

## Ways & Means Committee Holds Hearing on Hospital Consolidation and Physician Integration

September 21, 2011

One of the primary objectives of the recently enacted health reform legislation was to promote hospital and physician alignment, coordination and integration. Unsurprisingly, hospitals and physicians have responded to these new incentives with increased merger activity and other integration strategies. Now, in an unexpected twist, the usually business-friendly, Republican-controlled U.S. House of Representatives Committee on Ways and Means is examining consolidation activity within the health industry to determine the effect these transactions are having on efficiency and health care costs.

Over the years, hospital and insurance company mergers and physician group arrangements have been viewed through a relatively positive policy lens. While certain competitive pressures between the various health sectors exist, there has been general agreement that consolidation reduces redundancy and inefficiency, and therefore costs. However, recent studies suggest that consolidation may be leading to higher costs and lower quality. On September 9, 2011, the U.S. House of Representatives Committee on Ways and Means Subcommittee on Health held a hearing to examine stepped-up consolidation in the wake of health reform legislation.

Subcommittee on Health Chairman Wally Herger (R-CA) and Ranking Member Pete Stark (D-CA) both expressed significant concern over harmful effects resulting from health industry consolidation. Chairman Herger cited a Rand Corporation study published in the September 2011 edition of *Health Affairs* as evidence that provider consolidation limits beneficiary choice, compromises patient care and drives up prices.

Chairman Herger also spoke critically of the health reform legislation, claiming it was fueling harmful consolidation. The Patient Protection and Affordable Care Act incentivizes integration and consolidation in a number of ways, not the least of which are programs that promote accountable care organizations and Medicare reimbursement changes, which incent providers to consolidate services in order to strengthen their financial positions to better absorb impending cuts.

A panel of witnesses testified their concerns about concentrated markets with no evidence of savings being returned to patients. Martin Gaynor, a professor of economics and health policy at Carnegie Mellon University, offered a number of policy initiatives to constrain consolidation, including greater antitrust enforcement and price/rate regulation. Paul Ginsburg, president for the Center for Studying Health System Change, pointed to state legislation to ban some hospital contracting practices as an example of initiatives that Congress should consider. Other

witnesses suggested that Congress examine the tax treatment of employer-sponsored health insurance and reduce tax subsidies for high-cost health benefits as a way to influence market conduct.

Noticeably absent from the hearing were providers and payors. While groups like the American Hospital Association submitted testimony for the record, they were not represented on the panel of witnesses.

As Congress continues to examine the drivers of consolidation and the potential consequences, health reform has also reinforced the focused attention on health care market consolidation already taking place at the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ), both of which are responsible for investigating and potentially challenging mergers and acquisitions that may substantially lessen competition. The FTC currently has an active docket of investigations and litigation involving hospital mergers, and is understood to be reviewing consolidations of competing physician organizations as well. In the health care sector, the DOJ principally addresses commercial payer mergers and contracting practices, and likewise is pursuing an active enforcement agenda .

With increased consolidation on the horizon, the DOJ and FTC are expected to continue to closely scrutinize, and potentially seek to block, health care industry mergers and acquisitions that, in the agencies' view, would create market dominance and restrain competition. On the provider side, the FTC's primary concern is that market power may drive up prices paid by health plans and their insured population (in the form of higher premiums and co-pays and reduced access). On the payer side, the DOJ analyzes whether mergers will enable health plans to drive provider prices down to a less than competitive level, or to raise prices to employers or premiums to enrollees.

While some of the studies discussed at the hearing were only recently published, the principal argument that competitor consolidations may lead to anticompetitive effects is, of course, not novel. In the end, the price and other potential competitive effects resulting from a merger depend on the facts and circumstances applicable to that specific merger and the market in which it occurs, as well as the extent to which the transaction will create cost-saving efficiencies and quality enhancements. Hearings such as this one can and do shed light on broad perspectives concerning competitor consolidations, however, while serving to remind the FTC and DOJ of Congress' interest in ensuring the competitive operation of markets inside and outside health care.

McDermott Will & Emery has spoken with Ways and Means Committee members and staff about next steps with regard to legislative and regulatory responses to consolidation. These conversations reveal that there appears to be no immediate plans to advance legislation in this area this year, but Congress will continue to closely monitor market dynamics, and plans could change if more unfavorable data emerges.

In 2012, Congress is expected to evaluate various policies including but not limited to:

- Increasing transparency of price and quality of services, and making provider price data more readily available
- Repealing aspects of the health reform law that drive consolidation
- Modifying antitrust laws
- Amending tax policies

Additionally, Congress, the DOJ and FTC will continue to scrutinize pharmaceutical, hospital, physician, insurance plan and pharmacy benefit manager mergers and acquisitions to determine how these consolidations affect the quality and cost of delivering health care.

Even in the absence of legislation, Congress can take steps to delay or disrupt proposed consolidations. Targeted scrutiny of individual transactions—including oversight hearings, document requests or unfavorable media statements—can slow or disrupt transactions, and add to transaction costs.

In light of this heightened scrutiny, organizations contemplating mergers or other alignment activities should consider integrating congressional strategies into consolidation plans. Apprising members of Congress in advance of consolidation activity, for example, may help inoculate against undesirable scrutiny and prepare elected officials to defend consolidation activity, if such defense becomes necessary. Additionally, hospitals and physicians planning integration steps should consider how such consolidation is likely to impact the issues of concern to Congress—quality, cost, access—and be prepared with data and messaging to advance that story should Congress choose to examine a proposed merger or alignment strategy. McDermott's Health Industry Advisory and Government Strategies Practice Groups can advise companies on proactive congressional intervention strategies to minimize disruptive congressional or agency scrutiny.

Click [here](#) to submit testimony to the Health Subcommittee by Friday, September 23, 2011.

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