



UNITED STATES OF AMERICA  
**Federal Trade Commission**  
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Office of Policy Planning  
Bureau of Competition  
Bureau of Economics  
Northeast Regional Office

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FTC staff fully recognizes that collaborations among health care providers often

II. New York Senate Bill 2647 and New York Assembly Bill 2888

These two bills, introduced in the New York state legislature in January 2015, are intended to extend state action immunity to ECMC and WCHC, public benefit corporations created by the New York State Public Authorities Law, as well as any private and public entities with which they collaborate. These bills are identical to a bill enacted in June 2013, which conferred state action immunity to the Nassau Health Care Corporation (“NHCC”) and the entities with which it collaborates.<sup>12</sup>

Sponsors of the bills claim that ECMC and WCHC have always had the authority to collaborate with private and public entities under the general and special powers granted to them under the Public Authorities Law.<sup>13</sup> However, following the recent U.S. Supreme Court decision in *FTC v. Phoebe Putney Health System, Inc.*,<sup>14</sup> the bills “seek[] to clarify [the state’s] intention that such collaborations may be carried out regardless of whether they displace competition and may otherwise be considered violations of state or federal antitrust laws.”<sup>15</sup>

According to the proposed bills, “the benefits of collaboration by the corporation outweigh any adverse impact on competition. These purported benefits include expanding access to healthcare services, as well as consolidating unnecessary and duplicative health care services, enhancing the quality of health care services, lowering the costs and improving the efficiencies of healthcare services, and achieving improved reimbursement from commercial payors. Based on these alleged benefits, the bills propose to amend the public authorities law to expressly allow these corporations “to engage in collaborative activities consistent with [their] health care purposes, notwithstanding that those collaborations may have the effect of displacing competition in the provision of hospital, physician or other health care-related services.”<sup>17</sup>

The bills also discuss the state’s oversight of ECMC and WCHC. However, it is unclear to what degree the collaborative activities of ECMC and WCHC will be actively supervised by the state. States may provide antitrust immunity for certain activities when there is a clearly articulated state policy to displace competition and there is active supervision of the policy or activity.<sup>18</sup> FTC staff takes no position on Suprhpart4( sta)]TJher th(r)-1.13

### III. Concerns Regarding Potential Anticompet

economic literature shows that non-profit hospitals with market power – which ECMC and WCHC may achieve through many of the activities that purportedly would now be immunized by the bills – tend to have higher commercial prices and higher costs, the latter of which can harm non-commercial patients, particularly the uninsured.<sup>28</sup> Finally, economic literature also shows that collusion among health care providers usually leads to higher quality care for all patients.<sup>29</sup>

Another cause for concern is that, unlike the New York COPA regulations that were the subject of FTC staff's recent comment to the NY DOH,<sup>30</sup> the bills do not expressly preserve the authority of the NY AG to challenge any collaborative activity undertaken by these public health care entities in the event that the anticompetitive harms outweigh the potential benefits of coordination. Notwithstanding our overall concerns with the purported grant of antitrust immunity in the COPA regulations, these bills appear to confer broader antitrust immunity than the COPA regulations without the same degree of state oversight and, indeed, remedial authority.

Finally, FTC staff has concerns that, as written, these bills may be construed to purport to grant antitrust immunity when ECMC and WCHC collaborate with private or

Moreover, the goals of antitrust are consistent with the goals of the Patient Protection and Affordable Care Act ("ACA"),<sup>34</sup> and health care reform efforts more generally. 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 ACA.<sup>35</sup> Specifically, antitrust is not a barrier to New York health care providers who seek to form competitive collaborative arrangements that are likely to reduce costs and benefit health care consumers through increased efficiency and improved coordination of care. Indeed, antitrust agencies seek only to prevent mergers and other collaborations when there is substantial anticompetitive harm and

benefit consumers,” they also have warned that collaboration that eliminates or reduces price competition or allows providers to gain increased bargaining leverage with payors raises significant antitrust concerns. Antitrust concerns can arise if integration involves a





[york-s.b.3186-allow-health-care-providers-to-negotiate-collectively-health-plans/111024nyhealthcare.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-oregon-senate-bill-231a-which-includes-language-intended-to-exempt-certain-collaborations-among-competing-health-care-providers-participating-in-a-primary-care-transformation-initiative) FTC Staff Comment to Sen. Chip Shields, Or. State Legislature, Concerning S.B. 231-A, Intended to Exempt Certain Collaborations Among Competing Health Care Providers and Providers Participating in a Primary Care Transformation Initiative (May 2015), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-regarding-oregon-senate-bill-231a-which-includes-language-intended-to-exempt-certain-collaborations-among-competing-health-care-providers-participating-in-a-primary-care-transformation-initiative](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-oregon-senate-bill-231a-which-includes-language-intended-to-exempt-certain-collaborations-among-competing-health-care-providers-participating-in-a-primary-care-transformation-initiative)

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[https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-senators-coleman-and-kissel-representatives-fox-and-hetherington-concerning-b.6343-intended-to-exempt-members-of-certified-cooperative-arrangements-from-the-antitrust-laws/110608chc.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-senators-coleman-and-kissel-representatives-fox-and-hetherington-concerning-b.6343-intended-to-exempt-members-of-certified-cooperative-arrangements-from-the-antitrust-laws/110608chc.pdf) FTC Staff Comment to Sens. Coleman and Kissel and Reps. Fox and Hetherington, Conn. Gen. Assembly, Concerning Connecticut H.B. 643, Intended to Exempt Members of Certified Cooperative Arrangements from the Antitrust Laws (June 2011), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-senators-coleman-and-kissel-representatives-fox-and-hetherington-concerning-b.6343-intended-to-exempt-members-of-certified-cooperative-arrangements-from-the-antitrust-laws/110608chc.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-senators-coleman-and-kissel-representatives-fox-and-hetherington-concerning-b.6343-intended-to-exempt-members-of-certified-cooperative-arrangements-from-the-antitrust-laws/110608chc.pdf)

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[https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-representative-tom-emmer-minnesota-house-representatives-concerning-minnesota-ok-h.f.no.120-and-senate-bill-s.f.no.203-health-care-cooperatives/v090003.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-representative-tom-emmer-minnesota-house-representatives-concerning-minnesota-ok-h.f.no.120-and-senate-bill-s.f.no.203-health-care-cooperatives/v090003.pdf) FTC Staff Comment to Rep. Tom Emmer, Minn. House of Reps. Concerning Minn. H.F. No. 120 and Senate Bill S.F. No. 203 on Health Care Cooperatives (Mar. 2009), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-representative-tom-emmer-minnesota-house-representatives-concerning-minnesota-ok-h.f.no.120-and-senate-bill-s.f.no.203-health-care-cooperatives/v090003.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-representative-tom-emmer-minnesota-house-representatives-concerning-minnesota-ok-h.f.no.120-and-senate-bill-s.f.no.203-health-care-cooperatives/v090003.pdf)

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All advocacies are available at <https://www.ftc.gov/policy/advocacy/advocacy-filings>

<sup>11</sup> N.Y. PUB. AUTH. LAW §§ 3300-3321 (2015) (“Title 1: Westchester County Health Care Corporation”); *id.* §§ 3625-3646 (“Title 6: Erie County Medical Center Corporation”).



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Katherine Baicker & Helen Levy, *Coordination versus Competition in Health Care Reform*, 369 NEW ENG. J. MED. 789 (2013) available at <http://www.nejm.org/doi/full/10.1056/NEJMp1306268>; Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update* (Robert Wood Johnson Found., Synthesis Project Report, June 2012), [http://www.rwjf.org/content/dm/farm/reports/issue\\_briefs/2012/rwjf73261](http://www.rwjf.org/content/dm/farm/reports/issue_briefs/2012/rwjf73261); Paul B. Ginsburg,

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agency, the DOJ, have issued considerable guidance over the years. Key sources of guidance include the Agencies' general guidelines on collaborations among competitors, as well as joint statements specifically addressing the application of the antitrust laws to the health care industry, including physician network joint ventures and other provider collaborations. F. 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-amg-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-amg-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).

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Healthy Competition in Health Care Markets, Antitrust, the ACA, and ACOs (June 11, 2013),

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<sup>39</sup> FTC & DOJ, IMPROVING HEALTH CARE, *supra* note 8, at 14.

<sup>40</sup> ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 335 (2007), [http://govinfo.library.unt.edu/amc/reports/recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/reports/recommendation/amc_final_report.pdf)

<sup>41</sup> Ramirez, *supra* note 32.

<sup>42</sup> Feinstein, *supra* note 32. There is a significant and ever-growing body of empirical research showing that increased concentration among health care providers results in higher prices without offsetting improvements in quality. *e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update* (Robert Wood Johnson Found., Synthesis Project Report, June 2012), [http://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2012/rwjf73261](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261)

<sup>43</sup> See Nassau University Medical Center DSRIP PPS Organizational Application 25-26 (Dec. 22, 2014), [https://www.health.ny.gov/health\\_care/medicaid/redesign/dsrrip/pps\\_applications/docs/nassau\\_university\\_medical\\_center/nassau\\_queens\\_organizational\\_application.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/dsrrip/pps_applications/docs/nassau_university_medical_center/nassau_queens_organizational_application.pdf) (stating that this PPS would include 15 hospitals in this region, as well as a substantial portion of ambulatory surgical centers, primary care providers, specialty care providers, rehabilitative and behavioral health services facilities, and skilled nursing facilities); Millennium Collaborative Care DSRIP PPS (ECMC) Organizational Application 14 (Dec. 22, 2014), [https://www.health.ny.gov/health\\_care/medicaid/redesign/dsrrip/pps\\_applications/docs/erie\\_county/millennium\\_collaborative\\_care\\_pps\\_org\\_app.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/dsrrip/pps_applications/docs/erie_county/millennium_collaborative_care_pps_org_app.pdf) (stating that the Millennium Collaborative Care LLC will be a wholly-owned subsidiary of Erie County Medical Center Corporation, the lead entity in the PPS). *id.* at 17 (“All providers in the region have been invited to participate in the PPS, including the Cayuga Medical Partners PPS and Finger Lakes PPS.”), *id.* at 27-28 (throughout western New York there are 22 acute care hospitals, 10 of which are in the MCC PPS; 74 nursing home facilities, 41 of which are in the MCC PPS; in addition, MCC PPS will include all of the urgent care centers, health homes, rehabilitative and behavioral health services facilities, specialty medical programs, home care services, and managed care organizations, and more than half of the ambulatory surgical centers, federally qualified health centers, primary care and specialty medical providers, laboratory and radiology services, and pharmacies); and Westchester Medical Center DSRIP PPS Organizational Application 26-27, 33 (Dec. 22, 2014), [https://www.health.ny.gov/health\\_care/medicaid/redesign/dsrrip/pps\\_applications/docs/westchester\\_medical\\_center/westchester\\_org\\_app.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/dsrrip/pps_applications/docs/westchester_medical_center/westchester_org_app.pdf) (it appears that this PPS covers 8 counties in the Hudson Valley region, and may include lower percentages of health care providers than the PPS networks associated with NHCC and ECMC, with 11 of 51 hospitals, 1,868 of 1,048 primary care providers, and 1,551 of 43,460 specialty care providers).