Office of Policy Planning
Bureau of Economics
Bureau of Competition

June 4, 2013

The Hon. Catherine Osten and the Hon. Peter Tercyak, Co-Chairs
Labor and Public Employees Committee, Connecticut General Assembly
Legislative Office Building, Room 3800
Hartford, CT 06106

Re: Request for Comment on H.B. 6431

Dear Senator Osten and Representative Tercyak:

The staffs of the Federal Trade Commission=s Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] are pleased to respond to your request for comment on the potential competitive impact of Connecticut House Bill 6431, "An Act Concerning Cooperative Health Care Arrangements," as amended by LCO Number 6504 ("H.B. 6431" or "the Bill").[2] The Bill provides for the formation of "health care collaboratives" comprising otherwise independent health care practitioners. The Bill would authorize these and similar "prospective" entities to jointly negotiate prices and other terms with health plans. It also attempts to immunize these joint negotiations from scrutiny under the antitrust laws.

FTC staff recognize that collaborations among physicians and other health care professionals can be fruitful. At the same time, we write to express strong concerns that the Bill is based on inaccurate premises about the antitrust laws and the value of competition among physicians. If enacted, it will very likely benefit only participating physicians, who seek to enhance their bargaining power in selling their services, while harming health care competition and health care consumers in Connecticut.

> First, the antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit health care consumers. As explained in extensive guidance issued by the federal Antitrust Agencies, competitor collaborations – including health care provider collaborations – often are

Second, a central purpose of the Bill appears to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients.

Third, because procompetitive health care collaborations already are permissible under the antitrust laws, the Bill's main effect would be to foster precisely those types of collective negotiations that would *not* generate efficiencies and therefore would *not* pass muster under the antitrust laws. The joint negotiations contemplated by the Bill are likely to lead to increased health care costs and decreased access to health care services for Connecticut consumers.

This Bill raises competition concerns similar to those raised by proposals for "Cooperative Health Care Arrangements" considered in prior sessions of the Connecticut General Assembly. As you may know, FTC staff reviewed one such bill in 2011,[3] and the analysis in that letter (attached) still applies. Connecticut Attorney General George Jepson's recent testimony befo

II. The Connecticut Bill

As noted above, the Bill (as amended) provides for the formation of "health care collaboratives" – certain collaborations or joint ventures of otherwise independent health care practitioners.[12] The Bill further provides that any such collaborative, and any "prospective health care collaborative," may jointly negotiate price and other terms with health plans.[13] All health plans – broadly defined to include any entity, large or small, "that pays for health care services"[14] – would be required to negotiate with such collaboratives "in good faith,"[15] subject to mandatory mediation by a state-designated mediator should negotiations prove unsuccessful.[16] Health plans – but not collaboratives

of the ACO program. Many ACOs already have been formed, both for participation in Medicare's Shared Savings Program (introduced by the ACA) and for offering services to commercial markets. In January 2013, the Centers for Medicare and Medicaid Services ("CMS") announced that more than 250 ACOs already had been established under its own programs,[25] with roughly half being "physician-led organizations that serve fewer than 10,000 beneficiaries."[26] Hundreds of additional ACO-type organizations reportedly have formed outside the Medicare program.[27] This empirical evidence belies claims that antitrust concerns are chilling the development of physician-sponsored ACOs.

The Antitrust Agencies have been closely involved in providing guidance concerning both Medicare and commercial ACO formation, to ensure that the prospect of antitrust liability does not impede the formation of beneficial ACOs.[28] As CMS noted in publishing the final ACO rules, CMS and the Antitrust Agencies "worked very closely … to develop policies to encourage participation and ensure a coordinated and aligned inter- and intra-agency program implementation."[29] On the same day the CMS ACO rules were published, the Antitrust Agencies released a joint statement explaining their enforcement policy approach to ACOs "to ensure that health care providers have the antitrust clarity

antitrust exemptions threaten broad consumer harm while benefitting only certain market participants.

Yet, health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on

conduct that is inconsistent with federal antitrust law and policy, and that such conduct could work to the detriment of Connecticut health care consumers.

We appreciate your consideration of these issues.

Respectfully submitted,

Andrew I. Gavil, Director
Office of Policy Planning

Howard Shelanski, Director
Bureau of Economics

Richard A. Feinstein, Director
Bureau of Competition

Attachments

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[1] This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission (Commission) or of any individual Commissioner. The Commission has, however, voted to authorize staff to submit these comments.

[2] Letter from the Hon. Catherine Osten and the Hon. Peter Tercyak, Connecticut General Assembly, to Andrew I. Gavil, Director, Office of Policy Planning, Fed. Trade Comm'n, May 20, 2013.

[3] FTC Staff Comment to Senators Coleman and Kissel and Representatives Fox and Hetherington, Connecticut General Assembly, Concerning Connecticut H.B. 6343, Intended To Exempt Members of Certified Cooperative Arrangements From the Antitrust Laws (June 2011), *available at* http://www.ftc.gov/os/2011/06/110608chc.pdf.

[4] Testimony of Attorney General George Jepson Before the Comm. on Labor and Pub. Employees (Mar. 5, 2013) (regarding AG's opposition to H.B. 6431, as introduced); *see also* Testimony of Attorney General George Jepson Before the Comm. on Labor and Pub. Employees (Feb. 28, 2012) (regarding AG's opposition to prior "cooperative health care arrangements" bill, S.B. 182).

[5] Federal Trade Commission Act, 15 U.S.C. ▪ 45.

[6] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

[7] *See Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978) (The antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

[8] *See generally* Fed. Trade Comm'n, An Overview of FTC Antitrust Actions In Health Care Services and Products (Mar. 2013), *available at* http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf; *see also* Fed. Trade Comm'n, Competition in the Health Care Marketplace: Formal Commission Actions, *available at* http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm.

[9] *See, e.g.,* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE ("DOJ"), IMPROVING HC

[15] *Id.* at § 4(d)(1).

[16] *Id.* at § 4(b), (b)(1)-(3).

[17] *Id.* at § 4(d)(1)-(2) (providing that civil penalties up to $25,000 per day, per each distinct violation, may apply to any health plan that violates pertinent provisions).

[18] *Id.* at §2(a) (stipulating that joint negotiations may take place "[n]otwithstanding the antitrust laws"). The raised bill purports "[t]o permit health care providers to enter into cooperative arrangements that would not be subject to certain antitrust laws," Conn. Gen. Assembly, Raised H.B. No. 6431, Session Year 2013, *available at* http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB6431&which_year=2013#. According to an analysis by the General Assembly's Office of Legislative Research, the Bill would, at the least, "generally exempt [approved collaboratives] from state antitrust laws." Conn. Gen.

diverse ACOs including, as of 2010, a Brookings/Dartmouth Accountable Care Collaborative comprising "approximately sixty provider systems across the country.").

[28] *See generally* Susan S. DeSanti, *ACO Antitrust Guidelines: Coordination Among Federal Agencies*, 11-2 ANTITRUST SOURCE 1 (DEC. 2011).

[29] Dep't Health & Human Servs., Ctrs. Medicare & Medicaid Servs. ("CMS"), 42 CFR Part 425, Medicare

[37] In addition, the asymmetric "good faith" negotiation requirement and threat of very large fines, applicable to all health plans, large and small (*supra* note 17), will likely decrease the incentives of cooperatives to compete on price and quality. It will also likely impede the ability of health plans to use selective contracting, a key mechanism for promoting quality and cost-containment goals.

[38] FTC v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013) (quoting FTC v. Ticor Title Ins. Co., 504 U. S. 621, 636 (1992)); *see also* North Carolina State Bd. of Dental Examiners v. FTC, No. 12-1172 (4th Cir. May 31, 2013) (no state action immunity for dental board that sought to exclude non-dentist competitors in teeth whitening services).

[39] *FTC v. Phoebe Putney*, 133 S. Ct. at 1015 (state legislature's objective of improving access to affordable health care does not logically suggest contemplation of anticompetitive means, and "restrictions [imposed upon hospital authorities] should be read to suggest more modest aims."). As the U.S. Court of Appeals for the Fourth Circuit has observed, "[f]orewarned by the [Supreme Court's] decision in *National Society of Professional Engineers* . . . that it is not the function of a group of professionals to decide that competition