Office of Policy Planning
Bureau of Economics
Bureau of Competition

May 2, 2016

The Hon. Larry C. Stutts
Alabama State Senate
Alabama State House
11 South Union Street, Suite 735
Montgomery, Al 36130-4600

Dear Senator Stutts:

The Federal Trade Commission ("FTC") Office of Policy Planning, Bureau of

collaborate" from the federal antitrust laws

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If effective, the broad antitrust exemption the Bill purports to provide could immunize anticompetitive mergers, price fixing, boycotts, and a wide variety of other anticompetitive conduct that harms consumers. Many health care provider collaborations can be efficient and beneficial, and no antitrust exemption is needed to permit them from occurring. Indeed, the Bill appears to reflect mistaken beliefs about the antitrust laws and the benefits of competition among health care providers. If enacted, t

consideration: (1) Any of its health care facilities and other properties, real or personal, and any funds and assets, tangible or intangible, relative to the ownership or operation of any such health care facilities," among other assets.[17] In addition, the Bill would vest the power of eminent domain in authorities.[18]

There appears to be no requirement that all facilities owned or operated by authorities, their subsidiaries, or their affiliates participate directly in medical education, research, or training or that all such facilities engage directly in the provision of health care to Alabama citizens. Under the terms of the Bill, even the determination of what counts as a "health care facility" would be left to the authority's discretion.[19]

As noted above, the Bill purports to insulate these many and diverse entities, and their conduct, against the safeguards and consumer protections provided by the antitrust laws.[20]

III. The Bill Is Unnecessary Because the Antitrust Laws Already Permit Efficient Health Care Collaborations

The Bill appears to assume that antitrust laws prohibit efficient health care mergers, acquisitions, and collaborations to the detriment of health care and consumers in Alabama.

Turning specifically to mergers, the Horizontal Merger Guidelines issued jointly by the Antitrust Agencies recognize that merger-generated efficiencies "may result in lower prices, improved quality, enhanced service, or new products."[25] Those efficiencies are routinely assessed in merger investigations as part of an evaluation of the potential anticompetitive harm stemming from a merger or acquisition. For those reasons, and because many mergers do not threaten competition, the Antitrust Agencies have challenged few of the thousands of health care provider mergers, joint ventures, and other types of collaborations that have occurred in recent years, and have "brought those challenges only after rigorous analysis of market conditions showed that the acquisition was likely to substantially lessen competition."[26] These outcomes confirm that the antitrust laws already consider likely benefits, as well as competitive harms, and therefore already accomplish many of the Bill's objectives.

Moreover, the goals of antitrust law are consistent with the policy goals of fostering the coordination and integration of health care delivery via collaboration among health care providers through, for example, the formation of Accountable Care Organizations.[27] Despite what some health care industry participants have claimed, the antitrust laws do not prohibit the kinds of collaboration necessary to achieve the health care reforms contemplated by the Affordable Care Act and other policy initiatives.[28] Specifically, antitrust does not impede Alabama health care providers from forming

enforcement—including attempts to confer state action immunity—is likely to harm Alabama's health care consumers, including patients as well as both public and private third-party payors

In its 2007 report, the congressionally established, bipartisan Antitrust Modernization Commission[32] succinctly stated a widely recognized proposition: "[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.[33]"

Yet, in the face of this proposition, health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from payors wilem -0.004 Tc 0.004 Tw [(a)--51.17 Td [(a)6(nd)-6(d)-4(h)-4(ag)-1oth ca

increases in the price of hospital care.”[39] Moreover, additional empirical evidence suggests that, “[a]t least for some procedures, hospital concentration reduces quality.”[40]

For example, recent research indicates that “health spending on the privately insured varies by more than a factor of three across the 306 hospital referral regions (HRRs) in the US.”[41] For individual procedures, hospital prices can vary even more. The same study found that, “[h]ospitals’ negotiated transaction prices routinely vary by over a factor of eight or more across the nation and by a factor of three within HRRs.”[42] Different factors may contribute to this variation but “hospital market structure stands out as one of the most important factors associated with higher prices, even after controlling for costs and clinical quality.”[43]

Academic medical centers are no less responsive than other health care providers to changes in market structure and conditions, and therefore may respond to changes in market concentration in ways that harm consumers. For example, a retrospective study of a merger involving an academic medical center found that “four of the five commercial insurers experienced large and statistically significant price increases at the merged hospital.”[44] Moreover, those insurers “were forced to raise their prices by at least 10 percentage points more at the merged hospital relative to other Chicago area hospitals.”[45] Furthermore, the study found that the relative price increase could not be explained by changes in case mix, patients’ severity of illness, payer mix, or teaching intensity.[46]

Empirical evidence also suggests that greater competition incentivizes providers to become more efficient and innovative. A recent study shows that hospitals faced with a more competitive environment have better management practices.[47] In sum, ample evidence exists that competition can and does work in health care markets.[48]

The FTC has engaged in significant enforcement efforts to prevent anticompetitive behavior in health care provider markets precisely because consumers benefit from competition and, conversely, are harmed by anticompetitive mergers and conduct.[49]

VI. Conclusion

Competitor collaborations, mergers, and acquisitions can be procompetitive, benefitting patients and payors alike. Interest in such collaboration among health care providers is understandable and, indeed, important. As we have explained both in this comment and in numerous and detailed guidance documents, however, the antitrust laws already permit efficient, pro-consumer collaborations among competing health care providers, and already permit efficient and pro-consumer mergers. The Bill’s apparent attempt to confer antitrust immunity is therefore unnecessary for collaborations

We appreciate your consideration of these issues.

Respectfully submitted,

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Office of Policy Planning

Ginger Jin, Director
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Deborah Feinstein, Director
Bureau of Competition

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[1] Letter from the Hon. Larry C. Stutts, Alabama State Senate, to the Hon. Edith Ramirez, Chairwoman, Fed. Trade Comm'n (March 10, 2016).

[2] Alabama House Bill 241/Senate Bill 243, proposed § 3(b)(2) (the companion bills will be cited hereinafter as Senate Bill 243).

[3] Id.

[4] Federal Trade Commission Act, 15 U.S.C. § 45.

[5] Clayton Act, 15 U.S.C. § 18.

[6] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

[7] See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (The antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

[8] See generally Fed. Trade Comm'n, An Overview of FTC Antitrust Actions In Health Care Services and Products (Mar. 2013), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/hcupdaterev.pdf; see also Fed. Trade Comm'n, Competition in the Health Care Marketplace: Formal Commission Actions, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care.

[9] See, e.g., FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE ("DOJ"), IMPROVING HEALTH CARE:

A DOSE OF COMPETITION (2004), http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf [hereinafter FTC & DOJ, IMPROVING HEALTH CARE]. The report was based on, among other things, 27 days of formal hearings on competitive issues in health care, an FTC-sponsored workshop, independent research, and the Agencies' enforcement experience.

[10] FTC and staff advocacy may take the form of letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, amicus briefs, or reports. See, e.g., FTC Staff Letter to the Honorable Theresa W. Conroy, Connecticut House of Representatives, Concerning the Likely Competitive Impact of Connecticut House Bill 6391 on Advance Practice Registered Nurses ("APRNs") (Mar. 2013), https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice (competitive impact of statutorily required "collaborative practice

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independent-practice-association-inc./gripa.pdf.

[23] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, supra note 22, at 2.

[24] Edith Ramirez, Antitrust Enforcement in Health Care—Controlling Costs, Improving Quality, 371 NEW ENG. J. MED. 2245 (2014), http://www.nejm.org/doi/pdf/10.1056/NEJMp1408009. See also Deborah L. Feinstein, Dir., Bureau of Competition, Remarks at the Fifth National Accountable Care Organization Summit in Washington, DC: Antitrust Enforcement in Health Care: Proscription, not Prescription, 26 (June 19, 2014), https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf ("We continue to hear claims that antitrust principles are at odds with the mandates of the Affordable Care Act. I believe these arguments misunderstand the focus and intent of federal antitrust enforcement. . . . In the final analysis, our actions make clear the important role of antitrust in health care policy. Ultimately, we believe that the imperatives of developing lower cost, higher quality health care can coexist with continued enforcement of the antitrust laws.").

[25] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES, § 10 (2010), https://www.ftc.gov/tips-advice/competition-guidance.

[26] Feinstein, supra note 24, at 9.

[27] These widely shared policy goals are central to the Accountable Care Organizations contemplated under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3022, 14 Stat. 119, 395 ("Affordable Care Act"). Ctrs. Medicare & Medicaid Servs., Fast Facts, All Shared Savings Program and Pioneer ACOs Combined (Apr. 2015) (404 shared savings ACOs and 19 Pioneer ACOs with 7.92 million assigned beneficiaries in 49 states plus Washington, DC and Puerto Rico). The FTC has not challenged any of these 423 ACOs. See also Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations, 76 Fed. Reg. 67,802, 67,822 (Nov. 2, 2011) (codified at 42 C.F.R. pt. 425) ("[T]he intent of the Shared Savings Program and the focus of antitrust enforcement are both aimed at ensuring that collaborations between health care providers result in improved coordination of care, lower costs, and higher quality, including through investment in infrastructure and redesigned care processes for high quality and efficient service delivery.").

[28] FTC Staff Comment to the West Virginia House of Delegates Regarding SB 597 and the Competitive Implications of Provisions regarding "Cooperative Agreements" Between – and Possible Exemptions from the Federal Antitrust Laws for – Health Care Providers (Mar. 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-west-virginia-house-delegates-regarding-sb-597-competitive-implications-provisions/160310west-virginia.pdf;

[39] Gaynor & Town, Impact of Hospital Consolidation,