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

Indeed, the Federal Trade Commission and its staff have provided substantial gui

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²(...continued)

principles. See FTC website, <http://www.ftc.gov/bc/healthcare/industryguide/index.htm>.

³ *E.g.*, Prepared Statement of the Federal Trade Commission Concerning “The Community Pharmacy Fairness Act of 2007,” Before the Antitrust Task Force of the Committee on the Judiciary, United States House of Representatives (October 17, 2007) <http://www.ftc.gov/os/testimony/P859910pharm.pdf>; Prepared Statement of the Federal Trade Commission on Examining Competition in Group H

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⁸ See FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (August 1996) available at <http://www.ftc.gov/reports/hlth3s.htm>

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¹³ Congressional Budget Office Cost Estimate, H.R. 1304, *supra* note 12, at 1.

¹⁴ The bills' default position, whereby a contract or other proposal would be deemed approved unless affirmatively rejected based on the bills' specified criteria and finding requirements, inverts the current legal standard applicable to such conduct under the antitrust laws. Long-established antitrust standards consider price agreements among competitors to be presumptively anticompetitive and unlawful unless they are shown by the participants to be reasonably necessary to create or further some procompetitive, efficiency-enhancing, joint activity. Even then, the price agreements may still be held unlawful after further analysis, if the participants possess market power and the overall effect of the activity in the market, on balance, is determined to be anticompetitive. *See, e.g., North Texas Specialty Physicians*, 2005-2 Trade Cas. (CCH) ¶ 75,032, *aff'd. sub nom. North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5 Cir. 2008); *Polygram Holding, Inc.*, 5 Trade Reg

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¹⁵ Section 62R.08.

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rates are deemed approved even if no decision is made.²¹ Thus, even if the legislature passes the bills, health care cooperatives may still be subject to federal antitrust laws.

Finally, we note that state action immunity is not retroactive. Even if there is state supervision sufficient to exempt a health care cooperative's conduct from the application of the federal antitrust laws, immunity would only arise for future supervised conduct. Past conduct that violated the federal antitrust laws would not be immune from prose

²¹ *Id.* at 634-35 (“prices or rates are set as an initial matter by private parties, subject only to veto if the State chooses to exercise it, the party claiming immunity must show that state officials have undertaken the necessary steps to determine the specifics of the rate setting scheme”).

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