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COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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October 10, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Dear Chairman Simons:

I write with regard to recent reports alleging that insurers and hospital systems in the United States are entering into restrictive contracts deliberately designed to prevent consumers' access to quality, lower cost care. According to the Wall Street Journal:

[d]ominant hospital systems use an array of secret contract terms to protect their turf and block efforts to curb health-care costs. As part of these deals, hospitals can demand insurers include them in every plan and discourage use of less-expensive rivals. Other terms allow hospitals to mask prices from consumers, limit audits of claims, add extra fees and block efforts to exclude health-care providers based on quality or cost.¹

If true, these practices undermine Congress's efforts to lower the cost of, and increase access to, health care for millions across the country.

In 2016, health care expenditures in the United States increased 4.3% and accounted for approximately 18% of Gross Domestic Product, totaling \$3.3 trillion, or \$10,348 per person.² Spending is projected to grow at an average rate of 5.5% per year and reach \$5.7 trillion by 2026.³ The last thing American patients and consumers need at this time is a health care system that permits or encourages anticompetitive agreements that hinder access to lower cost care.

As you may know, the Department of Justice is currently in litigation against Atrium Health—a “system with huge market share in the Charlotte, N.C., area”—challenging its use of

¹ Anna Wilde Mathews, “Behind Your Rising Health-Care Bills: Secret Hospital Deals that Squelch Competition,” *The Wall Street Journal* (Sept. 18, 2018) available at <https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963?mod=searchresults&page=1&pos=3>.

² National Health Expenditure Data, Centers for Medicare & Medicaid Services, available at <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html>.

³ *Id.*

such contractual agreements as anticompetitive.⁴ According to the Deputy Assistant Attorney General for Antitrust, the Department:

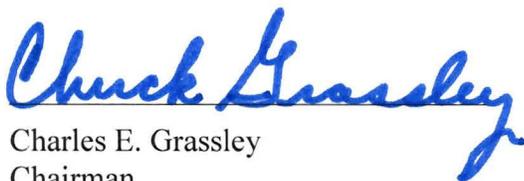
has challenged Atrium's practice of including so-called anti-steering restrictions in its contracts with major health insurers. Without these provisions, insurers could promote competition by 'steering' patients to medical providers that offer lower priced, but comparable or higher-quality services. Importantly, that practice benefits consumers, but the anti-steering restrictions prevented it. We alleged that Atrium used these restrictions on steering to protect itself from price competition, and consumers lost the benefit of that competition.⁵

It is critical for Congress to understand the FTC's perspective on these issues, including whether contractual provisions—like those highlighted in recent reports—impact the cost of health care in the United States and whether consolidation in the marketplace magnifies the impact of such provisions.

The FTC is charged with ensuring competition and protecting American consumers from anticompetitive behavior. Accordingly, I urge you to conduct an assessment of how prevalent the use of such contractual provisions is in the health care industry, whether there is anticompetitive use of these provisions, and whether consolidation in the marketplace increases the potentially harmful impact of these provisions on competition. If the FTC has already initiated an investigation or inquiry into these reports, I request a written update on its efforts and intentions by no later than October 31, 2018.

Thank you for your attention to this matter, and I look forward to your response. If you have any questions, please contact Ryan Dattilo or Kyle McCollum of my Judiciary Committee staff at 202-224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

⁴ Wilde Mathews, *supra* note 1.

⁵ Keynote Remarks at the American Bar Association's Antitrust in Healthcare Conference, Deputy Assistant Attorney General Barry Nigro, Antitrust Division, U.S. Dept. of Justice (May 17, 2018) *available at* <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar>.