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With Critics Alleging PBM-Like Tactics, GPOs Could Face Interest from Antitrust Enforcers

Group purchasing organizations (GPOs), health care middlemen who purport to use their collective buying power to score deals on drugs and equipment for the purchasers they represent, could make a prime target for federal antitrust enforcers, according to sources familiar with the matter.

"Both DOJ and the FTC are increasingly focused on third-party intermediaries or consultants that are involved in pricing negotiations or decisions on behalf of their customers," Justin Bernick, partner at Hogan Lovells, told *The Capitol Forum*.

Critics allege that GPOs use their market power to require restrictive, limited-source contracting and to demand fees from manufacturers. As a result, critics say that GPOs' alleged anticompetitive conduct leads to less competition, particularly on price, and destabilized drug supply chains. Critics describe GPOs' market position as similar to another oversized middleman in the pharmaceutical supply chain, pharmacy benefit managers (PBMs), which are already subject to an ongoing FTC investigation.

"It's a pay-to-play game," Phillip Zweig, executive director of Physicians Against Drug Shortages said of the GPOs. "This is legalized bribery. And for all these years, they've gotten away with it."

The medical purchasing industry is highly concentrated. The three largest GPOs—Vizient, Premier Inc. (PINC) and HealthTrust Purchasing Group—together account for about 90% of hospital purchasing in the U.S. The three largest drug wholesalers, which control over 90% of prescriptions in the U.S.—McKesson (MCK), Cencora (COR) (formerly AmerisourceBergen) and Cardinal Health (CAH)—also have integrated GPO businesses, as *The Capitol Forum* reported.

"There's the Big Three GPOs that do the contracting for the majority of the hospitals, and there's the Big Three distributor GPOs that do the contracting for the majority of the retail pharmacy organizations," David Gaugh, interim president and CEO of the Association for Accessible Medicines, told *The Capitol Forum*. "And because of that, there's very limited access for many of the generic manufacturing companies to get on contract and to sell their product."

These intermediaries, who stand between medical suppliers and purchasers, claim to offer discounts, but some critics aren't convinced. In 2002, the U.S. General Accounting Office found that contracting with a GPO did not guarantee lower prices for hospitals on all products.

"They purport to offer a discount, and so you have to join and abide by the contract or you pay a penalty price," Daniel Walker, shareholder at Berger Montague and former attorney with the FTC's

Health Care Division, told *The Capitol Forum*. "But it is a collective action problem. If nobody agreed to be bound by these contracts, and the companies had to market their products outside of these exclusive or bundled contracts, the manufacturers would have to compete and the prices would be lower for everyone."

Potential antitrust enforcement. Ongoing shortages of essential drugs, the subject of several recent Congressional hearings, have drawn some attention to the role played by the Big Three hospital GPOs in the drug supply chain. In November 2022, nine advocacy groups, including the American Economic Liberties Project and Physicians Against Drug Shortages, wrote to FTC Chair Lina Khan urging the agency to launch a 6(b) investigation into GPO contracting, consolidation in the industry and how GPOs impact pricing and supply.

While no such investigation has materialized, the FTC took a step in July 2023 that might signal a shift in the agency's priorities—withdrawing a policy statement from 1996 that carved out "antitrust safety zones" for joint purchasing arrangements among health care providers. The FTC simultaneously withdrew a health care policy statement from 2011. DOJ's Antitrust Division had already withdrawn the 1996 policy statement and two others in February.

The antitrust enforcers' moves "signaled a new direction and an interest in our issue," Zweig said. And according to Bernick of Hogan Lovells, the withdrawal of the guidance "creates additional antitrust risk for both the intermediaries themselves and their customers."

Indeed, the FTC has made clear its interest in taking a closer look at health care middlemen, having launched a 6(b) investigation into the allegedly anticompetitive rebate practices of PBMs.

"A lot of the arguments made against PBMs are also ones that can be made against GPOs," Walker said. "In theory, they're there to bargain against the manufacturer and lower prices for their customers. But in fact, all their money comes from the manufacturers—and they get more of it the higher the prices are."

Walker added, "That creates a lot of incentive to help a monopolist keep a monopoly, because they're getting a cut of monopoly profits."

The FTC has recently checked off a few wins in its health care enforcement, which could mean the agency has more staff available to pursue a new investigation. The FTC declined to comment on *The Capitol Forum*'s questions about potential forthcoming enforcement. DOJ did not respond to a request for comment.

Anti-Kickback or Pro-Kickback? In 1987, Congress passed a safe harbor provision under the Anti-Kickback Statute (AKS) for Medicare—shielding the business model used by GPOs in negotiating with medical suppliers and drugmakers.

The safe harbor, finalized in 1991, exempts the "administrative fees" paid by vendors to GPOs from AKS enforcement—as long as the GPOs' contracts with their members disclose any fees recouped from a vendor above three percent of the purchase price. The law also states that GPOs must disclose the amount received by each vendor to the hospitals they represent at least annually, and to HHS upon request.

"The Anti-Kickback safe harbor was enacted in 1987, and that changed the whole business model from a nonprofit cooperative to a for-profit," Zweig said. "It changed the whole incentive structure, which gave rise to this whole pay-to-play scheme."

Zweig added, "The safe harbor set a ceiling of three percent on administrative fees, and if they exceeded three percent, they were to report this to the hospitals. But to get around that, they just invented other types of other fees by other names—marketing fees and conversion fees and advance fees."

The 2022 letter to the FTC requested that the agency study whether eliminating the AKS safe harbor would help fix problems related to competition, market dynamics and shortages.

In 1996, DOJ and the FTC published the recently withdrawn "Statements of Antitrust Enforcement Policy in Health Care." That guidance said the agencies would not challenge joint purchasing arrangements among health care providers as long as the purchases made through the arrangement accounted for less than 35% of sales in the relevant market, and the cost of the purchases made through the arrangement accounted for less than 20% of the total revenues of each seller.

"Almost immediately after those rules took effect, the GPOs started merging," Zweig said.

Since then, the FTC has not challenged any GPO mergers, nor has the agency conducted an antitrust investigation into the industry. DOJ filed a case against an Arizona GPO in 2007 for allegedly anticompetitive contracting practices, scoring injunctive relief in a later judgement, but otherwise has not specifically targeted the group purchasing industry.

In some instances, health care manufacturers have sued each other, alleging the use of GPO contracts to foreclose competition. For example, in February 2023, Applied Medical Resources Corporation sued Medtronic for alleged practices including "exclusive dealing and anticompetitive bundling agreements with GPOs and hospitals that restrain trade in the market for advanced bipolar

devices." The FTC filed an amicus brief in that case in July, arguing that Applied Medical had used a valid framework for alleging unlawful bundling and exclusive dealing.

The Government Accountability Office, for its part, has published several reports describing federal oversight of GPOs and the industry's funding structure.

In the past two decades, the impact of GPOs on costs, supply and competition has been debated at a smattering of Congressional hearings. Most recently, at a Senate Finance Committee hearing on December 5, 2023, Senator Ron Wyden (D-OR) pointed to consolidated health care middlemen—hospital GPOs and drug wholesalers—as a driving factor behind drug shortages, as *The Capitol Forum* reported. Wyden may be considering accompanying legislation.

Premier, the only publicly traded company among the Big Three hospital GPOs, addressed the FTC and DOJ's decision to withdraw the 1996 guidance and the possibility of antitrust enforcement in its most recent 10-K.

"Earlier in 2023, the DOJ and FTC withdrew the Healthcare Statements, stating that they were outdated and overly permissive and indicating that the agencies would provide future guidance through case-by-case enforcement," the company said. "In the absence of current guidance, we have continued to attempt to structure our contracts and pricing arrangements in accordance with the Healthcare Statements and believe that our GPO supplier contracts and pricing discount arrangements should not be found to violate the antitrust laws."

The company also noted that the GPO industry faces antitrust scrutiny "from time to time."

Vizient declined to comment on this story; none of the other "Big Three" hospital GPOs or drug wholesalers responded to *The Capitol Forum*'s request for comment.