Testimony
United States Senate Committee on the Judiciary
Hospital Group Purchasing: How to Maintain Innovation and Cost Savings
September 14, 2004

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United States Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

"Hospital Group Purchasing – How to Maintain Innovation and Cost Savings"

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Testimony Submitted by
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Introduction

I am Robert Betz, Ph.D., President and CEO of the Health Industry Group Purchasing Association (HIGPA). HIGPA represents over 150 health care supply chain organizations, including nearly every major group purchasing organization (GPO) in the United States, and many of the vendors with whom they do business.

Today's hearing allows both policy makers and the public to learn of the industry's efforts and accomplishments over the past two years and share our thoughts with the Subcommittee about maintaining a GPO industry that helps hospitals realize significant savings on the best products for their patients. I appreciate the opportunity to submit testimony on behalf of the members of HIGPA.

At the outset, I would like to highlight the following points:

1. Two years ago, HIGPA developed a Code of Conduct which focused on several areas, including: promoting competition and innovation; eliminating the potential for conflicts of interests; ensuring open communications between members and vendors; establishing guidelines for the use of contracting tools; and providing transparency by requiring full disclosure to members of all vendor payments. Our Code has provided greater accountability to hospitals and other providers.

2. Since 2002, this industry has undergone a full review by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), and they found there was

no need for additional regulation of the industry. As they have indicated in their July 2004 joint report on health care competition and policy, the current tools available to them are sufficient to oversee the industry, and assure continued competition.

3. We offer to engage in productive dialogue with the Subcommittee to explore non-legislative approaches for assuring the changes that have been made remain in place, and the industry is always vigilant in adapting its practices as the market continues to evolve.

HIGPA's Code of Conduct Principles

In 2002, with the assistance and guidance of your Subcommittee, HIGPA cooperatively developed a Code of Conduct Principles for its GPO membership – designed to strengthen the delivery of health care products and services by creating a set of principles for GPOs to incorporate into their businesses.

HIGPA's Code is unprecedented in the health care supply chain industry, and the only mandatory one within the industry. The adoption and implementation of the Code underscores the group purchasing industry's commitment to improving health care and advancing technological innovation at the most manageable cost to providers of care and their patients. Ultimately, it has provided greater accountability to hospitals and other providers.

Our Code establishes baseline principles that individual GPOs have adopted to improve the group purchasing industry, while also recognizing that a one-size-fits-all approach would be counterproductive to ensuring a competitive GPO marketplace. We maintain that if all GPOs had the same essential business models, health care providers would be unable to benefit from competition among GPOs. By establishing baseline principles for all GPOs, the Code recognizes that both individual GPOs, and the industry as a whole, have important spheres of responsibility.

Throughout the adoption and implementation of the Code, HIGPA has always stated that our Code was to be considered a "living" document. Specifically in the public release, the Association stated, "HIGPA's Code of Conduct Principles is intended to be a document that is updated and modified as necessary." This principle shows that the industry allows for modifications to the Code when circumstances warrant. Therefore, it is imperative the industry continue to use tools such as codes of conduct and certification programs to ensure prompt, flexible, and effective industry regulation.

Highlights of HIGPA's compliance program include the following:

? HIGPA's Bylaws were amended to include the requirement that all GPO members must adopt the HIGPA Code of Conduct into their business model in order to be a member of the Association, and then continue to be in compliance to remain a member.

? At the beginning of each year, HIGPA's American-based GPOs certify compliance

with our Code of Conduct. HIGPA's ongoing compliance program offers a solid example of the industry's good faith effort to address industry business practices, now and for the future.

? HIGPA's new "Code of Conduct" web page offers information about HIGPA's Code of Conduct Principles, the Association's GPO Compliance Officers and the new web-based "Vendor Information Exchange."

? GPOs are tasked daily with the difficult job of learning about new medical products at the direction of their health care provider members. In accordance with the Association's Code of Conduct Principles, HIGPA created our web-based "Exchange" to enable every health care manufacturer, whether currently contracting with a GPO or not, the ability to promote their "new and innovative" products directly to GPO members of HIGPA. Upon accessing the submission form, manufacturers are asked to provide contact information for the representative marketing the new technology, product name and a detailed description, with the ability to upload marketing documents. As part of its commitment to the Subcommittee, the GPO industry reached out to the small medical device manufacturers' community to find ways to collaborate and facilitate communication among all players in the health care supply chain.

? To be in compliance with the HIGPA Code of Conduct, each GPO must designate a Compliance Officer to assure that their respective purchasing organization is abiding by the provisions set forth in the Code. Anyone who has questions regarding a specific GPO's compliance can contact that GPO's Compliance Officer through HIGPA's web site.

Antitrust Compliance

In July 2004, the FTC and the DOJ produced a joint report on health care competition and policy, titled, "Improving Health Care: A Dose of Competition" (hereinafter, 2004 FTC/DOJ Report). This report was issued after significant scrutiny of the industry, including a workshop in September 2002 and a hearing in September 2003. The FTC and DOJ ultimately concluded the agencies have ample tools to assure continued competition in the GPO industry. Additionally, the 2004 FTC/DOJ Report states Health Care Statement Seven, the policy statement that governs GPOs, provides the FTC and DOJ with the ability to review group purchasing organizations' business practices at any point:

"Health Care Statement 7 and its safety zone aim to address monopsony and oligopoly concerns with the formation of a GPO. This statement does not address all potential issues that GPOs may raise. The Agencies believe amending the statement to address some, but not all potential issues, is likely to be counterproductive. Health Care Statement 7 does not preclude Agency action challenging anticompetitive contracting practices that may occur in connection with GPOs. The Agencies will examine, on a case-by-case basis, the facts of any alleged anticompetitive contracting practice to determine whether it violates the antitrust laws."

Indeed, this report reveals that existing law and policy provide the necessary tools to prevent anti-competitive behavior by GPOs and that changes would be counterproductive. It is for these reasons continued self-regulation is a viable compliance option for the health care group purchasing industry.

The Value of Compliance Programs

Moreover, the Federal Trade Commission has demonstrated a preference for self-regulation in industries that offer efficient self-compliance systems. As former Chairman of the Federal Trade Commission (1995-2001), Robert Pitofsky, wrote:

"From a public policy perspective, self-regulation offers several advantages over government regulation or legislation. It often is more prompt, flexible, and effective than government regulation. Self-regulation can bring the accumulated judgment and experience of an industry to bear on issues that are sometimes difficult for the government to define with bright line rules. Finally, government resources are limited and unlikely to grow in the future. Thus, many government agencies, like the FTC, have sought to leverage their limited resources by promoting and encouraging self-regulation." (February 18, 1998)

Numerous industries, in addition to the GPO sector, recognize the benefits of self-regulation to manage issues, which are similar to group purchasing. Business trades, including the American National Standards Institute (ANSI), financial rating services such as Moody's, the National Association of Securities Dealers (NASD), and certifications for kosher and halal food, among many others, rely on industry self-regulation to provide strong standards without reliance on government oversight. Time has proven that the well-placed trust by consumers in self-regulation offers them the best value.

Potential Legislation

There is absolutely no need for legislation. Through HIGPA, the industry reiterates the point made in its September 2, 2004 letter to the Subcommittee and strongly opposes any effort to impose new restrictions on the group purchasing industry that are unnecessary and harmful to our health care provider members.

Draft legislation has been provided to HIGPA by the Subcommittee's staff. The GPOs of HIGPA are alarmed at this Subcommittee's consideration of legislation that would ultimately restrain health care providers' ability to control one of the few budget items it can—supply costs. So, without going through each of the elements of the legislation, allow me to highlight some of the more serious concerns it raises:

? Although the draft legislation is entitled the Medical Device Competition Act of 2004, it actually extends to all products and services sold to health care providers.

? The reach of the definition of "purchasing agent" would clearly include group purchasing organizations (GPOs) and integrated delivery networks (IDNs), but also potentially pharmacy benefit managers (PBMs), distributors, wholesalers, and even providers as well as employees of these entities who work in the procurement chain.

? The draft legislation requires the Secretary of HHS to promulgate procedures for annual certification that a purchasing agent is in compliance with all regulations promulgated by the Secretary.

No other segment of the health industry is currently subjected to any such government certification process. The certification process could entail seeking information from other parties, such as vendors and providers, which could significantly exacerbate the burden and expense to all participants in the health care supply chain.

? A three percent cap on vendor payments was expressly rejected by Congress when it enacted the current statutory exception. Placing a cap on fees raises numerous issues regarding how fees are calculated. For example, how do you calculate the fee if it is fixed in the aggregate (which is authorized by the statutory exception and current safe harbor)? Is it an average of three percent and, if so, over what period of time?

? Many of the congressional findings in the draft legislation regarding contracting practices of "purchasing agents" are directly contradictory of the conclusions set forth in the 2004 FTC/DOJ Report. This report concluded the current regulations governing the GPO industry are sufficient for the FTC and DOJ to monitor the industry.

? The draft legislation refers to anti-competitive practices, including tying, bundling or sole source contracting, but fails to define, or otherwise reference, any source to define these practices or the circumstances under which these practices are anti-competitive. There is significant established law, as demonstrated by Professor Herbert Hovenkamp, in his antitrust analyses regarding GPOs, and Robert Bloch, partner at Mayer, Brown, Rowe and Maw, ("An Analysis of Group Purchasing Organizations' Contracting Practices Under the Antitrust Laws: Myth and Reality") , that defines these practices, and demonstrates they are often pro-competitive, such that each must be analyzed on a case-by-case basis – as recommended by the FTC and DOJ.

? For these reasons, promulgation of regulations that apply to multiple, very different parties and relationships, as well as to extremely variable factual scenarios is virtually unworkable and risks stymieing competition and cost savings in the industry.

These are just some of the major concerns about the proposed legislation. They alone persuade HIGPA that this proposed legislation is far-reaching, unwarranted, and potentially harmful to the fight to hold down health care costs.

Our industry continues to engage in a vigorous examination of ways to improve and strengthen our certification and compliance process. We do this because we believe strongly that private sector compliance programs are the most efficient and effective way to advance best practices in hospital supply purchasing and strengthen our health care system. We offer to engage in productive dialogue with the

Subcommittee to explore non-legislative approaches for assuring the changes that have been made remain in place, and the industry is always vigilant in adapting its practices as the market continues to evolve.

Closing

Over the last 40 years the purpose of antitrust policy has been to protect consumer welfare, not competitors. In any event, the concerns raised against the GPO industry do not create an antitrust issue.

We return to the Subcommittee again today, not because hospitals are unhappy with the current system of group purchasing, but because some manufacturers aren't able to capture the sales they desire. We are here today because a small, yet vocal, group of medical device manufacturers would like to have Congress intervene in the marketplace in favor of "small" suppliers, at the expense of health care providers and the patients they serve every day.

We are here today because these manufacturers and their trade association cloak their arguments as being in the best interests of patients. They would have you believe that patients, and even health care workers, are being harmed because hospitals are being denied the ability to purchase their products. This is simply not true. It is the clinicians making decisions about the most appropriate medical devices to use – through the GPO process – that are the real advocates for patients.

At the end of the day, GPOs are responsible to their member providers, not to for-profit suppliers. What some self-interested, profit-maximizing companies are urging is to give hospitals less power in the procurement and supply chain.

Make no mistake, if Congress weakens the ability of GPOs to negotiate the best deals for their provider members – as is proposed in the draft legislation – patients will not be better served. Rather, the cost of health care will increase and manufacturers that would like to see GPOs severely weakened will realize greater financial success.

Given that group purchasing empowers providers to negotiate discounts from suppliers at virtually no cost to those providers, GPOs are the real untold success story in health care. Providers, payers and ultimately, consumers will pay more for products and services purchased through GPOs if their ability to negotiate on behalf of their providers is curtailed by additional restrictions on the GPO contracting processes. Imposing such restrictions as taking away the essential contracting tools available to GPOs to get the best deals on products for their members would tilt the marketplace in favor of manufacturers and have a negative impact on pricing, discounts, and savings that GPOs attain for their member providers.

I urge members of this Subcommittee not to weaken a crucial mechanism that helps providers reduce their purchasing costs which allows them to commit more financial resources to patient care.

Thank you.