April 29, 2024

The Honorable Jonathan Kanter
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Assistant Attorney General Kanter and Chair Khan,

In today's modern economy, algorithms frequently dictate the prices consumers pay, wages workers earn, or levels and quality of service people receive. Consumers are constantly interacting with algorithms as part of their daily lives—whether they're shopping online, paying rent, booking a flight, hailing a ride, looking for a new app to download, or accessing the healthcare system. Given the significant role that algorithms play in our everyday economic lives, it is imperative that the Department of Justice (DOJ) and Federal Trade Commission (FTC) ensure that algorithms are not used to corrupt the competitive process, increase prices, or otherwise harm consumers.

In December of last year, I held a hearing on the dangers that algorithmic pricing tools pose to free and competitive markets. After learning about the emerging danger that certain pricing algorithms may pose to consumers, I introduced the *Preventing Algorithmic Collusion Act* to ensure that the use of pricing algorithms is clearly disclosed, that the DOJ and FTC have adequate tools to audit pricing algorithms, and that there are no loopholes in enforcement authority when it comes to prosecuting anticompetitive behavior that occurs through an algorithm.

Recent reporting has indicated that firms may be using algorithmic tools to undermine competition and push additional costs onto patients that receive healthcare out of their insurance network. The *New York Times* reported on one such firm, MultiPlan, which sells data to help insurance companies determine how much they should pay providers for out-of-network medical care, and how much of that cost is passed directly to patients. While it is common for patients to pay different rates for out-of-network care, I am concerned that—rather than competing for business from employers by reducing these costs to employees—algorithmic tools are processing data gathered across numerous competitors to subvert competition among insurance companies. The result is that—instead of competing with each other—insurance companies are pushing additional hidden costs on to employees and patients.
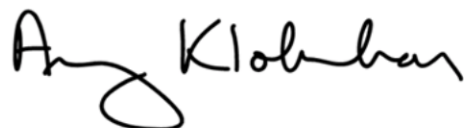
In 2009, a settlement agreement with the New York Attorney General required health insurers to shift out-of-network pricing decisions to a non-profit entity. But this provision lasted only five years. After the settlement expired, there was a concerted shift by numerous insurance companies toward MultiPlan's for-profit services. Freed from the constraints of the settlement, MultiPlan has now positioned itself as a central hub that gathers out-of-network payment data across the industry and uses algorithmic tools to process this data to recommend artificially low payments to physicians potentially at the expense of employees or patients. This business model appears to be a product of ownership by numerous private equity firms and at least two acquisitions of rival service providers. MultiPlan reportedly collects fees commensurate with how little its insurance-company clients pay to doctors. In other words, the more money MultiPlan forces patients to pay for out-of-network care, the more money it makes.

The New York Times even reported that MultiPlan sometimes "told insurers what unnamed competitors were doing." This has put some doctors in the impossible position of depriving patients of care or providing that care at a significant loss. Algorithms should be used to make decisions more accurate, appropriate, and efficient, not to allow competitors to collude to make healthcare more costly for patients.

The use of algorithmic tools to push costs away from insurance companies to patients, potentially by using algorithms to process sensitive data from competitors throughout industry, is similar to conduct by algorithmic price-setting firms in rental and hotel markets that the DOJ and FTC have argued violate the antitrust laws. In one brief, the agencies jointly declared that "[a]lgorithms are the new frontier" for anticompetitive acts, and that "[c]oncerted action can take many different forms, including competitors' jointly delegating key aspects of decision making to a common entity, such as an algorithm provider." The reporting around MultiPlan indicates it may have used algorithmic tools to co-opt and coordinate insurance payment decisions in much the same way.

I encourage you to investigate the use of algorithms that collect and process data in the out-of-network insurance payment industry to determine payments for physicians and out-of-pocket costs for patients to determine whether any of this conduct violates the law. I appreciate your prompt attention to these issues.

Sincerely,

Amy Klobuchar
United States Senator