AMERICAN ECONOMIC LIBERTIES PROJECT

Before the Department of Justice, Department of Health and Human Services and the Federal Trade Commission

Response to Request for Information
Docket No. ATR 102

Written Comments from the American Economic Liberties Project
Solicitation for Public Comment on Consolidation in Health Care Markets

June 5, 2024

We submit this comment in response to the Department of Justice ("DOJ"), Department of Health and Human Services ("HHS"), and Federal Trade Commission ("FTC") joint request for information ("RFI") regarding consolidation in health care markets. The American Economic Liberties Project ("Economic Liberties") is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States.

We write to urge the DOJ, HHS, and FTC to conclude the information-gathering stage of their coordination and swiftly take concrete, decisive actions to stop harmful consolidation and monopolistic practices in the health care sector. People die when government policymakers actively maintain the status quo or pursue pseudo-solutions such as the "transparency dodge."

As we will show in this comment, extensive information responsive to the RFI already exists and is readily available. Consolidation in healthcare markets has harmed patients, providers, and workers, while increasing costs for employers that provide health insurance, as well as taxpayers through Medicaid and Medicare. DOJ, FTC, and HHS can act within their existing authorities right now to address the problem of consolidation in healthcare.

Authorities must not lose sight of the big picture: America spends nearly twice as much on healthcare as other countries, with far worse outcomes, vast disparities, and an overworked and underpaid caretaking workforce. Solving this problem requires a robust "industrial policy" for health care--one that restores power to clinicians and patients, structures health care markets to foster *fair* competition, and builds and allocates resilient health care infrastructure that meets care needs and is insulated from corporate extraction. The administration can take a range of actions, today, to further this agenda, including enforcing antitrust laws, banning price discrimination practices that drive consolidation, adopting "Glass-Steagall" concepts in public programs, ending

corporate insurance subsidies, creating a public option for prescription drugs, and structurally addressing abusive prior authorization tactics.[1]

Given the ample existing literature documenting the mechanics of consolidation and monopolistic practices as well as the harms they have wrought, there is no "need for additional proceedings" such as "workshops" or other prolonged information-gathering processes. Every additional day of delay in taking action is another day of letting the harms of consolidation compound.

A. Existing Sources Already Thoroughly Address the Information the RFI Seeks

Topic 1: Effects of Consolidation

Many studies and reports have already documented how consolidation harms each of the stakeholder groups highlighted by this question, including patients,[2] public and private payers,[3] providers, health care workers, and support staff,[4] and employers who provide health insurance for their employees.[5]

Patients suffer higher prices and worsened care in consolidated markets, with claims being unjustly and even automatically denied, prior authorization being weaponized to put profit over health outcomes, and noncompete agreements forcing patients to find new providers.[6] Public payers (i.e., Medicare and Medicaid) overpay vertically integrated insurance conglomerates

---

[1] *See*, e.g., Hayden Rooke-Ley, "Medicare Advantage and Vertical Consolidation in Health Care," American Economic Liberties Project, April 2024, p. 8, https://www.economicliberties.us/wp-content/uploads/2024/04/Medicare-Advantage-AELP.pdf ("AELP Medicare Advantage Report").

[2] *See,* e.g., C.E. O'Hanlon, "Impacts of Health Care Industry Consolidation in Pittsburgh, Pennsylvania: A Qualitative Study," Inquiry, Dec. 2020, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7691888/; Sara Sirota, "The Harms of Hospital Mergers and How to Stop Them," American Economic Liberties Project, April 26, 2023, pp. 3-7, https://www.economicliberties.us/our-work/the-harms-of-hospital-mergers-and-how-to-stop-them/ ("AELP Hospital Mergers").

[3] Three Axis Advisors, "Illinois Medicaid managed care pharmacy analysis," March 13, 2019, https://www.3axisadvisors.com/projects/2019/3/12/illinois-medicaid-managed-care-pharmacy-analysis.

[4] Amy Phillips, "What the research says about the impacts of hospital consolidation across the United States," Washington Center for Equitable Growth, December 6, 2023, https://equitablegrowth.org/what-the-research-says-about-the-impacts-of-hospital-consolidation-across-the-united-states/.

[5] *See,* e.g. Zachary Levinson, Jamie Godwin, Scott Hulver, Tricia Neuman, "Ten Things to Know About Consolidation in Health Care Provider Markets," Kaiser Family Foundation, April 19, 2024, https://www.kff.org/health-costs/issue-brief/ten-things-to-know-about-consolidation-in-health-care-provider-markets/ ("KFF Consolidation in Provider Markets"); Sam Hughes, Emily Gee, Nicole Rapfogel, "Health Insurance Costs Are Squeezing Workers and Employers," Center for American Progress, November 29, 2022, https://www.americanprogress.org/article/health-insurance-costs-are-squeezing-workers-and-employers/.

[6] American Economic Liberties Project and Innovation for Medicines, Access, and Knowledge, "The Costs of Pharma Cheating," May 2023, https://www.economicliberties.us/wp-content/uploads/2023/05/AELP_052023_PharmaCheats_Report_FINAL.pdf; Tamara B Hayford, "The Impact of Hospital Mergers on Treatment Intensity and Health Outcomes," November 18, 2011, https://onlinelibrary.wiley.com/doi/10.1111/j.1475-6773.2011.01351.x; William F Sherman, Akshar H Patel, Bailey J Ross, et. al, "The Impact of a Non-Compete Clause on Patient Care and Orthopedic Surgeons in the State of Louisiana: Afraid of a Little Competition?," October 14, 2022, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9569414/.

billions of dollars a year because these insurers are able to game the system under Medicare Advantage with increased consolidation,[7] while private payers (i.e., private insurance companies) are price gouged by consolidated hospital systems and private equity rollups.[8] Providers are often confronted with a choice between being bought out by a large healthcare conglomerate where they lose independence and the ability to exercise their own judgment to ensure high quality of care– or closing their business.[9] Health care workers, including nurses and pharmacy workers, often suffer from suppressed wages and fewer job options.[10] Employers who provide health insurance benefits for their employees are paying higher costs each year as they have less bargaining power, while their employees have fewer options and worse coverage.[11]

Topic 2: Claimed Business Objectives for Transactions

Similarly, there are already well-documented examples of consolidating healthcare transactions– particularly those spearheaded by private equity companies – that not only do not meet the touted goals and benefits of consolidation but worsen the quality of care.[12]

The consolidation of hospitals leads to higher prices, worse health outcomes, closures and reduced access to care, lower wages for staff, and poorer health coverage for privately insured employees.[13] The vertical combination of payer-providers allows conglomerates to steer patients

---

[7] *See,* e.g. AELP Medicare Advantage Report at pp. 11-17.

[8] *See,* e.g. KFF Consolidation in Provider Markets; Hoag Levins, "Hospital Consolidation Continues to Boost Costs, Narrow Access, and Impact Care Quality," University of Pennsylvania, Leonard Davis Institute of Health Economics, January 19, 2023, https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality/; The Federal Trade Commission, "FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas," press release, September 21, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across; Linda Blumerg and Kennah Watts, "Evidence on Private Equity Suggests that Containing Costs And Improving Outcomes May Go Hand-In-Hand," Health Affairs, April 23, 2024, https://www.healthaffairs.org/content/forefront/evidence-private-equity-suggests-containing-costs-and-improving-outcomes-may-go-hand.

[9] *See,* e.g., AELP Medicare Advantage Report at p. 38.

[10] Amy Phillips, "What the research says about the impacts of hospital consolidation across the United States," Washington Center for Equitable Growth, December 6, 2023, https://equitablegrowth.org/what-the-research-says-about-the-impacts-of-hospital-consolidation-across-the-united-states/#:~:text=Healthcare%20providers%2C%20specifically%20nurses%20and,wages%20and%20decreased%20job%20mobility.

[11] *See,* e.g. AELP Hospital Mergers.

[12] Fred Schulte, "Sick Profit: Investigating Private Equity's Stealthy Takeover of Health Care Across Cities and Specialties," KFF Health News, November 14, 2022, https://kffhealthnews.org/news/article/private-equity-takeover-health-care-cities-specialties/.

[13] *See,* e.g. AELP Hospital Mergers; Austin Frakt, "Hospital Mergers Improve Health? Evidence Shows the Opposite," The New York Times, February 11, 2019, https://www.nytimes.com/2019/02/11/upshot/hospital-mergers-hurt-health-care-quality.html; Martin Gaynor, Farzad Mostashari, and Paul B Ginsburg, "Making Health Care Markets Work: Competition Policy for Health Care," The Brookings Institution, April 2017, https://www.brookings.edu/wp-content/uploads/2017/04/gaynor-et-al-final-report-v11.pdf; Arthur H Gale, "Bigger But Not Better: Hospital Mergers Increase Costs and Do Not Improve Quality," January 2015, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6170097/.

into their own subsidiaries.[14] At the same time, consolidation of pharmacy benefit managers (PBMs) and group purchasing organizations (GPOs) leads to higher drug prices, fewer pharmacies, fewer supplies and manufacturers, and less choice for patients.[15]

As for whether consolidation delivers "innovation" benefits, a classic example belying this claim is the dialysis industry. The dialysis duopoly cornered "a miraculous life-saving medical innovation of the 1960s"[16] and turned the market into a technologically stagnant area where "changes have been primarily incremental and have not fundamentally transformed care delivery."[17] The dialysis market is now a "legal morass full of pointless death and moral injury."[18]

Simply put, the claimed benefits of consolidation are no more than smoke and mirrors.

Topic 3: Notable Transactions

The types of entities that cause harm and the typical targets of harmful transactions are no mystery. Private equity, in particular, has a history of rolling up providers.[19] Hospitals also have a track record of swallowing up providers, a trend that insurers have begun to follow in recent years. Such dynamics are detailed in the sources cited for previous topics.

Private Equity

Private equity ownership increases prices in health care.[20]

The FTC's own lawsuit[21] against U.S. Anesthesia Partners and private equity firm Welsh, Carson, Anderson & Stowe provides a stark illustration of the dangers of corporate ownership of medical

---

[14] *See,* e.g. AELP Medicare Advantage Report.

[15] Zach Freed, "The Pharmacy Benefit Mafia: The Secret Health Care Monopolies Jacking Up Drug Prices and Abusing Patients and Pharmacists," American Economic Liberties Project, https://www.economicliberties.us/wp-content/uploads/2022/06/2022-6-22-PBM-Quick-Take.pdf; Sara Sirota, "The Dirty Secret of Drug Shortages," American Economic Liberties Project, October 2023, https://www.economicliberties.us/wp-content/uploads/2023/10/20230720-AELP-DrugShortages_Brief_v7.pdf

[16] Matt Stoller, "The Dirty Business of Clean Blood," BIG, Feb. 3, 2024, https://www.thebignewsletter.com/p/the-dirty-business-of-clean-blood.

[17] K.F. Erickson et al, "Market Consolidation and Innovation in US Dialysis." Adv Chronic Kidney Dis. 2022 Jan;29(1):65-75, https://pubmed.ncbi.nlm.nih.gov/35690407/

[18] Matt Stoller, "The Dirty Business of Clean Blood," BIG, Feb. 3, 2024, https://www.thebignewsletter.com/p/the-dirty-business-of-clean-blood.

[19] HMS Communications, "Care riskier for patients at private equity hospitals," The Harvard Gazette, January 2, 2024, https://news.harvard.edu/gazette/story/2024/01/healthcare-riskier-for-patients-at-private-equity-hospitals/.

[20] Haizhen Lin, Elizabeth L Munnich, et. al, "Private equity and healthcare firm behavior: Evidence from ambulatory surgery centers," Journal of Health Economics, September 2023, https://www.sciencedirect.com/science/article/abs/pii/S0167629623000784; Yashawswini Singh, Zirui Song, et. al, "Association of Private Equity Acquisition of Physician Practices With Changes in Health Care Spending and Utilization," September 2, 2022, https://pubmed.ncbi.nlm.nih.gov/36218927/.

[21] The Federal Trade Commission, "FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas," press release, September 21, 2023, https://www.ftc.gov/news-

practices. Private equity roll-ups, claiming to generate "synergies" and improve "efficiency" instead typically lead to price hikes that squeeze patients and providers without improving quality or health outcomes.

Private equity firm Apollo Global Management's ownership of two of the largest hospital systems in the country – Lifepoint Health and ScionHealth – has led to cuts in services, layoffs, poor quality ratings, and investigations. This ownership poses "substantial risk to patients and healthcare workers" as the private equity firm is seeking high returns in a short period of time, not being afraid to cut-costs in risky areas.[22]

Hospital and Insurer Consolidation

The impacts of hospital mergers have been studied for decades. Consolidation reliably leads to price hikes, without any consistent evidence of improved quality of care.[23]

As detailed in a recent Economic Liberties report, there is a recent trend of vertical consolidation driven by capitation-based financing where insurers buy providers, pharmacy benefit managers, and other related healthcare businesses.[24] The largest players in the market, including UnitedHealth,[25] Humana, CVS Health, and Cigna have all engaged in similar vertical consolidation strategies.

Key examples include:

- UnitedHealth Group's acquisition of Change Healthcare, which was promised to "mak[e] the healthcare system simpler and more adaptive to the needs of payers, providers and patients,"[26] instead did the opposite, with the Change Healthcare hack crashing the entire ecosystem because UHG used its monopoly power to extract profits instead of improving cybersecurity.[27]
- The merger of CVS with Caremark in 2007 was justified as "offer[ing] a better way to deliver pharmaceutical services and reduce healthcare costs in what is an increasingly

events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[22] Private Equity Stakeholder Project, "Apollo's Stranglehold on Hospitals Harms Patients and Healthcare Workers," https://pestakeholder.org/wp-content/uploads/2024/01/PESP__Report_Apollo_Lifepoint_2024.pdf

[23] *See,* e.g. KFF Consolidation in Provider Markets.

[24] *See,* e.g. AELP Medicare Advantage Report.

[25] The American Economic Liberties Project, "UnitedHealth Group Abuse Tracker," https://www.economicliberties.us/data-tools/unitedhealth-group-abuse-tracker/.

[26] UnitedHealth Group, "Optum and Change Healthcare Complete Combination," press release, October 3, 2022, https://www.unitedhealthgroup.com/newsroom/2022/2022-10-3-optum-change-healthcare-combination.html; Paige Minemyer, "UnitedHealth closes acquisition of Change Healthcare," Fierce Healthcare, October 3, 2022, https://www.fiercehealthcare.com/payers/unitedhealth-closes-acquisition-change-healthcare.

[27] U.S. Senate Finance Committee, "Wyden Hearing Statement on Change Healthcare Cyberattack and UnitedHealth Group's Response," May 1, 2024, https://www.finance.senate.gov/chairmans-news/wyden-hearing-statement-on-change-healthcare-cyberattack-and-unitedhealth-groups-response.

complex healthcare system. We believe this will translate into greater value for shareholders of both companies."[28] CVS/Caremark's combined stock has certainly delivered greater value to shareholders, but the claim of reduced healthcare costs is questionable looking back across 17 years of consistently rising premiums and total drug costs, and the impact on non-CVS pharmacies has been a brutal series of closures resulting in widespread pharmacy deserts.[29]

- Cigna's acquisition of PBM Express Scripts in 2018 made broad claims of benefits to the public, including "greater quality and affordability for customers."[30] However, there has been little evidence to prove this, as it has been reported multiple times since the deal closed that Express Scripts is raising prices or paying its own mail-order pharmacy an exorbitant amount compared to other pharmacies.[31] And in fact, Cigna has proved it intends to get larger and utilize monopoly power throughout the healthcare system when it proposed to acquire Humana last year before it abandoned the deal due to regulatory scrutiny.[32]

The below chart illustrates how prevalent vertical integration has become:[33]

[28] U.S. Securities and Exchange Commission, "Caremark and CVS Announce S-4 Filing Declared Effective by SEC," press release, January 19, 2007, https://www.sec.gov/Archives/edgar/data/1000736/000119312507009173/dex991.htm.

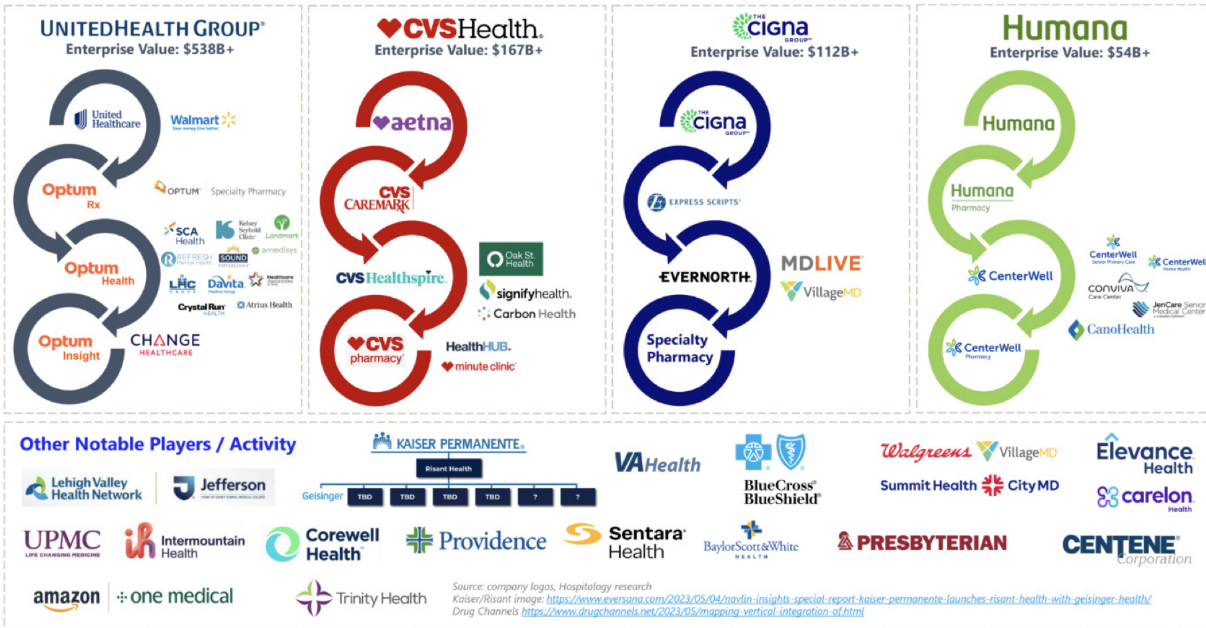
[29] Jenny S. Guadamuz, G Caleb Alexander, Shannon N Zenk, "Assessment of Pharmacy Closures in the United States From 2009 Through 2015," JAMA Network, October 21, 2019, https://www.google.com/url?q=https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2753258&sa=D&source=docs&ust=1717612676632138&usg=AOvVaw1gCESYiFV5ehC5CUcMzPFN; Tom Murphy and Kasturi Pananjady, "As pharmacies shutter, some Western states, Black and Latino communities are left behind," AP News, June 3, 2024, https://apnews.com/article/pharmacy-closure-drugstore-cvs-walgreens-rite-aid-91967f18c0c059415b98fcf67ad0f84e.

[30] Business Wire, "Cigna to Acquire Express Scripts for $67 Billion," press release, March 8, 2018, https://www.businesswire.com/news/home/20180308005488/en/Cigna-to-Acquire-Express-Scripts-for-67-Billion.

[31] Express Scripts, "Changes to your TRICARE prescription drug copayments in 2024," https://militaryrx.express-scripts.com/blog/changes-your-tricare-prescription-drug-copayments-2024; Marty Schladen, "Contractor for WV public employees system payts itself way more for some drugs than necessary," February 6, 2024, Ohio Capital Journal, https://ohiocapitaljournal.com/2024/02/06/contractor-for-w-va-public-employees-system-pays-itself-way-more-for-some-drugs-than-necessary/.

[32] Anirban Sen and Deena Beasley, " US health insurers Humana, Cigna in talks to merge," Reuters, November 29, 2023, https://www.reuters.com/markets/deals/us-health-insurers-humana-cigna-talks-merge-wsj-2023-11-29/; Lauren Thomas, "Cigna Calls Off Humana Pursuit, Plans Big Stock Buyback," The Wall Street Journal, December 10, 2023, https://www.wsj.com/business/deals/cigna-calls-off-humana-pursuit-plans-big-stock-buyback-ae1c6b3c.

[33] Blake Madden, "Vertical Integration Dominates the Payor Landscape," Workweek, January 5, 2024, https://workweek.com/brand/hospitalogy/page/3/.



General Comment on Topics 1-3

The above responses highlight a subset of examples from a large body of literature. Other commenters have also provided detailed case studies and overviews.[34] Where we respectfully part ways with some commenters and the framing of the RFI itself is on next steps and the scope of policy responses. It is time to move to action, not more workshops or transparency untethered to enforcement. These kinds of bureaucratically timid approaches are actively harmful, since they sacrifice our most precious commodity, time, which patients often simply do not have.

B. Substantive Action Is Overdue

Topic 4: Stop Consolidation Instead of Relying on the Transparency 'Dodge'

On January of 2021,[35] the Centers for Medicare & Medicaid Services implemented a hospital price transparency rule to force hospitals to publicly display their 'master charge' list.[36] To date, it has not been fully implemented due to HHS refusing to enforce its rule. Hospitals litigated, lost, and then just refused to release the data, with feeble follow-up from bureaucrats.

---

[34] *See,* e.g., https://www.regulations.gov/comment/FTC-2024-0022-1620 (CEPR), https://www.regulations.gov/comment/FTC-2024-0022-1716 (PESP), and https://www.regulations.gov/comment/FTC-2024-0022-1704 (CAP).

[35] Centers for Medicare & Medicaid Services, "Hospital Price Transparency," https://www.cms.gov/priorities/key-initiatives/hospital-price-transparency.

[36] Paige Sutherland and Meghna Chakrabarti, "The fight for transparent health care prices in America," WBUR, February 13, 2024, https://www.wbur.org/onpoint/2024/02/13/the-fight-for-transparent-health-care-prices-in-america; Cynthia A Fisher, "New analysis: CMS vastly overestimates hospital price transparency efforts," Stat News, March 2, 2023, https://www.statnews.com/2023/03/02/cms-vastly-overestimates-transparency-hospital-prices/.

The rule, aside from reflecting a meek approach to public service, ultimately distracted regulators from adopting more effective solutions, fixing underlying problems, or building momentum for meaningful reforms. Myopic focus on transparency rules allows powerful players to continue monopolistic practices unchecked, thereby hurting patients, providers, and healthcare professionals in pursuit of higher profits.

The saga of Steward Health – a Massachusetts based hospital that was created by a cardiac surgeon and private equity firm Cerberus – similarly reflects the dangers of delaying action.[37] In the early 2020s, after 10 years of dubious business practices and financial schemes plunged multiple hospitals into financial crisis, Cerberus "sold" Steward to its surgeon founder, who then immediately "used Steward's cash to pay himself a $100 million dividend." The hospitals, meanwhile, still failed to pay the overdue bills of dozens of small businesses, and hospital facilities devolved into "third world" conditions involving burst pipes and bat infestations, while struggling with staffing problems that jeopardized patients' lives. By contrast to authorities in Malta, who seized the assets of various executives involved in the scheme, U.S. authorities have not taken substantial action beyond sending indignant letters.

Transparency requirements, warning letters, and similar band aid actions are not solutions for anyone but those whose careers benefit from policy theater.

To address consolidation in healthcare, we recommend the following suite of policy responses:

1. DOJ and FTC Should Vigorously Enforce Antitrust Laws

We applaud the DOJ's and FTC's enforcement efforts to date, including the effort alongside HHS for public reporting of anticompetitive practices in health care,[38] as well as their joint adoption of updated merger guidelines.[39] We encourage the DOJ and FTC to continue to expand their efforts to prevent illegal mergers and challenge monopolistic structures and practices in the health care sector.

---

[37] Maureen Tkacik, "A Hospital Heist Seeks Protection in the Ponzi-Friendliest Court in America," The American Prospect, May 6, 2024, https://prospect.org/health/2024-05-06-hospital-heist-steward-friendly-bankruptcy-court-texas/.

[38] The Federal Trade Commission, "Federal Agencies Launch Portal for Public Reporting of Anticompetitive Practices in the Health Care Sector," press release, April 18, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/04/federal-agencies-launch-portal-public-reporting-anticompetitive-practices-health-care-sector.

[39] The American Economic Liberties Project, "Fact Sheet: The FTC is Holding Corporate Actors Accountable, Protecting Small Businesses, Workers, and Consumers," May 13, 2024, https://www.economicliberties.us/our-work/factsheet-the-ftc-is-holding-corporate-actors-accountable-protecting-small-businesses-workers-and-consumers-2/#; The American Economic Liberties Project, "Transforming Antitrust Enforcement: How AAG Kanter is Protecting Competition Across the Economy," June 2024, https://www.economicliberties.us/wp-content/uploads/2024/06/2024-06-03-DOJ-Accomplishments.pdf; The American Economic Liberties Project, "Economic Liberties Supports FTC and DOJ's Draft Merger Guidelines and Proposes Key Additions in Two Separate Comment Letters," press release, September 18, 2023, https://www.economicliberties.us/press-release/economic-liberties-supports-ftc-and-dojs-draft-merger-guidelines-and-proposes-key-additions-in-two-separate-comment-letters/.

2. Prior authorization reform in MA

We propose that HHS require Medicare Advantage (MA) plans to use existing Medicare Administrative Contractors (MACs) or similar third-party entities to fulfill the functions of prior authorization and claims adjudication. Today, MA insurance companies determine whether to grant prior authorizations and how to adjudicate claims. This presents an inherent conflict of interest: these insurance companies are incentivized to excessively deny and delay care because these practices reduce total expenditures, thereby increasing profits. Accordingly, prior authorization and claim adjudication functions should be split off and handled by unconflicted third parties.

The MACs currently serve this function in traditional Medicare, and they could easily do so in MA. HHS already extensively regulates prior authorization rules in MA, but action to date has been inadequate and fails to address the root of the problem. By removing prior authorization and claims adjudication from the conflicted MA plans, CMS would foster more appropriate forms of competition in MA.[40]

3. Reduce risk adjustment payments

Insurance companies receive risk adjustment payments based on disease burden of the population, with the goal of ensuring providers are paid enough to deliver care and encourage them to treat all patients regardless of health.[41] However, insurers, particularly those under Medicare Advantage plans, have utilized upcoding schemes to make their patients appear sicker,

---

[40] We encourage HHS to examine its legal authority to pursue more creative and impactful solutions. For example, the "non-interference" clause of Section 1854(a)(6)(B)(iii) of the Social Security Act expressly states that its purpose is "to promote competition." It does not appear to be intended to prevent HHS from addressing conflicts of interest. The focus is merely on preventing HHS from dictating that an MA organization contract with any "***particular***" entity or adopt any "***particular***" price structure. Thus, HHS could consider adopting a rule that would instruct any MA organization to divest price authorization and claim adjudication functions to any other unconflicted entity (or more narrowly, any unconflicted MAC) of its choice. That could simultaneously promote intra-regional competition among MACs. Moreover, even if HHS adopted a rule requiring MA organizations to use a particular MAC for prior authorization and claim adjudication functions, that arguably would not violate the non-interference provision to the extent such functions are not "items or services under this title." Certainly, such a rule would not dictate any particular price structure for the divested functions. Another relevant source of authority is Section 1115A of the Social Security Act, under which Center for Medicare and Medicaid Innovation (CMMI) may test "innovative payment and service delivery models to reduce program expenditures while preserving or enhancing the quality of care." § 1115A(a)(1) (codified at 42 U.S.C. § 1315a). CMMI is tasked with selecting models where "there is evidence that the model addresses a defined population for which there are deficits in care leading to poor clinical outcomes or potentially avoidable expenditures." 1115A(b)(1). To carry out these models, Section 1115A expands upon existing waiver authority in the Social Security Act and allows CMMI to waive, among other provisions, requirements of title XVIII (which governs Medicare and MA), "as may be necessary solely for purposes of carrying out this section with respect to testing models described in subsection (b)." 1115A(d)(1). Conflicted denials of prior authorization and claim adjudication demonstrably lead to poor clinical outcomes for patients. Accordingly, ending conflicted market structures would be within CMMI's authority.

[41] Centers for Medicare & Medicaid Services, "Risk Adjustment," https://www.cms.gov/priorities/innovation/key-concepts/risk-adjustment.

therefore increasing their risk adjustment payments. This has led to higher healthcare costs, worse care for patients, and wasted taxpayer dollars amounting to at least $54 billion a year.[42]

To prevent large MA monopolists from gaming the system, the government must reduce these payments.

CMS could do the following:

- Increase the coding intensity adjuster to correct for risk-score inflation;
- Alter the risk adjustment model to rely less on traditional Medicare;
- Remove certain abusive risk scoring tactics from measurement (i.e., chart reviews, home-based risk assessments).[43]

CMS could also expand its 2023 rulemaking[44] to further address erroneous diagnoses. This includes:

- Extending the retrospective lookback period;
- Devoting more resources for audits;
- Imposing strict penalties along with repayment for erroneous submissions.[45]

4. Collect information and set benchmarks in MA to prevent MLR gaming

The Medical-Loss-Ratio (MLR) was established to cap insurance administrative costs and profits to ensure that a minimum percentage of dollars was spent on medical care. However, insurance companies can get around these requirements by paying themselves – including through their subsidiaries.[46] This has led to an acquisition spree of payers-providers, and other vertical integration within the ecosystem.

To prevent this MLR gaming, CMS should collect, publicly share, and set benchmarks for pricing data from MA insurers.

---

[42] Rylee Wilson, "MedPac: Medicare Advantage will receive estimated $88B in overpayments in 2024," Becker's Payer Issues, January 16, 2024, https://www.beckerspayer.com/payer/medpac-medicare-advantage-will-receive-estimated-88b-in-overpayments-in-2024.html; Steven M. Lieberman, Paul Ginsburg, and Samuel Valdez, "Medicare Advantage Enrolls Lower-Spending People, Leading to Large Overpayments," USC Schaeffer, June 13, 2023, https://healthpolicy.usc.edu/research/ma-enrolls-lower-spending-people-leading-to-large-overpayments/; Laura Skopec and Robert Berenson, "The Medicare Advantage Quality Bonus Program," Urban Institute, June 26, 2023, https://www.urban.org/research/publication/medicare-advantage-quality-bonus-program.

[43] *See,* e.g. AELP Medicare Advantage Report at p. 34.

[44] Centers for Medicare & Medicaid Services, "Medicare Advantage Risk Adjustment Data Validation Final Rule (CMS-4185-F2) Fact Sheet," January 30, 2023, https://www.cms.gov/newsroom/fact-sheets/medicare-advantage-risk-adjustment-data-validation-final-rule-cms-4185-f2-fact-sheet.

[45] *See,* e.g. AELP Medicare Advantage Report at p. 34.

[46] Eileen Appelbaum, Rosemary Batt, and Emma Curchin, "Profiting at the Expense of Seniors: The Financialization of Home Health Care," Center for Economic and Policy Research, September 26, 2023, https://www.cepr.net/report/profiting-at-the-expense-of-seniors-the-financialization-of-home-health-care/.

5. **Glass Steagall in MA**

A better way to address MLR gaming and the myriad anti-competitive abuses that arise from vertical consolidation would be to implement a "Glass Steagall" for health care.[47] CMS should analyze the scope of its potential authority to prohibit insurance companies in public programs – as a Condition of Participation in Medicare and Medicaid – from consolidating and owning both sides of health care transactions. This would also prohibit MA plans, Part D plans, and PBMs from owning pharmacies and medical practices.

6. **Encourage states to move to price standardization through CMMI**

Price discrimination is likely the biggest driver of provider consolidation in the US healthcare system. It is well known that corporate hospitals and private equity companies pursue consolidation roll up strategies in order to negotiate higher prices in the commercial market (and Medicare, as it relates to site-differential payments). Yet there is no evidence that these consolidated entities provide better care. To encourage fair competition in the healthcare system that would enable small providers to sustain themselves, HHS should be looking for ways to end price discrimination in the system. CMMI – the innovation center within CMS – could do this by coordinating with states and announcing that they will embrace models at the state level that end price discrimination and standardize payment across providers and payers.

7. **Test a Medicare Part D Public Option through CMMI**

For their medical coverage, Medicare beneficiaries have the option of choosing traditional Medicare, in which the government directly reimburses providers or choosing Medicare Advantage, in which benefits are outsourced to insurance companies. However, when it comes to prescription drug coverage, Medicare beneficiaries have no such option: Part D only offers the benefit through private insurance companies and their PBMs. This has led to extreme drug prices in the U.S.

Patients should have a "public option" for the Part D benefit. CMMI could test such a model, which, instead of contracting out the benefit to the insurance company, would directly serve the function played by insurance companies and PBMs today.

8. **Require transparency in ownership throughout the healthcare ecosystem[48]**

Private equity, insurance companies, and other asset managers use complicated and obscure corporation structures that are difficult to track.[49] While we generally oppose transparency as a

---

[47] *See,* e.g. AELP Medicare Advantage Report at p. 36; Ashley Nowicki and Hayden Rooke-Ley, "Too big to Care: It is time for a Glass-Steagall Act for health care," The Hill, May 1, 2024, https://thehill.com/opinion/healthcare/4633316-unitedhealth-group-change-cyberattack-glass-steagall-act-healthcare-too-big-to-fail/.

[48] Brookings Institution, Center on Health Policy, Comment Letter to DOJ, HHS, and FTC regarding consolidation in health care markets, May 6, 2023, https://www.brookings.edu/wp-content/uploads/2024/05/Consolidation-Comment-Final.pdf; Loren Adler and Matthew Fiedler, "Response to a request for information on improving data on Medicare Advantage," June 3, 2024, https://www.brookings.edu/articles/response-to-a-request-for-information-on-improving-data-on-medicare-advantage/.

[49] *See,* e.g. AELP Medicare Advantage Report at p. 33.

standalone solution, following through on utilizing already existing transparency measures – such as ultimate beneficial owner disclosures by publishing existing datasets – can facilitate enforcement of existing laws as we have suggested above. HHS should release more enrollment data on ownership transparency, and it should request more robust enrollment data that illuminates the range of ownership and control arrangements to further align with FTC and DOJ on President Biden's Executive Order to promote competition throughout the economy.[50]

Conclusion

Consolidation in healthcare allows dominant firms and conglomerates to extract profit from every level of the ecosystem and abuse their smaller competitors, leading to higher cost, worse care, reduced access to care, and harm to entire communities. These harms have been amply documented over many years. Accordingly, now is the time for the HHS, DOJ, and FTC to turn to taking swift, concrete, and decisive actions to stop the tide of consolidation and remediate existing harmful market structures and practices.

[50] The White House, Executive Order 14036, "Promoting Competition in the American Economy," July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.