regulations that may impede competition without also offering countervailing benefits to consumers.

Health care competition is critically important to the economy and consumer welfare. For this reason, anticompetitive conduct in health care markets has long been a key focus of FTC activity. The agency has brought numerous antitrust enforcement actions involving the health care industry.[3] In addition, the Commission and its staff have given testimony,[4] issued reports,[5] and engaged in advocacy to state legislatures regarding various aspects of competition in the health care industry. Of particular relevance, the Commission and its staff have advocated against federal and state legislative proposals that would create antitrust exemptions for collective negotiations by health care providers when such exemptions are likely to harm consumers.[6]

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[3] See

The Texas Bill

S.B. 8 allows establishment of "health care collaboratives" -- organizations that may consist of physicians and other health care providers, including hospitals -- and is apparently intended to provide them with an exemption from the antitrust laws. That immunity would extend to a collaborative's negotiations of all contracts with payors, both governmental and private.[7] According to the Bill's preamble, the antitrust exemption is considered necessary to "explore innovative health care delivery and payment models [and] to give health care providers the flexibility to collaborate and innovate to improve the quality and efficiency of health care."[8] The preamble also states that the Bill is not intended to authorize what would otherwise be per se violations of the antitrust law.[9]

To qualify as a health care collaborative, an organization must be certified by the Commissioner of the Texas Department of Insurance.[10] To be certified, a collaborative must be able to demonstrate that it has processes in place to contain costs and evaluate health care quality. It must also show:

> the willingness and potential ability to ensure that the health care services be provided in a manner that: (i) increases collaboration among health care providers and integrates health care services; (ii) promotes quality-based health care outcomes, patient engagement, and coordination of services; and (iii) reduces the occurrence of potentially preventable events.[11]

[7] S.B. 8, § 1.01(c) (Tex. 2011).

[8] S.B. 8, § 1.01(a)(1) and (3) (Tex. 2011).

[9] S.B. 8, § 1.01(c) (Tex. 2011).

[10] S.B. 8, § 848.054 (Tex. 2011).

[11] S.B. 8, § 848.057 (Tex. 2011).

collaboratives and collective negotiations.

(b) The Bill Poses a Substantial Risk of Consumer Harm

The Bill as written goes beyond the current law and appears intended to extend broad antitrust immunity to health care collaboratives. Regardless of any stated intent by a collaborative to improve health care quality and control costs, the practical effect of the Bill will be to exempt anticompetitive conduct from antitrust scrutiny. We think this would pose an unnecessary and substantial risk of consumer harm.

It is well-recognized that antitrust exemptions routinely threaten broad consumer harm for the benefit of a few. The bipartisan Antitrust Modernization Committee observed "[t]ypically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality and reduced innovation."[16] Although the Bill would not exempt conduct that amounts to a "per se" violation of the antitrust laws, the Bill appears intended to shield a broad range of anticompetitive conduct from antitrust challenge. This may cover anticompetitive mergers and acquisitions as well as a range of agreements among competitors that, although strictly speaking per se illegal, are so inherently likely to injure competition that they are condemned under the rule of reason absent any plausible procompetitive justification.[17]

In addition, it is not likely that the Department of Insurance's consideration of competition concerns and the Attorney General's review will protect consumers from the harmful effects of this legislation, for a number of reasons. The initial review of a health care collaborative is limited in scope, and even the more detailed review that may occur upon certificate renewal may not be sufficient. Further, it is not clear that the Department of Insurance has the necessary expertise to conduct the type of fact-intensive, time-consuming analysis of competition and market power needed to protect consumers. Even if the Department does find a problem, the grounds for revocation are limited. Indeed, if a health care collaborative uses its market power to increase prices for consumers, there is

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http://www.ftc.gov/bc/healthcare/industryguide/advisory.htm; also Fed. Trade Comm'n & U.S. Dep't of Justice,

no provision for remedying this harm. Moreover, there is no mandatory review of a collaborative's status after the first year. Finally, the extent of and time allotted for the Attorney General's review are limited and the standards under which the Attorney General can find a determination inadequate are unclear. Thus, the review provisions are not adequate to protect consumers from the likely harm created by the Bill.

The Bill May Not Create State Action Immunity

The antitrust immunity that the Bill purports to confer on private health care collaboratives is effective only if the State of Texas has clearly articulated an intention to replace competition in this area with a regulatory scheme, and actively supervises this private conduct.[18] The active supervision test seeks to determine "whether the State has exercised sufficient independent judgment and control so that the details [of the restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties."[19] As explained by the Supreme Court in Patrick v. Burget, state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[20]

Here, the State's review proposed under the Bill does not appear sufficient to protect consumers from the potential anticompetitive effects of collaborations that do not further the goals of the legislation. Additionally, the Bill does not appear to mandate any ongoing state supervision of health care collaboratives after the initial approval and one-time renewal processes. The State, for example, under the Bill as written, would not require [illegible]

We appreciate your consideration of these issues.

Respectfully submitted,

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