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The Good, the Questionable, and the (Potentially) Ugly Health Care Policies in the Biden Competition Executive Order

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KEY TAKEAWAYS

President Biden's executive order promoting competition is counterproductive. It relies too heavily on excessive regulation while limiting freedom.

The order does contain some positive health care provisions: hospital price transparency, hearing aids without prescription, and better access to generic drugs.

Just like Obamacare, however, the Biden order gives HHS too much power through regulation of health care and Americans' health-related decision-making.

There's a lot to dislike in President Biden's executive order on "Promoting Competition in the American Economy."[1] It has been described as a "central planner's dream" and faulted for relying too much on regulation and too little on enhancing economic freedom.[2]

The sweeping executive order is generally objectionable, but there is some welcome news in its health care section. In particular, the Administration's commitment to continuing and building on Trump Administration initiatives on price transparency, permitting the sale of hearing aids without prescriptions, and curbing anticompetitive practices that block the introduction of affordable generics are positive steps toward market-based health care reform. But the order also contains recommendations of dubious value on drug importation, standardization of exchange-based health insurance coverage, and greater federal control of prescription drug prices.

It will take weeks and perhaps months to fully understand the order's implications, because an executive order does not define policy. Rather, it sets an overall direction for federal agencies. An executive order is not a royal decree; it is a directive from the President to his executive branch appointees to operationalize his policy goals.

The Biden executive order, for example, directs the Secretary of Health and Human Services (HHS) to implement several health care policies. HHS will subsequently issue regulations and sub-regulatory guidance in response to the President's directive. Until the department releases those details, it is impossible to make definitive judgments on the policy contents. It is possible, however, to evaluate the executive order's policy direction while reserving final judgment until the agencies flesh out the details.

The Good

- **Hospital Price Transparency.** The executive order doubles down on a Trump Administration regulation that requires hospitals to disclose their prices.[3] Hospitals mounted legal challenges to these rules and so far have lost in the federal courts.[4] Although the rules took effect on January 1, an estimated 94 percent of hospitals are not complying with them.[5] One reason for widespread noncompliance is that the fines for breaking the rules—just $300 daily or $109,500 annually—may be less than the cost of following them. On July 19, HHS proposed to increase those penalties to more than $2 million annually for the largest hospital systems.[6] In stiffening enforcement of the rule, HHS Secretary Xavier Becerra cited the executive order and vowed that "concealing the costs of services and procedures will not be tolerated by this Administration."[7]

- **Sale of Hearing Aids Without a Prescription.** According to the White House, the price of hearing aids averages more than $5,000, discouraging millions of people who could benefit from the devices from buying them.[8] Congress enacted legislation in 2017 to permit over-the-counter sales of hearing aids, but the Food and Drug Administration (FDA) has not yet promulgated implementing regulations. The executive order should prompt FDA to take this step, despite its long-standing reluctance to give consumers access to medically necessary products, including rapid tests for COVID-19.[9]

- **Elimination of Barriers to Generic Market Entry.** According to the Association for Accessible Medicines, a group that represents manufacturers of generic drugs and biosimilars, generics saved consumers $313 billion in 2019, including $96 billion in the Medicare program alone.[10] Generics account for 90 percent of prescriptions but just 20 percent of prescription drug spending.[11] The executive order calls on federal agencies to increase access to generic medicines by cracking down on arrangements, including pay-for-delay, that delay their introduction.

The Questionable

Some directives in the executive order either are unclear or promote policies that appear unlikely to benefit consumers.

- **Drug Importation.** The executive order would continue the Trump Administration policy of allowing states to import prescription drugs from Canada. While in theory this might provide some benefits to consumers, its outcome depends on the willingness of the Canadian government to supply Americans with drugs that it purchases for its own citizens. The State of Florida proposed to establish an importation program last year. Its first barrier was failing to attract a single bidder to run the program.[12] The Canadian government also balked, citing concerns that exporting drugs to the U.S. could result in shortages in Canada.[13] In addition, the Pharmaceutical Researchers and Manufacturers of America (PhRMA) has filed a lawsuit in federal court seeking to block the Administration from approving Florida's importation program.[14] Even if all this is sorted out, state importation of drugs from Canada would have at best a negligible effect on drug prices.

- **Hospital Consolidation.** The executive order does not explicitly target hospital consolidation, but it does direct federal antitrust regulators to take a more aggressive approach to consolidation within industries and to examine both prospective and retroactive tie-ups. Several studies have documented the adverse effects on prices of hospital consolidation, including mergers with other hospitals and the acquisition of medical practices, ambulatory surgical centers, and other entities. Increasing the power of federal regulators in this area could have counterproductive effects, and the extent to which they can unwind established hospital oligopolies is unclear.

Hospital consolidation is abetted by a web of federal and state anti-competitive regulations, including the Affordable Care Act's ban on physician-owned hospitals and state certificate-of-need and certificate-of-public-advantage laws. These laws protect market incumbents by erecting barriers to entry and otherwise strangling competition to the detriment of consumers.

The (Potentially) Ugly

Although it is not possible to make a final judgment on some of the executive order's directives until the agencies release policy details, some will almost certainly produce undesirable policies. These include:

- **Government Price Controls on Prescription Medicines.** The executive order gives the Administration 45 days to develop a plan "to continue the effort to combat excessive pricing of prescription drugs and enhance domestic pharmaceutical supply chains, to reduce the prices paid by the Federal Government for such drugs, and to address the recurrent problem of price gouging." Increased competition and price transparency would be as welcome in this segment of the health care industry as in the hospital segment, but the President and his congressional allies have made clear that they want the federal government to begin setting prices for prescription drugs throughout the economy. Such a policy would adversely affect patients by curbing innovation.[15] Instead of government price-setting, the Administration should pursue bipartisan policies that would make prescription drugs more affordable, including by promoting generic competition and reforming the Medicare Part D program.[16]

- **Standardized Options in the Federal Health Insurance Exchanges.** Obamacare's rigid regulatory regime has driven up health insurance premiums and limited consumer choices. Washington decides which benefits are "essential" and which are not, as well as what percentage of medical claims an insurer must pay, and otherwise restricts the options on offer to consumers. Insurers are, however, allowed some flexibility in organizing benefits and cost-sharing between consumers and the insurers within these federal parameters.[17] Issuers of Silver plans, for example, can offer different deductibles and cost-sharing amounts for medical services. The Biden Administration believes that giving consumers even this tiny dollop of freedom of

choice does them great harm. The executive order directs the Secretary of HHS to require insurers that sell through federal exchanges to offer identical deductibles, maximum out-of-pocket payments for covered in-network services, and cost-sharing amounts at each "metal" level.

Ironically, the executive order elsewhere proclaims that "a fair, open and competitive marketplace has long been a cornerstone of the American economy" and praises how the marketplace "means more choices, better service and lower prices" for consumers. Unfortunately, the executive order does not apply these principles to health insurance coverage.

Conclusion

President Biden's executive order on "Promoting Competition in the American Economy" in many places takes an excessively regulatory and counterproductive approach to health care problems that only free markets can resolve, but it also includes some useful policy directions in health care with its endorsement of hospital price transparency, generic drug competition, and making hearing aids available without a prescription. While the value of its other directives is questionable at best and harmful at worst, final judgment must await the release of agency regulatory and administrative documents that will supply the missing details.

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Endnotes

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