

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2301 Rayburn House Office Building  
Washington, DC 20515-6515

May 15, 2008

**VIA E-MAIL**

The Honorable Thomas O. Barnett  
Assistant Attorney General for Antitrust  
c/o Joshua H. Soven  
Chief, Litigation I Section  
U.S. Department of Justice  
Antitrust Division  
1401 H Street, N.W.  
Suite 4000  
Washington, DC 20530

RE: Tunney Act Comments, *United States v. UnitedHealth Group Incorporated*, Civil  
Case No. 08-0322

Dear Assistant Attorney General Barnett:

These comments are submitted pursuant to the Tunney Act<sup>1</sup> regarding the Proposed Final Judgment (PFJ) filed by the U.S. Department of Justice (DOJ) with the U.S. District Court for the District of Columbia in *United States v. UnitedHealth Group Incorporated*, Civil Case No. 08-0322.

The Tunney Act requires the Court to determine whether the PFJ is in the public interest.<sup>2</sup> In making this determination, the Court must carefully consider the fact that entry of the PFJ will profoundly reduce competition in the health care markets of Clark County and the State of Nevada, and pose significant risks to consumers, physicians and small businesses. The public benefit arising from entry of the PFJ is not readily apparent.

While the Department of Justice (DOJ) took steps to protect senior citizens by requiring the divestiture of Medicare Advantage related assets, I am concerned the PFJ does not adequately protect the rest of the public, including small businesses, healthcare providers and patients.

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<sup>1</sup> 15 U.S.C. §§ 16(b)-(h).

<sup>2</sup> 15 U.S.C. § 16(e).

On October 25, 2007, the Committee on Small Business held a hearing entitled *Health Insurer Consolidation—The Impact on Small Business*. The Committee heard from witnesses representing small businesses, the medical community and consumers who expressed concern regarding the growing trend of consolidation in the health insurance industry.

Witnesses made the following comments at the hearing:

“ . . . consolidation has left physicians with little leverage against unfair contract terms that deal with patient care and little control over their own employees rising health insurance premiums.”<sup>3</sup>

“The lack of competition among health insurers absolutely affects my insurance cost, as well as the quality and scope of coverage. Our state’s [Illinois] non-competitive health care insurance environment, due to the monopoly of one or two carriers, places all the leverage in the hands of the insurers. I can’t vote with my feet and dollars if I have no alternatives from which to select.”<sup>4</sup>

“Consolidation of health insurance plans have [sic] created a profound imbalance that hurts the ability of family physicians to negotiate contracts. This is harmful to our practices, but also means that many of our patients cannot find the primary care physicians who accept their insurance.”<sup>5</sup>

“Health insurance consolidation has in part created a take it or leave it market for small businesses. Reduced competition through consolidations both of insurance carriers and health insurance carrier provider networks has led to increased pricing (and) fewer choices for small businesses and their employees.”<sup>6</sup>

The hearing record is included as part of this comment.

Access to health insurance is an area of key concern to small businesses. The rising cost of health care is regularly cited by small firms as one of their biggest worries. Small businesses need to have choices in the health insurance marketplace. In addition, mergers should not be permitted that enable a health insurer to reduce compensation to physicians below competitive rates. If the playing field for health care providers is not level, quality of care declines and patients ultimately suffer.

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<sup>3</sup> Statement of Dr. William G. Plested, III, Immediate Past President, American Medical Assn.

<sup>4</sup> Statement of Robert Hughes, President of the National Association for the Self-Employed (*quoting a member*).

<sup>5</sup> Statement of Dr. James D. King, President, American Academy of Physicians.

<sup>6</sup> Statement of James R. Office, General Counsel, Victory Wholesale Grocers.

The health insurance marketplace has become increasingly consolidated in recent years. Consolidation has left small businesses with fewer choices and physicians with diminished leverage to negotiate with plans. Econometric evidence shows that in the managed care field, an increase in the number of competitors is associated with lower health plan costs and premiums; conversely, a decrease in the number of competitors is associated with higher health plan costs and premiums.<sup>7</sup> In the majority of metropolitan areas, a single insurer now dominates the marketplace. If individuals and small businesses cannot get coverage through the dominant insurer in these areas, they may not be able to find alternatives.

Because mergers of health insurers affect access to health care and influence the quality of medical services to consumers, they command great scrutiny.

To maintain competition in the marketplace, the proposed acquisition of Sierra Health Services, Inc. (“Sierra”) by UnitedHealth Group Incorporated (“United”) requires the divestiture of more assets than merely those related to United’s Medicare Advantage business in the Las Vegas area. Sierra is United’s largest rival in the state of Nevada. The level of concentration posed by this merger is tremendous. A combined United-Sierra would have a nearly 80 percent share of the commercial HMO market in Nevada and almost a 94 percent share of the commercial HMO market in Clark County.

DOJ notes that “United and Sierra together account for approximately 94 percent of the total enrollment in Medicare Advantage plans in the Las Vegas area,” and that the “acquisition is likely to reduce competition substantially in the sale of Medicare Advantage plans in the Las Vegas area in violation of Section 7 of the Clayton Act.”<sup>8</sup> Similar effects on competition will likely arise both in the commercial HMO market, which will see virtually the same levels of concentration as the Medicare Advantage market, and the market for the purchase of physician services. The PFJ fails to address this diminishment of competition in these markets in Las Vegas and the State of Nevada.

It is critical that the Court consider the following factors in evaluating the PFJ:

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<sup>7</sup> *Examining Health Care Mergers in Pennsylvania*: Hearing Before the Senate Judiciary Committee, 110<sup>th</sup> Congress (April 9, 2007) Statement of Lawton Burns, Professor, Wharton School of Business.

<sup>8</sup> 73 Federal Register 12763 (March 10, 2008).

### **The PFJ Could Enhance United's Market Power and Hurt Small Businesses**

United will go from having a 12 percent share of the HMO market in the state of Nevada to an 80 percent share. In Clark County, the market share will surge from 14 percent to 94 percent. By allowing the two largest competitors in the state to merge, small businesses will face severely diminished options in health insurance plans. The insurance marketplace in Nevada and Clark County is already highly concentrated—which necessitates an even higher level of scrutiny. With such a dominant market position, a combined United-Sierra could attain market power to raise prices to small businesses above competitive levels. Small businesses will have few alternatives to a combined United-Sierra and as a consequence, will be stuck with higher premium costs. If costs rise above competitive levels more small firms will stop providing coverage to employees, increasing the number of Nevada's uninsured.

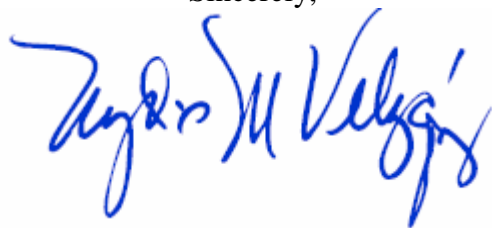
Additionally, it is important to contemplate that existing barriers to entry in the HMO market are extremely high. It is unlikely that a combined United-Sierra will face any new competitors in Nevada in the near future.

### **The PFJ Could Enhance United's Monopsony Power and Hurt Physicians and Patients**

With such an overwhelming market share, the combined United-Sierra could reduce compensation for providers to the point where it is below competitive levels. Lower service, poorer quality and reduced access to health care could result. Physicians and other providers may not have sufficient alternatives to allow them to circumvent the compensation decreases of a combined United-Sierra. The costs for physicians to switch to other health care insurers are substantial as physician time is valuable and it can be difficult for a physician to quickly replace lost patients. With such a dominant market share and high switching costs, physicians may find that, when faced with lower reimbursement, they are unable to switch from a combined United-Sierra to another insurer. If this is the case, a combined United-Sierra could exercise market power against health care providers.

I appreciate consideration of the above mentioned issues. I am concerned that the PFJ does not adequately preserve competition in the health insurance marketplace for small businesses, physicians and consumers.

Sincerely,



Nydia M. Velázquez  
Chairwoman