UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Competition
Bureau of Consumer Protection

May 29, 2008

Hon. Elaine Nekritz
State Representative
State of Illinois – 57th District
24 South Des Plaines River Road
Des Plaines, IL 60016

Dear Representative Nekritz:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, Bureau of Consumer Protection, and Bureau of Competition[1] are pleased to respond to your invitation for comments regarding Illinois House Bill 5372 (HB 5372 or the Bill) and the proposed regulation of retail health care facilities in Illinois.[2] You ask whether HB 5372 "contains provisions that would be considered anticompetitive." In particular, you express concern about the Bill's prohibition of the location of a retail health care facility "in any store or place that provides alcohol or tobacco products for sale to the public."

Store-based health clinics – offering a small, fixed, and publicized range of basic health care services[3] – have the potential to expand access to health care by making very basic medical care convenient and less costly.[4] Retail clinics are often able to lower

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[2] Letter from the Hon. Elaine Nekritz to Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission (Apr. 9, 2008) (regarding Illinois House Bill 5372, 95th General Assembly 2007-08).

[3] Typical services include, e.g., common adult vaccinations, basic triage and diagnosis, and basic treatment of certain common ailments. *See generally* William Sage, *The Wal-Martization of Health Care*, 28 J. OF LEGAL MED. 503, 504-7 (2007) (Describing the typical conditions LSCs treat and their physical design

costs – and prices charged to consumers – by offering a fixed, limited range of services in existing retail settings.[5] The use of a small leased space in an extant retail setting has been identified as a particular factor in the lower cost structure of such clinics that tends to reduce the prices they charge.[6]

The legislature's attention to such clinics is therefore commendable. At the same time, the FTC staff believes that certain provisions in HB 5372 need clarification because certain interpretations of those provisions could excessively restrict retail clinics to the detriment of Illinois health care consumers.[7] In addition, because several of the Bill's requirements would pertain only to retail clinics – and not other health care facilities offering the same services or staffing – those requirements could put retail clinics at a competitive disadvantage without offering countervailing consumer benefits.

Interest and Experience of the Federal Trade Commission

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[8] Section 12 of the FTC Act specifically prohibits the dissemination of false advertisements for foods, drugs, devices, services, or cosmetics.[9]

Anticompetitive conduct in health care markets has long been a target of the FTC's law enforcement mission.[10] The FTC and its staff also have investigated the competitive effects of restrictions on the business practices of health care providers. In 2003, the FTC and the Department of Justice Antitrust Division held twenty-seven days

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able to fulfill the immediate needs of patients with minor conditions with less waiting time, more flexible evening and weekend hours, and in some cases, lower out-of-pocket expenses." American Medical Association, Report 7 of the Council on Medical Serv

of hearings on health care and competition law and policy.[11] In 2004, the FTC and the Antitrust Division jointly released a report – based on those hearings, an FTC-sponsored workshop, and independent research – that covered diverse issues in health care competition and delivery.[12]

FTC has also used its law enforcement authority to maintain the integrity of health care advertising. From April 2006 through February 2007, the FTC initiated or resolved thirteen law enforcement actions involving allegedly deceptive health claims.[13] The Commission and its staff have also undertaken research and advocacy directed specifically at health care advertising issues.[14] Those activities, like the hearings and report,[15] emphasized the importance of access to truthful and non-misleading health care marketing information to consumers. The FTC has sought to limit the anticompetitive and anti-consumer effects of unnecessary restrictions on truthful and non-misleading advertising by, among others, physicians,[16] chiropractors,[17] and optometrists.[18]

The FTC has also examined the emerging retail or limited service clinic market. These clinics were the focus of a panel at a recent FTC public workshop.[19] Last year, FTC staff submitted comments on draft Massachusetts regulations regarding limited service clinics. The draft regulations recognized that new models of health care delivery

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[11] Federal Trade Commission and Department of Justice, Joint Hearings on Health Care and Competition Law and Policy (2003). Links to transcripts and other hearings materials are available at http://www.ftc.gov/bc/healthcare/research/healthcarehearing.htm.

[12] Federal Trade Commission and Department of Justice, IMPROVING HEALTH CARE: A DOSE OF COMPETITION Chapter 7 (2004) [hereinafter A DOSE OF COMPETITION], *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[13] *See, e.g.,Cavailabgse gs*

could make basic health care more accessible to consumers.[20] The FTC staff comments supported the goals of the regulation, but expressed concern that a proposed requirement that all limited service clinic advertising – and no other clinic advertising – be pre-screened and pre-approved, could deprive consumers of useful information about available care and act as a barrier to entry for new competitors.[21] Massachusetts adopted the FTC staff's suggestions in its final regulations.[22]

Discussion

As noted above, the legislature's initiative to accommodate the potentially pro-competitive development of retail clinics may be of substantial benefit to Illinois health care consumers. At the same time, several provisions in HB 5372 raise competition concerns. First, certain ambiguous provisions could be read in ways that harm health care competition and consumers. For example, the proposed statutory definition of retail health care facilities – read in conjunction with Illinois law regarding the corporate practice of medicine[23] – could be read to imply that the proposed clinic restrictions apply according to clinic ownership or affiliation, rather than the nature of the services provided or the licensed professionals providing them. If so, the restrictions could, individually or collectively, work as a substantial barrier to entry for retail clinics in Illinois, which could tend to restrict the supply of basic health care services or raise their prices.

Second, certain provisions appear to impose special and potentially burdensome restrictions on the operation of retail clinics and, in some cases, on contracting between retail clinics, health care consumers, and third-party payers. For example, the special restrictions on retail clinic advertising may work to prohibit or chill consumer access to truthful and non-misleading information about prices for basic medical services. Although false or misleading marketing information can harm health care competition and consumers, access to truthful and non-misleading information is important to consumers' effective participation in their health care and health care expenditures.

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practice standards for various categories of health care providers. Nonetheless, the basis for imposing special supervisory burdens in a retail setting – or perhaps in a retail setting according to clinic ownership – is not clear. Such special requirements could potentially

for those Illinois consumers for whom copayments and deductibles represent an increasing burden.[39] The Bill's "non-discrimination" provision would be problematic – for competition and consumers – if it were to restrict such incentives with regard to retail clinics. It could also prevent payers from negotiating favorable terms with retail clinics in the first place, if contracts could not be based on the volume of business that might be anticipated with discounted copayments. The rationale for prohibiting lower copayments or deductibles when consumers receive lower-cost basic medical care from licensed health care professionals, in the particular setting of a retail clinic, is unclear.[40]

Finally, the Bill's requirement that a retail clinic provide "separate restrooms" may increase costs for retail clinics.[41] If existing restrooms in the retail settings housing retail clinics satisfy this requirement, retail clinics can easily meet this requirement, so it is unlikely to have a substantial impact on costs. However, to the extent that "separate restrooms" is read generally to require new construction of restrooms within a clinic space, it may represent a significant additional sunk cost for new clinics.[42] In that case, the legislature should determine what benefits, if any, the restroom requirement has and weigh them against the requirement's additional costs.

B. Competition Concerns Raised by Special Clinic Requirements

1. Advertising Restrictions

Some of the advertising restrictions under HB 5372 may unduly restrict consumer access to truthful and non-misleading information about basic health care services. In particular, staff is concerned about the Bill's restrictions on advertising price information. Under HB 5372, it would be "unlawful for a facility to advertise comparisons of its fees for available services with the fees of other facilities with respect to which a permit has been issued under this Act or that are licensed or otherwise authorized to operate under

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[39] *See, e.g.* Reed Abelson and Milt Freudenheim, Even the Insured Feel the Strain of Health Costs, N.Y. Times, May 4, 2008, *available at* http://www.nytimes.com/2008/05/04/business/04insure.html?th&emc=th.

[40] A related concern is the Bill's restriction on a facility advertising that it "will accept as payment for services rendered . . . the amount the third party payor covers as payment in full." HB 5372 at at pingH 0 0 Tf0]0(rp()d)-5((rp))d

commercial speech jurisprudence since *Virginia State Board of Pharmacy*.[51] If commercial speech is not false or misleading, and does not concern unlawful activities, restrictions on that speech must satisfy two conditions: they must serve a substantial government interest; and they may not be more extensive than necessary to serve that interest.[52] Illinois' interest in isolating its own consumers from objective and truthful price information is unclear. To the extent that evidence emerges that certain particular ways of framing price information are inherently misleading, FTC staff suggests that the state consider regulations more narrowly tailored to such types of statements.

2. Alcohol and Tobacco

The Bill's prohibition against locating a clinic "in any store or place that provides alcohol or tobacco products for sale to the public" may also limit competition.[53] FTC staff recognizes the state's interest in safeguarding the health and welfare of its citizens and the fact that such interests may prompt regulatory restrictions that guard against, for example, the sale of otherwise lawful alcohol and tobacco products to minors.[54] However, the rationale for not allowing a clinic in a retail store that also sells tobacco or alcohol is unclear. At the same time, this restriction could limit the supply of retail clinics and the basic medical services they would provide if retail stores were to decide sales of tobacco and alcohol were more profitable than having a retail health clinic. Or, the requirement could raise the retail clinic's costs[55] and increase prices for those services.

Further, there is no such general restriction that applies to other health care services, such as a prohibition on tobacco sales in doctors' buildings or free-standing pharmacies, or on the placement of pharmacies and pharmacy services in establishments such as grocery stores or big-box retailers that also sell tobacco products.[56] The rationale for restricting tobacco sales in proximity to one particular type of health care service provider is also unclear.

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[51] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976) (state's interest in integrity of pharmacy profession does not justify unnecessary suppression of truthful advertising under First Amendment).

[52] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)t).l 0 Le44(en)-4(t).l 0 Le44(en)-4

Finally, to the extent that hospital-owned or physician-owned retail clinics might be exempted from the Bill's requirements independent of location or services provided, this provision could place significant restrictions on certain competitors but not others, within the same market. If so, the provision would be a further barrier to competition among providers of such basic medical services, to the potential detriment of Illinois health care consumers.

3. Facilities and Operating Requirements

There are several other provisions of the Bill that may impose special operating burdens on retail clinics. For example, each clinic "must have a designated receptionist and waiting area."[57] Certain retail health care clinics in other states appear to operate without the services of a separate receptionist and waiting area.[58] The requirement of a designated receptionist, separate from those licensed health care professionals providing care at the facility, could impose a significant additional operating cost on certain small clinics.[59] At the margin, such added costs could reduce the supply of basic medical services or increase the prices at which they are offered. At the same time, the requirement appears unrelated to any specific health concerns about the care such clinics would deliver.

Conclusions

The Commission staff recognizes that important health and safety concerns may be raised by the marketing or provision of health care services. At the same time, it appears that retail health care facilities have the potential to expand access to basic health care services. Illinois' initiative to provide for the emergence of this new model of health care delivery, within the bounds of responsible practice and professional licensing standards, is to be encouraged. However, several of HB 5372's provisions could harm health care competition – and the emergence of new clinics – without providing countervailing benefits for Illinois health care consumers.

Staff suggests the Legislature considering clarifying those provisions in the Bill that may be subject to interpretations that would limit health care competition so that they are not erroneously interpreted or applied in ways that unnecessarily put retail clinics at a competitive disadvantage to other providers of similar services. Second, as several of the Bill's provisions appear on their face to place undue regulatory burdens on retail clinics relative to other providers of the same or similar services, staff suggests that the Legislature consider eliminating such unequal treatment of retail clinics. If there is evidence that specific health, safety, or other risks to consumers are associated with particular features of retail clinics in providing services, staff suggests that remedial regulations be narrowly tailored to address those risks in as competitively neutral a

[57] HB 5372 § 35(a)(5).

[58] Many employ, for example, electronic check-in at kiosks or check-in terminals. *See, e.g.*, Vimo Research Group, *Retail Health Care Clinics Overview and Atlas* 9 (Sept. 2007).

[59] *See supra* notes 3-6, 41-2, and accompanying text.

manner as is feasible. Absent these suggested changes, HB 5372 could substantially limit the potential benefit of retail clinics to Illinois health care consumers, especially those with inadequate access to basic medical services, by making it more difficult to open and operate such clinics, or by raising their costs of doing so, which likely would raise the costs of their services to consumers.

Respectfully submitted,

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