UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Competition

June 8, 2011

Senators Eric D. Coleman and John A. Kissel
Representatives Gerald Fox and John W. Hetherington
Connecticut General Assembly
Room 2500 L.O.B.
300 Capitol Avenue
Hartford, CT 06106-1591

Dear Senators Coleman and Kissel and Representatives Fox and Hetherington:

Interest and Experience of the Federal Trade Commission

Congress has charged the Federal Trade Commission ("FTC" or "Commission") with enforcing the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce.[3] Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental 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.[4] In addition, the Commission and its staff have given testimony,[5] issued reports,[6] 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 long 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.[7]

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[3] Federal Trade Commission Act, 15 U.S.C. ' 45.

[4] *See* Federal Trade Commission, Overview of FTC Antitrust Actions in Health Care Services and Products, Sept. 2010, available at: http://www.ftc.gov/bc/110120hcupdate.pdf.

[5] *See* Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Subcomm. On Courts and Competition Policy, On "Antitrust Enforcement in the Health Care Industry," Dec. 1, 2010; Prepared Statement of the Fed. Trade Comm'n Before the Subcomm. On Consumer Protection, Product Safety, and Insurance, Comm. on Commerce, Science & Transportation, On "The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care," July 16, 2009 (all testimonies available at: http://www ftc.gov/ocr/testimony/index.shtml).

[6]

The Connecticut Bill

H.B. 6343 allows the establishment of "cooperative arrangements" – agreements among health care providers – and apparently intends to provide them with an exemption from the antitrust laws upon approval by the Connecticut Attorney General. That immunity would extend to "sharing, allocating or referring patients, personnel, instructional programs, support services or facilities or medical, diagnostic or laboratory facilities or procedures, or negotiating fees, prices or rates with managed care organizations, and includes, but is not limited to, a merger, acquisition or joint venture."[8] The Bill also prohibits managed care organizations from refusing to negotiate "in good faith" with parties in a certified cooperative arrangement. A managed care organization that violates this prohibition is subject to a penalty of up to $25,000 per day.[9]

To qualify as a cooperative arrangement under the Bill, the health care providers must apply for and receive a "certificate of public advantage" from the Connecticut Attorney General.[10] The Attorney General's review of an application must consider the benefits of the arrangement,4" 0hee0y(ibition is subject to1c0023 Tw 14.045 0w 14.9nder th96(e Billtive arr

discuss their concerns regarding health plan practices, whether among themselves or with health plans. We understand that some supporters of the Bill may be under the impression that any such discussions would violate the antitrust laws. But that is not the case. Health care professionals may, under existing antitrust law, engage in collective advocacy, both to promote the interests of their patients and to express their opinions about other issues, such as payment delays, dispute resolution procedures, and other matters.[18]

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

The Bill is intended to extend antitrust immunity to a broad range of agreements among health care providers to eliminate competition. Regardless of any stated intent by a health care provider 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."[19] The Bill appears intended to shield a broad range of potentially anticompetitive conduct from antitrust challenge. Such anticompetitive conduct may include cooperative agreements not to compete with regard to patients, procedures, personnel, or support services, agreements on the fees providers will accept from health plans, and agreements that will have the effect of eliminating beneficial competition through merger.

In addition, the Bill's requirement that managed care organizations negotiate with parties to a cooperative agreement – backed up with a potential civil penalty of $25,000 per day for a failure to negotiate "in good faith" – compounds the likely consumer harm.[20] This requirement not only will decrease the incentives of cooperatives to

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[18] The 1996 *Statements of Antitrust Enforcement Policy In Health Care* issued by the Commission and the Department of Justice explain the ways in which antitrust law permits health care providers to collectively provide both fee and non-fee related information to health plans. (Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy In Health Care* (1996), available at:
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compete on price and quality, but also threatens the ability of health plans to effectively use selective contracting, a key mechanism for promoting quality and cost-containment goals. Furthermore, the lack of clarity surrounding what constitutes "good faith" negotiation in this context may discourage plans from actively pursuing programs and contract terms that would benefit consumers. Moreover, determining liability based on a failure to negotiate in "good faith" could require courts to assess the reasonableness of prices and other terms of dealing, a role for which they are ill-suited.[21]

It will be difficult, if not impossible, for the Attorney General's review to protect consumers from the harmful effects of this legislation. First, it is not clear that the Attorney General has the necessary funds or available resources to conduct the type of fact-intensive, time-consuming market analysis needed to evaluate the competitive effects of a health care cooperative during the certification process. The time allotted for the Attorney General's review is limited to ninety days and the standards under which the Attorney General may assess the cooperatives are unclear. Second, the Attorney General's ability to remedy the harm caused by an anticompetitive cooperative, once formed, is limited. The Attorney General's oversight relies solely on his or her review of a cooperative's annual "progress report." Moreover, even if the Attorney General finds a cooperative arrangement has caused consumer harm, the power to address such problems is circumscribed by the limited remedy (revocation or modification of certification) as well as the limited grounds for exercising that remedy. Thus, if a cooperative has used its market power to increase prices without countervailing benefit, there is no means to remedy that harm. Third, once three years have passed since a cooperative's certification, the Attorney General has no power to modify or revoke the purported antitrust immunity conveyed by the certification, regardless of the circumstances. Thus, the review provisions will not protect consumers from the likely harm created by the Bill.

The Bill Likely Will Not Create State Action Immunity

The federal antitrust immunity that the Bill apparently purports to confer on cooperative arrangements is effective only if the State of Connecticut has clearly articulated an intention to replace competition in this area with a regulatory scheme, and actively supervises this private conduct.[22] 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."[23] 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."[24]

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[21] *Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

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Here, the State's review proposed under the Bill does not appear sufficient to meet the requirements of the state action doctrine. Notwithstanding the requirement that annual progress reports be file

We appreciate your consideration of these issues.

Respectfully submitted,

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Joseph Farrell, Director
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Richard A. Feinstein, Director
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