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Subcommittee on Health

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Chairman Pallone, Ranking Member Shimkus, and Members of the Subcommittee, thank you for the invitation to participate in today's hearing on pricing in healthcare. My name is Mike Cowie and I am an antitrust partner at Howrey LLP in Washington DC. I formerly served in leadership positions at the Federal Trade Commission (FTC). At the FTC, I supervised antitrust investigations in healthcare.

The Subcommittee on Health is considering legislation that would require healthcare companies to make public filings or internet postings of pricing terms.[1] My testimony today focuses on the evaluation of these types of pricing policies from the perspective of antitrust.

<u>FTC Analysis</u>. In antitrust investigations, a major objective of the FTC is to protect consumers from anticompetitive pricing through collusion -- that is, pricing determined jointly among competing companies rather than independently by each individual company. FTC attorneys and economists follow guidelines to determine whether industries are susceptible to anticompetitive price increases. One of the key factors is whether pricing terms are available and known among competitors.

Collusion among companies to raise prices is more likely in industries where pricing terms are known among competitors. If a company knows how its rivals set prices, that company may raise its own prices to meet those of its competitor. Why work to undercut the competition if you know customers will pay a higher price? Under the

[1] H.R. 4700, The Transparency in All Health Care Pricing Act of 2010; H.R. 2249, The Health Care Price Transparency Promotion Act of 2009; H.R. 4803, The Patients' Right to Know Act.

antitrust guidelines, the FTC treats collusion as less likely in industries with non-public or private pricing terms. An FTC investigation and the decision on whether to bring an enforcement action may turn on whether competitors have visibility into pricing terms, thereby raising a danger of collusion.

The FTC has opposed regulation requiring public posting of pricing terms. For example, the FTC staff opposed a state law requiring liquor wholesalers to file price lists with a state agency.[2] It expressed concern that "[t]he availability of comprehensive price information tends to make it easier for industry members to coordinate prices tacitly and to detect and discourage deviation from the consensus price."[3] The FTC raised the same concerns in pharmaceutical pricing. The FTC staff has opposed state legislation requiring pharmacy benefit managers (PBMs) to list in public filings the price discounts or rebates received from drug manufacturers.[4] It warned that the posting of "precise details of rebate arrangements" would make "tacit collusion . . . more feasible."[5]

Other Federal Agencies. The FTC has not stood alone on this policy. The Department of Justice Antitrust Division has opposed regulation requiring public filing of price terms.[6] Likewise, the Congressional Budget Office (CBO) has recognized that mandatory posting of pricing terms may reduce incentives to discount. A few years ago the CBO evaluated a proposed policy to force providers of Medicare prescription drug plans to post data on price rebates negotiated from drug manufacturers. CBO expressed concern that "manufacturers would probably reduce their largest rebates because of the

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[2] FTC Director of Regional Office, Statement to the Commonwealth of Massachusetts Alcohol Beverages Control Commission, June 26, 1996, www.ftc.gov.

[3] *Id*. at 2.

[4] FTC Office of Policy Planning, Letter to New York Legislature, Mar. 31, 2009, at 4-5, www.ftc.gov.

[5] *Id*.; *see also* FTC Office of Policy Planning, Letter to Virginia House of Delegates, Oct. 2, 2006, at 13, www.ftc.gov.

[6] U.S. Department of Justice, Comments to FCC, FCC Docket No. 90-132, Sept. 28, 1990, at 41, 44-46.

pressure that disclosure of such large rebates would place on their arrangements with other customers."[7] This "would tend to increase costs for both the Medicare program and, on average, for enrollees."[8]

Economic Studies. The CBO and the Justice Department, like the FTC, have reasoned that posted pricing may reduce incentives to discount and contribute to tacit collusion. This view is built upon a strong foundation of economic research. Economic studies have found that mandatory publication of pricing terms often leads to higher pricing. For example, in the 1980s Congress required long distance carriers, such as MCI, Sprint, and AT&T, to file their pricing terms with the Federal Communications Commission (FCC). Economists and policy-makers eventually concluded that this policy caused long distance rates to converge and increase.[9] Academic studies of posted-pricing policies in other industries have likewise reached the conclusion that such policies have in fact led to price stabilization and price increases.[10]

Pharmaceutical Pricing. To further the discussion of potential effects of transparency in healthcare, it may be helpful to examine the nature of transparency and competition in the biopharmaceutical sector. When choosing among medicines, patients and prescribers currently have access to a wide range of publicly available information about pricing. This includes information on pricing of prescription drugs at retail

[7] Congressional Budget Office, Letter of Director Peter R. Orszag to U.S. House of Representatives, Comm. on Energy and Commerce and Comm. on Ways and Means, Mar. 12, 2007, at 4.

[8] *Id*. at 4.

[9] P.W. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services, 69-77 (MIT Press & AEI Press 1996); Hearing before the House Subcomm. on Telecommunications and Finance, Comm. on Energy and Commerce, 102d Cong., 1st Sess., June 19, 1991 (statement of Alfred C. Sikes, FCC Chairman); Tariff Filing for Nondominant Common Carriers, Notice of Proposed Rulemaking, CC Dkt. No. 93-96, 8 FCC Red. 1395 ¶ 13, 1993; Haring & Levits, What Makes the Dominant Firm Dominant?, FCC Office of Public Policy Working Paper No. 25, Apr. 1989, at 11-17.

[10] Fuller et al., Effect of Contract Disclosure on Price: Railroad Grain Contracting in the Plans, 15 W.J. Agric. Econ., 265, 271, 1990; Albek et al., Government-Assisted Oligopoly Coordination? A Concrete Case, The Journal of Industrial Economics, Dec. 1997, Vol. XLV at 429.

pharmacies, drug coverage provided by PBMs or health plans, and co-pays or coinsurance. Ensuring consumer access to this information is critical.

Nearly every health insurance plan has a formulary, typically with tiered copays. Patients can find which copay or coinsurance amount applies to a given medicine. One example of this is the Medicare Plan Finder database. Information on coverage and copay levels is widely available to prescribers and is often accessed through handheld devices and e-prescribing systems. Notably, the use of tiered formularies has driven virtually all prescription drug utilization by insured persons to the tiers with lower out-of-pocket costs.[11]

In contrast, public filing or internet posting requirements are ill suited for proprietary pricing terms negotiated in the pharmaceutical sector. Such public posting of pricing terms between manufacturers and sophisticated purchasing entities is unnecessary. These are the pricing terms negotiated between drug manufacturers and sophisticated purchasers – PBMs or health insurers. The arms-length negotiation process will lead to the best pricing outcome for consumers. The focus on pricing outcome is evident in the utilization pattern of medicines. IMS Health reports that in 2009, about three out of every four prescriptions used in the United States was filled with a generic.[12] The share of prescriptions filled by generics is expected to increase from this already high level over the next few years, as several brand drugs with large sales go off patent.

In coming years, more Americans will have health insurance coverage, including prescription drug coverage. This means the role of well-informed, large, and sophisticated purchasers will grow and more patients will obtain savings on prescription

[11] C. Baker, Drugs – Not the Cost Problem, Let's Talk Health Care, Apr. 13, 2007, www.letstalkhealthcare.org/prescription-drugs/drugs-not-the-cost-problem/.

[12] IMS Health, IMS Health Reports U.S. Prescription Sales Grew 5.1 Percent in 2009, to $300.3 Billion., Apr. 1, 2010, www.imshealth.com/portal/site/imshealth/menuitem.a46c6d4df3db4b3d88f611019418c22a/?vgnextoid=d690a27e9d5b7210VgnVCM100000ed152ca2RCRD.

drugs, rather than paying retail prices. Pricing terms should continue to be set through the negotiation process, not public filings or internet postings.

H.R. 4700, the "Transparency in All Health Care Pricing Act of 2010," in particular, would conflict with established antitrust principles designed to prevent collusion. It would require pharmacies, pharmaceutical manufacturers, insurance entities, and others to post all their pricing terms on the internet. The requirement of internet price posting – when applied to negotiated agreements between drug manufacturers and sophisticated purchasers – may well contribute to price stabilization and less discounting.

Conclusion. All consumers, particularly healthcare consumers, benefit from information enabling them to make informed decisions and to compare alternative suppliers and services. However, overbroad laws that require internet posting of price terms would undermine consumer interests. Public policy in healthcare should maximize incentives for vigorous price competition.