

CLIENT ALERT

Open Season: Multi-Agency Report Makes Recommendations to Free the Health Care Sector from Overregulation and Enhance Competition

Jan.10.2019

Last month, the U.S. Departments of Health and Human Services, Treasury, and Labor issued a report titled “[Reforming America’s Healthcare System Through Choice and Competition](#),” to better describe what the federal government envisions for health care reform in 2019 and beyond. With input from the Federal Trade Commission (FTC), the report provides the President and the incoming 116th Congress with the federal agencies’ insights into the health care industry and its shortcomings, and their recommendations on how federal and state laws, regulations, and policies should be changed or eliminated to foster competition, promote innovation, and ultimately lower health care costs in the United States.

This alert provides a brief overview of the themes underlying the report’s recommendations – promoting competition, deregulation, and consumer engagement within the health care industry – and the possible implications for the future of antitrust enforcement, health insurance, the oversight of professionals and entities treating patients, and other areas.

Competition and Antitrust Policy in Health Care Markets

The report emphasizes the central role that markets do and should play in the provision and delivery of health care and makes several suggestions for how impediments to more competition can be addressed through policy mechanisms. The section of the report that addresses antitrust policy is, however, relatively brief. It describes trends toward greater concentration in hospital and physician markets, cites to familiar academic literature showing the potential anticompetitive impact of consolidation, and calls out the increasing frequency with which hospitals are acquiring physician practices. The report is careful to explain that increased concentration has not led to market power and consumer harm in all instances, but calls for continued vigilance by the antitrust authorities to identify and prevent anticompetitive activity. Further, the report recommends that the Administration should continue to monitor market competition and should also ascertain the impact of horizontal and vertical integration among provider practices on competition and prices. Finally, the report recommends that Congress amend the Federal Trade Commission Act to give the FTC jurisdiction to enforce the antitrust laws against anticompetitive *conduct* by non-profit entities (currently, the FTC can only take antitrust enforcement actions against *mergers* involving non-profit entities).

Relaxed Restrictions in Insurance Markets

Highlighting both state and federal laws, the report recommends loosening health insurance restrictions and mandates to promote competition and choice. In particular, the report recommends reforming two categories of laws addressing contracts between payors and providers, any-willing-provider laws and network adequacy standards, as well as the insurer requirements of the Affordable Care Act (ACA).

Any-willing-provider laws generally require payors to enter into network provider contracts with any provider that meets the payor’s guidelines for inclusion in the network, essentially limiting an insurer’s ability to contract selectively in the creation of its

provider networks. The report points out that such laws shift leverage in contract negotiation away from payors, in turn limiting payors' abilities to control health care spending. The report recommends that policymakers scrutinize any-willing-provider laws and other similar contracting restraints.

The report points out that insurers' increased use of narrow provider networks can increase competition among providers and drive down overall health care costs, but that such cost reductions are weighed against the risk that enrollees may not have sufficient choice or access to in-network providers. Network adequacy standards, in many cases, attempt to apply quantitative measures to ensure adequate access to care. But the report questions whether such standards allow payors to design networks to control costs and take into account the possible salutary impact of telemedicine on access to care and a network's capacity, ultimately recommending that policymakers design standards to be sufficiently flexible and to ensure adequate transparency.

The report broadly criticizes the ACA's rules on health insurance coverage. The report specifically calls out the requirement for first-dollar coverage of preventive services and the imposition of the minimum medical loss ratio (MLR) as creating unnecessary costs and creating perverse incentives, and notes the lack of choice in some individual health insurance markets. The report recommends that policymakers loosen the burdensome requirements of the ACA to promote greater competition and choice by enacting legislation to remedy and mitigate the deleterious impact of its restrictions and requirements.

(De)regulation to Promote Transparency, Innovation, and Participation in the Health Care System

A significant portion of the report focuses on eliminating or scaling back health care laws and regulations currently impacting both medical professionals and institutional providers. The overarching logic for the various deregulatory strategies being advanced is simply and succinctly stated in the report: "[g]overnment policies that reduce the available supply of qualified healthcare service providers or the range of services they may safely offer can increase the prices paid for healthcare services, reduce access to care, and suppress the benefits of competition and innovation in healthcare delivery." Using this rationale as a guidepost, the report targets the following for reform:

- **Laws, regulations, and programs governing the licensure, scope of practice, and supply of health professionals:** The report advocates for reforming both federal and state laws to: (i) broaden the scope of practice of licensed professionals with specialized training – other than physicians – like nurse practitioners, physician assistants, and other allied health professionals; (ii) expand the ability of doctors and others to deliver services via telehealth, and to be reimbursed for doing so; and (iii) ease or lift licensing restrictions on multi-state practices that impede the mobility and practice of health care professionals across state lines, to be achieved through multi-state licensure compacts and other measures. The report also proposes desired reforms to facilitate or expedite the credentialing of foreign-trained doctors to practice in the U.S.; streamline the funding of graduate medical education to address physician workforce shortages; and scrutinize the enforceability of non-compete clauses constricting health care professionals from practices in certain markets ostensibly in competition with their prior employer or practice group.
- **Certificate of Need (CON) Laws and Certificates of Public Advantage (COPA):** The report advocates for the outright repeal or significant curtailment of state CON laws, arguing that they increase costs, impede healthy competition, and do not materially improve health care quality or access as intended when enacted. On the other hand, state COPA regulations, as described in the report, have the similar effect of sanctioning anticompetitive arrangements that would otherwise be subject to antitrust enforcement actions. In sum, the report argues that the artificial limits on the supply of health care providers, combined with the barriers to entry imposed by CON laws and the facilitation of consolidation

under COPA laws, undermine the goals of lower costs and improved quality, and prevent the supply of services available in the health care market from being at levels sufficient to cost-effectively meet consumers' demands.

More Transparency and Free Flow of Health Care Information to Better Engage Patients as Consumers of Health Care Services

The report's final section highlights the "unnecessary barriers," such as "excessive" reliance on government-subsidized third-party payments, believed to prevent patients from making informed decisions regarding the consumption of health care services and using their power to force health care providers to compete on the price and quality of health care services. In response, the report recommends the replacement of those barriers with policies promoting price transparency coupled with greater consumer-driven purchasing power that would enable patients to compare the true costs of items and services from multiple providers before they purchase them. As noted in Section 3 of the report, the federal government has promoted the option of allowing cheaper health insurance plans with a less comprehensive set of preventive health benefits to be offered to individuals while also promoting the expansion of Health Savings Accounts for those enrolled in high deductible health plans (HDHPs) and those covered by less comprehensive plans. As explained in the report, both HDHPs and Health Reimbursement Arrangements – in lieu of "existing third-party arrangements" – would "incentiviz[e] patients to shop for higher-value care."

Finally, to further facilitate patients' ability to "shop around" and directly buy services from the most cost-effective provider, the report strongly advocates for greater access of information about the price and quality of services, including the public availability of claims data, cost data, and quality data in formats useful to patients and other stakeholders. In addition, the report recommends measures for increasing the "portability" of electronic health records by prohibiting information blocking by health IT vendors and promoting open application programming interfaces. The Department of Health & Human Services has already made progress in pursuing these goals, particularly with the highly anticipated "[information blocking rule](#)" under review at OMB, and the "[Request for Information on Modifying HIPAA Rules to Improve Coordinated Care](#)," published in the Federal Register on December 14th.

Paving the Way for Change in 2019?

The release of the report after the 2018 midterm elections is no accident. This "wish list" sets forth the priorities of the executive agencies for reforming the health care system without advocating for a full-scale "repeal and replace" option to the ACA. The coincidental decision the following week from U.S. District Judge Reed O'Connor striking down the entirety of the ACA, which we [profiled in a separate alert](#), may also motivate Congress and state legislatures to take action on these recommendations to mitigate any destabilizing effects that the absence of the ACA could cause for insurance markets. What is clear from both the report and the district court's decision is that changes to the U.S. health care system are far from over.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Alexis J. Gilman

Partner – Washington, D.C.
Phone: +1 202.624.2570
Email: agilman@crowell.com

Joseph M. Miller

Partner – Washington, D.C.

Phone: +1 202.624.2809
Email: joemiller@crowell.com

Brian McGovern

Partner – New York
Phone: +1 212.895.4306
Email: bmcgovern@crowell.com

Joe Records

Counsel – Washington, D.C.
Phone: +1 202.624.2709
Email: jrecords@crowell.com

Stephanie D. Willis

Counsel – Washington, D.C.
Phone: +1 202.624.2721
Email: swillis@crowell.com