United Regional's monopoly power.

On February 25, 2011 the Antitrust Division filed a Proposed Final Judgment that is designed to end United Regional's use of discriminatory bundled price discounts. The American Medical Association (''AMA'') supports the Proposed Final Judgment and the Antitrust Division's efforts to prevent hospitals with monopoly power from foreclosing entry through the use of the discriminatory bundled price discounts.

The United Regional matter highlights how hospitals with monopoly power can use certain types of price discounts to make it impossible for physicians to compete on a level playing field. The Antitrust Division's action against United Regional shows how this lack of competition ultimately hurts consumers by locking in place high prices and lower quality.

A. The Structure of Competition In Health Care Markets

Throughout the country, physicians play a crucial role in facilitating the entry of new facilities that compete against hospitals with entrenched monopoly power. In order to compete against an entrenched monopolist, however, physicians need access to commercial health insurers that control access to patients.

Providers of medical services compete for contracts with health insurers. Because patients either cannot or will not use out-of-network providers, competition between providers for patients is significantly affected by the outcome of competition between providers for health insurance contracts. Health care markets cannot function in a competitive manner if either form of competition is monopolized or distorted by anticompetitive agreements.

Competition for health insurance contracts is particularly susceptible to anticompetitive conduct because commercial health insurance markets and hospital markets have experienced significant consolidation over the last 20 years. The consolidation by hospital and health insurance markets has given each side opportunities to limit the competition they face. Throughout the country, there are bilateral monopolies in which hospitals and health insurers jointly agree not to contract with each other's rivals in order to prevent entry into either the hospital or the health insurer market. Such arrangements are becoming more common and have the effect of mutually reinforcing the market power wielded by hospitals and health insurers.

The exclusive dealing arrangements challenged in United Regional were one-sided, in that they protected the hospital from entry, but were not designed to also prevent entry into the health insurance market. The anticompetitive effects created by United Regional's actions were still significant, and the Antitrust Division's enforcement action represents a definite step in the right direction.

B. Provider Access to Medicare and Medicaid Is Not a Substitute for Access to Commercial Health Insurance

An important issue raised by the Antitrust Division's action against United Regional is the relevance of Medicare and Medicaid in the antitrust analysis of health care markets. The Antitrust Division correctly concluded

[1] The American Medical Association understands that no hearing or trial has occurred in United Regional, and that United Regional has not admitted the truth of the allegations contained in the Antitrust Divisions' Complaint or Competitive Impact Statement. Indeed, the AMA understands that United Regional denies many of the facts alleged by the Antitrust Division. The AMA is not taking a position, one way or the other, concerning the truth of the allegations made by the Antitrust Division against United Regional. The AMA's comments are based on and limited to the allegations made by the Antitrust Division.

that the existence of Medicare and Medicaid did not prevent United Regional from possessing monopoly power. Further, access to those government programs by providers did not prevent United Regional's exclusive dealing arrangements from barring entry, and, thus, from limiting the provider choices available to consumers.

The Antitrust Division defined the relevant product markets affected by United Regional's anticompetitive practices as (a) ''general acute-care inpatient services * * * sold to commercial health insurers,'' and (b) ''the market for outpatient surgical services sold to commercial health insurers.'' The Antitrust Division correctly concluded that the existence of Medicare and Medicaid do not prevent the exercise of monopoly power by a hospital against commercial health insurers or patients.

Individuals who have commercial health insurance cannot switch over to Medicare or Medicaid because of price increases or output reductions in the commercial market. Thus, if a health insurer excludes various providers from its provider panel, patients cannot defeat those limitations by switching to Medicare or Medicaid. Access to the Medicare and Medicaid programs is defined by federal law, and does not turn on the quality, price or comprehensiveness of commercial health insurance products.

Defining a relevant product market, however, is only part of the analysis. While Medicare and Medicaid will not prevent a hospital from imposing onerous terms on health insurers that adversely affect patient choice, the Antitrust Division was correct in asking the next question as to whether this conduct actually could prevent rival hospital and outpatient centers from entering the market. One could argue that programs such as Medicare and Medicaid provide a large source of patients upon which a new potential rival hospital or outpatient center could base a business plan. Such an argument, however, is fallacious because Medicare and Medicaid cannot fund new entry given the way those programs are currently structured.

Medicare and Medicaid pay providers substantially less than commercial health insurers, and in many instances, pay providers less than the actual cost of providing a medical service. It is commonly recognized that hospitals and outpatient centers have to cross-subsidize their Medicare and Medicaid services with the profits earned from patients covered by commercial health insurance. Medicare and Medicaid, therefore, cannot function as facilitators of new entry into the market.

The Antitrust Division was correct in concluding that ''foreclosure analysis properly focuses on the profitability of the various payment sources available to health-care providers.'' Without access to the profitable sources of business in the health care market, potential or actual competitors cannot expand into new markets or grow to a level where they can seriously challenge the incumbent monopolist. The Antitrust Division was equally correctly when it concluded that access to Medicare and Medicaid by United Regional's actual or potential rivals was not an adequate substitute to the private commercial health insurers that United Regional locked up with exclusive contracts.

The Antitrust Division stated, for example, that the insurers with whom United Regional had exclusive contracts ''account for approximately 30% to 35% of the profits that United Regional earns from all payer-including the government payers-even though they account for only about 8% of United Regional's total patient volume.'' Without access to the most profitable segment of the health care market, United Regional's primary rival, Kell West, could not hope to develop into an effective competitor: * * * without the exclusionary contracts, Kell West likely would have used the profits that it obtained from contracts with the excluded commercial health insurers to expand sooner, and would also likely have added more beds and additional services, such as additional intensive-care capabilities, cardiology services, and obstetric services. Kell West has considered expansion into additional services on numerous occasions, but has been limited in its ability to expand due to its lack of access to commercially insured patients.

C. United Regional's Bundled Discounts Were Anticompetitive

The Antitrust Division alleged that United Regional used its market power to make it ''one of the most expensive hospitals in Texas.'' United Regional understood that its monopoly pricing would attract new entry, and it took steps to maintain its monopoly position by creating barriers to entry by using discriminatory bundled price discounts to obtain exclusive dealing arrangements from commercial health insurers.

According to the Antitrust Division, United Regional established a dual track pricing structure for health insurers. If a health insurer agreed to exclusivity, the health insurer received a premium discount on all of the services provided by United Regional. If a health insurer did not agree to exclusivity, the health insurer would receive a significantly smaller discount on all of the services it paid for on behalf of its policyholders. United Regional's bundled discount arrangement led to exclusive dealing arrangements with health insurers because United Regional's rivals did not and could not offer the full line of services that United Regional provided. United Regional's rivals could not match the total value of the discount United Regional offered. While the health insurer would get a comparable price discount on the services on which United Regional and its rival competed, the health insurer would lose the United Regional discount on all of United Regional's services if the health insurer abandoned exclusivity. As a result, a rival would have to offer a health insurer a discount substantially higher than the discount offered by United Regional. Only in this manner could a rival compete against the total value of the discount offered by United Regional. None of United Regional's actual or potential rivals could offer health insurers a discount large enough to make the health insurer abandon its exclusive dealing arrangement with United Regional. In fact, the total value of the discount United Regional offered was so large that its rivals would have to offer health insurers prices that would almost certainly be substantially below cost, and therefore would be unsustainable.

The Antitrust Division claims that United Regional's exclusive dealing-dependent pricing structure largely succeeded in foreclosing competition. All of the commercial health insurers in the area entered into exclusive arrangements, except for Blue Cross. Blue Cross was apparently large enough that it could off-set United Regional's market power and negotiated discounts without having to agree to an exclusive arrangement. The ability of United Regional's rivals to contract with Blue Cross apparently allowed them to survive in the market, but did not give them the ability to effectively compete against United Regional.

There is nothing inherently wrong with offering attractive price discounts to customers, and in many cases price discounts are procompetitive. Courts and economists, however, have recognized that price discounts are sometimes anticompetitive. The Antitrust Division correctly distinguished United Regional's anticompetitive bundled price discounts from procompetitive price discounts. To do this, the Antitrust Division correctly looked at United Regional's costs, as

opposed to its rivals' costs. Specifically, the Antitrust Division determined the patient volume for which United Regional and its rivals actually competed, and then applied the total discount United Regional offered to health insurers to that ''contestable volume.'' If the total discount, when applied to the contestable volume, results in the contestable volume being sold at a loss, a portion of the discount is then equivalent to a market control premium. The Antitrust Division was correct in concluding that United Regional was offering health insurance companies a market control premium in order to maintain its monopoly.

Finally, the AMA supports the narrowly tailored limitations the Antitrust Division set forth in the Proposed Final Judgment. Overall, the Proposed Final Judgment will prevent United Regional from ceding back to commercial health insurers a portion of its monopoly profits in order to maintain its monopoly power. The Proposed Final Judgment, however, does not prevent United Regional from offering incremental price discounts that allow it to offer discounted prices that are in line with its cost structure. Thus, potential rivals to United Regional will have to provide their services in an efficient manner in order to compete against United Regional on price when trying to strike deals with commercial health insurers. United Regional will also have to compete on the basis of the efficiencies it can offer, rather than on the raw use of its market power.

Overall, the Proposed Final Judgment will not have the effect of propping up inefficient firms that can only survive in the market because United Regional is unable to freely reduce its prices. Instead, the pricing restraints placed on United Regional should prevent it from using bundled discounts in order to limit the competition it faces from truly efficient firms.

Sincerely,

Henry S. Allen, Jr.

Senior Attorney, Advocacy

[FR Doc. 2011–14628 Filed 6–14–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–NEW]

Agency Information Collection Activities; Proposed Collection, Comments Requested; Applicant Information Form (1–783)

ACTION: 60-day Notice of Information Collection for Review.

The Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) Division will be submitting the following information collection renewal to the Office of Management and Budget (OMB) for review in accordance with established review procedures of the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until August 15, 2011. This process is conducted in accordance with 5 CFR 1320.10.

All comments, suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Rachel K. Hurst, Management Program Analyst, FBI, CJIS Division, Biometric Services Section (BSS), Support Services Unit (SSU), Module E–1, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306; or by facsimile to (304) 625–5392.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8-digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Rachel Hurst at 1–304–625–2000 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have a practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of information collection:* Approval of existing collection in use without an OMB control number.

(2) *The title of the form/collection:* Applicant Information Form.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* 1–783; CJIS Division, FBI, DOJ.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals. This collection is necessary for an individual to request a copy of their personal identification record to review it or to obtain a change, correction, or an update to the record.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Annually, the FBI receives 225,000 identification requests, therefore there are 225,000 respondents. The form requires three minutes to complete.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 11,250 burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Justice Management Division, United States Department of Justice, Policy and Planning Staff, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, United States Department of Justice.

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