Ohio House of Representatives
77 South High Street, 13th Floor
Columbus, OH 43266- 0603

Re: *Ohio House Bill 325*

Dear Representative Stapleton:

This letter[(1)] responds to your request for comment on House Bill 325,[(2)] a bill to permit competing health health care costs and

reduce access to care, without ensuring better care for patients. In our judgment, House Bill 325 raises

Commission and the U.S. Department of Justice address this issue directly.[(6)] In Example 3 of Statement 8, competing physicians form a hypothetical independent practice association ("IPA") to "combat the power" of managed care plans by negotiating with them collectively rather than individually. The IPA involves no integration that is likely to result in significant efficiencies (such as financial risk-sharing or clinical integration). This combination - collective negotiation over price and no significant efficiency-enhancing integration -

simply would not be possible in the absence of an antitrust exemption. This argument is unpersuasive for two reasons.

First, discussions between physician groups and health plans are not illegal. Current antitrust law permits doctors to negotiate collectively with health plans in various circumstances in which consumers are likely to benefit. The Health Care Statements, for example, describe multiple, antitrust-compliant methods by which physicians may organize networks, and other joint arrangements, to deal collectively with health plans and other physicians.[13] These methods include physicians' use of professional societies and other groups jointly to provide information and express opinions to health plans.[14] As the Commission explained in its testimony before Congress:

[T]he antitrust laws do not prohibit medicals societies and other groups from engaging in collective discussions with health plans regarding issues of patient care. Among other things, physicians may collectively explain to a health plan why they think a p

Market share can indicate market power if based upon a properly defined market, but even if the bill's categories correctly identified relevant markets, a 15 percent market share is not a level ordinarily presumed to constitute market power. Using 25,000 covered lives as the threshold is also problematic as, depending on the size of the market in question, this figure could represent substantially less than a 15 percent share. Furthermore, that a health plan will be deemed to have market power whenever its negotiating power significantly exceeds that of any given individual provider would make the limitation even less connected to any economically meaningful concept of market power. Indeed, it is likely that this provision could be used to justify collective fee setting in virtually all cases. As a result, although it purports to do otherwise, House Bill 325 would, in effect, authorize competing providers collectively to negotiate fees with health plans that lack market power.

B. Pre-Negotiation Physician Communications

House Bill 325 also attempts to shield consumers from the competitive harms resulting from physician collective bargaining by providing the state Attorney General with oversight of the negotiating process and collectively-bargained contract terms. The extent of this oversight is central to the state action analysis, and is discussed in further detail below.

As in the case of the market share screen, however, an initial problem with this protective mechanism is that it does not cover *all* conduct that requires oversight. Most notably, House Bill 325 allows physicians to agree on the fees that they will accept in their negotiations *before* they obtain the Attorney General's approval to undertake actual negotiations.[(19)] As a result, even if the health plan ultimately were deemed to lack substantial market power (making collective fee negotiations improper under the bill), the physicians already will have agreed on acceptable price terms. The likelihood that such an agreement on fees would spill over into individual negotiations on price terms is substantial.

C. Health Plan Opt-Out Power

Finally, House Bill 325 attempts to limit the anticompetitive impact of physician collective bargaining by preserving a health plan's power to opt-out of collective negotiations or collectively-negotiated terms. Nothing in the bill *requires* a health plan to participate in collective bargaining. A health plan may refuse to negotiate with a physician collective bargaining group and attempt to negotiate with its members individually. Also, the petition to the state Attorney General for approval of collectively-negotiated terms must be submitted jointly by the health plan and the physicians that are party to the contract.[(20)]

Once again, however, these provisions are not likely to offer substantial protection to Ohio's health care consumers. Although a health plan is not *required* to negotiate with a physician collective bargaining group, the economic pressure to do so is likely to be substantial. As the Commission has previously

that aspects of their economies will be governed by state regulation rather than market forces. States, however, may not simply authorize private parties to violate the antitrust laws.[(23)] Instead, a state must substitute its own control for that of the market. To that end, the state legislature must clearly articulate a policy to displace competition wit

to provide antitrust immunity would risk exposure to potentially significant financial liability for their actions.

I hope you find these comments helpful. Should you have any additional questions, feel free to contact Jeffrey W. Brennan, Assistant Director for Health Care Products and Services, at 202-326-3688.

Sincerely,

Joseph J. Simons, Director
Jeffrey W. Brennan, Assistant Director
Bureau of Competition

R. Ted Cruz, Director
John T. Delacourt, Attorney
Office of Policy Planning

Endnotes:

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

2. H.B. 325, 124th Gen. Assem., Reg. Sess. (Ohio 2002) ("H.B. 325").

3. *See* Testimony of Federal Trade Commission before the House Judiciary Committee on H.R. 1304 (June 22, 1999) ("FTC Testimony on H.R. 1304"), *available at* <http://www.ftc.gov/os/1999/9906/healthcaretestimony.htm> (Attachment 1).

4. *See, e.g.,* Letter to the Washington House of Representatives on House Bill 2360 (Feb. 8, 2002), *available at* <http://www.ftc.gov/be/v020009.pdf> (Attachment 2); Letter to the Alaska House of Representatives on Senate Bill 37 (Jan. 18, 2002), *available at* <http://www.ftc.gov/be/v020003.htm> (Attachment 3); Letter to the District of Columbia Office of Corporation Counsel on Bill No. 13-333 (Oct. 29, 1999), *available at* <http://www.ftc. gov/be/rigsby.htm>; Letter to the Texas Legislature on Senate Bill 1468 (May 13, 1999), *available at* <http://www.ftc.gov/be/v990009.htm>.

5. *See*

health, retirement, and financial services benefits of the health care business of a competing company allowed to proceed only after the acquirer agreed to divest its health maintenance organization businesses in Houston and Dallas-Forth Worth, Texas).

13. *See generally* Health Care Statements, *supra* note 6.

14. *See , e.g., Schachar v. American Academy of Opthalmology*, 870 F.2d 397 (7th Cir. 1989). *See also* Health Care Statements, *supra* note 6, at Statements 4-5.

15. FTC Testimony on H.R. 1304, *supra* note 3, at 7. *See also* Health Care Statements, *supra* note 6, at Statement 4 (creating an antitrust safety zone for health care providers' collective provision of non-fee-related information to health plans).

16. FTC Testimony on H.R. 1304, *supra* note 3, at 10.

17. H.B. 325 at § 1751.133(B).

18. An initial problem with this screening mechanism is that it does not apply to *all* price-related collective bargaining. For example, the bill does not require physicians to de[illegible]

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proceedings and adjudications of specific complaints about the reasonableness of rates); *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1334-35 (10th Cir 1988) (state held public hearings to assess the reasonableness of rates).

34. *See* H.B. 325 at §§ 1751.136(C), 1751.137(B), 3923.355(C), and 3923.356(B) ("The attorney general shall either approve or disapprove a petition . . . within thirty days.").

35. *Id.* at §§ 1751.136(C), 1751.137(C), 3923.355(C), and 3923.356(C).