UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Economics

April 22, 2015

Center for Health Care Policy and Resource Development
Office of Primary Care and Health Systems Management
New York State Department of Health
Corning Tower - Room 1815
Empire State Plaza
Albany, New York 12237

Re: Certificate of Public Advantage Applications Filed Pursuant to New York Public Health Law, 10 NYCRR, Subpart 83-1

Dear Sir or Madam:

The staffs of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] respectfully submit this public comment regarding the potential competitive impact of the Certificate of Public Advantage ("COPA") applications submitted by three newly formed performing provider systems ("PPSs") under the Delivery System Reform Incentive Program ("DSRIP") 4

For each of the three DSRIP PPSs, a COPA purportedly would provide federal antitrust immunity for certain collaborative activities among participating health care providers, including joint price negotiations.

FTC staff fully recognizes that collaborations among health care providers often are procompetitive. We write to express strong concerns that the COPA regulations, as well as the underlying authorizing legislation, are based on inaccurate premises about the antitrust laws and the value of competition among health care providers.

A COPA is unnecessary for these three DSRIP PPSs to engage in procompetitive collaborative activities. The antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit health care consumers, as explained in extensive guidance issued by the federal antitrust agencies. Indeed, very few health care provider mergers, joint ventures, or other types of collaborations are challenged by the federal antitrust agencies. Because procompetitive health care collaborations already are permissible under the antitrust laws, the main effect of the COPA regulations is to immunize conduct that would ***not*** generate efficiencies and therefore would ***not*** pass muster under the antitrust laws. Therefore, COPAs are likely to lead to increased health care costs and decreased access to health care services for New York consumers.

I. Interest and Experience of the Federal Trade Commission

Congress has charged the FTC with

III. Concerns Regarding Potential Anticompetitive Effects of New York's COPA Approach

Putting aside the issue of the sufficiency of the state's oversight of the COPA process,[17] FTC staff is concerned that combining the DSRIP program with the COPA regulations will encourage health care providers to share competitively sensitive information and engage in joint negotiations with payers in ways that will not yield efficiencies or benefit consumers. Furthermore, although the DSRIP program applies only to Medicaid patients, the potential anticompetitive effects of information sharing and joint payment negotiations under a COPA may extend to commercial and Medicare patients as well.[18] For example, it is possible that participating PPS providers would need to share information about all of their patient populations – including commercial, Medicare, and Medicaid patients – in order to properly implement the value-based payment models contemplated under the DSRIP

substantial portions of competing health care providers in their respective geographic regions,[33] there8](g)10(i)-(p)-4(e)-10(cF)-6Ch20rs th21)2(e)3 f1ce an 88 0 1 (lc)i-(p)-4(e p8.0ai)-(p)-4(e

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

[2] *See* Adirondack Health Institute DSRIP PPS Organizational Application (Dec. 22, 2014), http://health.ny.gov/health_care/medicaid/redesign/dsrip/pps_applications/docs/adirondack_health_institute/adirondack_org_application.pdf (Reference COPA-AHIPPS, DSRIP PPS ID: 23).

[3] *See* Advocate Community Partners DSRIP PPS Organizational Application (Dec. 22, 2014), http://health.ny.gov/health_care/medicaid/redesign/dsrip/pps_applications/docs/advocate_community_partners_awmedical/advocate_community_partners_org_app.pdf (Reference COPA-ACPPPS, PPS ID: 25).

[4] *See* Staten Island DSRIP PPS Organizational Application (Dec. 22, 2014), http://health.ny.gov/health_care/medicaid/redesign/dsrip/pps_applications/docs/richmond_med_ctr_staten_island_hospital/richmond_staten_island_hosp_org_app.pdf (Reference COPA-SIPPS, PPS ID: 43).

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

[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. of Prof. 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, OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/hcupdate.pdf. *See also Competition in the Health Care Marketplace*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care ("Cases").

[9] *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), https://www.ftc.go/tips

briefs, or reports.

[11] *See, e.g.*, FTC Staff Comment to Sen. John J. Bonacic, N.Y. State Senate, Concerning N.Y. Senate Bill S.3186-A, Intended to Permit Collective Negotiations by Health Care Providers (Oct. 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-

for the state to provide protections for a PPS. This protection will come in the form of a Certificate of Public Advantage (COPA), which will be granted if it appears that the benefits of a collaboration between PPS partners will outweigh any disadvantages attributable to their anticompetitive effects and will be subject to active state supervision. COPA regulations are explicated in Article 29-F of New York's Public Health Law.").

[14] *See* New York Public Health Law, Article 29-F, § 2999-aa (Antitrust Provisions, State Oversight) and § 2999-bb (Department Authority), *available at* http://nys.law.streaver.net/PBH/a2564.html.

[15] *See* 10 NYCRR, Subpart 83-1.5 (describing the review process for COPA applications), *available at* http://www.health.ny.gov/regulations/recently_adopted/docs/2014-12-17_certificate_of_public_advantage.pdf.

[16] *See* 10 NYCRR, Subpart 83-1.2 (describing the effect and application process of COPA), *available at* http://www.health.ny.gov/regulations/recently_adopted/docs/2014-12-17_certificate_of_public_advantage.pdf.

[17] States may provide antitrust immunity for certain activities when there is a clearly articulated state policy to displace competition and there is active state supervision of the policy or activity. *See Parker v. Brown*, 317 U.S. 341 (1943), *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013), and *North Carolina State Bd. Of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). FTC staff takes no position at this time on whether the COPA regulations would satisfy the active supervision prong of the state action doctrine.

[18] *See, e.g.*, DSRIP FAQs at 10 ("The DSRIP Program is an initiative is specifically targeted to the Medicaid and uninsured population. However, as PPS entities work to transform their service delivery system and payment structure, the state expects that the DSRIP

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joint statements specifically addressing the application of the antitrust laws to the health care industry, including physician network joint ventures and other provider collaborations. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), https://www.ftc.gov/sites/default/files/documents/reports/revised-federal-trade-commission-justice-department-policy-statements-health-care-antritrust/hlth3s.pdf (*see, e.g., id.* at Statement 8 regarding physician network joint ventures, Statement 7 regarding joint purchasing arrangements among providers of health care services, and Statement 6 regarding provider participation in exchanges of price and cost information).

In addition, FTC staff has issued and made public numerous advisory opinion letters containing detailed analyses of specific proposed health care collaborations. These letters have helped the requesting parties avoid potentially unlawful conduct as they seek to devise new ways of responding to the demands of the marketplace. They also have provided further guidance to the health care indu4 >>B7try as a3/re try Tw ((i80(d S)-4(t4S-1(ed)5 TDy)]TJ