U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 12, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed the Department of Justice's responses to questions directed to J. Bruce McDonald, Deputy Assistant Attorney General for the Antitrust Division. The questions arose after Mr. McDonald's testimony at the Committee's hearing on September 6, 2006 entitled "Examining Competition in Group Health Care." We hope that this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Member

Questions for the Record for
Deputy Assistant Attorney General J. Bruce McDonald
Hearing on "Examining Competition in Group HealthCare"
Senate Committee on the Judiciary
September 6, 2006

Question from Senator Schumer

At the Hearing, we examined the impact of consolidated health insurance companies on physicians. We did not, however, examine the effect on hospitals. In New York, the consolidation of health insurers has been dramatic. We have recently seen the acquisition of Empire Blue Cross/ Blue Shield by WellPoint, the acquisition of Oxford by United Health Group, and the proposed merger of the HIP Health Plans with Group Health Incorporated.

This activity exacerbates a disequilibrium, at least in my State, between the bottom lines of the health insurers and the bottom lines of our not-for-profit and public hospitals. For instance, last year the health insurance plans in New York State enjoyed a profit of $1.3 billion, while the hospitals have been in the red for seven consecutive years. Hospitals are held captive by huge national health plans, which need to sign contracts with plans like WellPoint, which has 34 million customers. And yet, our antitrust laws prohibit hospitals from banding together to negotiate prices.

a. How can we expect a hospital to negotiate a fair deal with a behemoth like WellPoint?

b. Should we amend our antitrust laws to allow struggling hospitals that serve our inner city, suburban, and rural communities to band together and negotiate fair payment terms with these huge national companies?

Answer: Although the hearing may have emphasized the potential effects of health insurance mergers on competition for the purchase of physician services, the potential effects on competition for the purchase of hospital services are no less important. When the Department investigates a health insurer merger, we focus on the effects in all relevant markets. As with physician services, if a merger would result in the price paid for hospital services being depressed below competitive levels, consumers are deprived of quality and choice and an enforcement action would be warranted to prevent that from occurring.

We do not believe creating an antitrust exemption to allow competing hospitals to jointly negotiate reimbursement rates is an effective answer to any concerns one may have regarding the size of health insurers. Experience has repeatedly demonstrated that consumers benefit from competition in obtaining lower prices, better quality, and more choices. The antitrust laws are the primary protector of competition, and while an antitrust exemption may work to benefit the

select group that gets license to disregard those laws, it generally does so at a cost to competition and consumers. Markets benefit from more competition, not less. Rather than alleviate the adverse effects of any existing market power, an antitrust exemption is likely to increase those adverse effects and shift them even more onto consumers. Accordingly, we believe the better approach is to be vigilant in investigating health insurer mergers so as to prevent the unlawful acquisition of monopsony power, and to investigate reports of potential collusive or exclusionary conduct by health insurers and bring enforcement action where warranted.

Questions from Senator Specter

Question 1: The Justice Department ordered divestitures in several geographic markets as a condition of approving United Health's recent acquisition of PacifiCare. Do you believe that the market for the purchase of physician services by health insurers has become highly concentrated in some geographic markets? Do you think that the Department is likely to take a more aggressive posture toward future mergers involving the market for physician services?

Answer: The Department reviews each merger, and each affected market, on a case-by-case basis. In our investigation of the UnitedHealth/PacifiCare merger, we determined that the merger as proposed would result in competitive harm with regard to reimbursement rates for physicians in certain markets, and therefore we insisted on divestitures to preserve competition in those markets. It is not possible to make general statements about whether mergers that have not yet been proposed will have such anticompetitive effects, but the Department will closely investigate mergers that raise any such competitive issues.

Question 2: In 2004, the Justice Department approved United health's acquisition of Oxford Health and Anthem's merger with WellPoint. Has the Department done any follow-up analysis to determine what the effect of those mergers has been? If so, has the Department noted either lower reimbursement rates or higher premium rates in the affected markets?

Answer: The Department remains on the lookout for potentially anticompetitive conduct that might warrant further investigation or enforcement action in these markets. We encourage individuals and businesses who believe they have evidence of a possible antitrust violation to bring that information to the Department for our review. With respect to the particular mergers in your question, the Department has not performed any post-merger analysis of the type you identified. The Department will continue to be vigilant in monitoring the health insurance marketplace for mergers and other activity that could potentially harm competition.

Question 3: Insurers assert that mergers generate efficiencies and reduce the cost of health care. Has the Department of Justice considered holding companies to their promises – decreased premium growth rates, increased payments to physicians, and so on – as a condition of merger approval?

Answer: Mergers often do generate efficiencies, and the Department takes efficiencies into account as appropriate in evaluating a proposed merger, provided the merging parties can show that the efficiencies likely will result from the merger and are not reasonably achievable absent the merger.

It is generally not practical or desirable to impose price regulation or other market regulation that would require prolonged interference in the marketplace. Government regulation of prices is inconsistent with the primary goal of antitrust, to let market forces determine pricing and output decisions. Furthermore, such regulation can often be subject to evasion that is hard to identify and police. For example, a merged firm that has agreed not to raise price may instead reduce service. Consumers in such situations are no less harmed, but proving that lower quality service was provided likely is more difficult and would require more substantial regulatory oversight. For these reasons, the strongly preferred approach is to identify structural problems with a proposed merger that are likely to substantially lessen competition, and to insist on structural remedies – *i.e.*, divestitures – that fix those structural problems, instead of seeking conduct remedies that may prove harmful or ineffectual.