

Office of Policy Planning
Bureau of Competition
Bureau of Economics
Bureau of Consumer Protection

April 3, 2015

Dr. Karen B. DeSalvo
National Coordinator for Health Information Technology
Office of the National Coordinator for Health Information Technology
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

Re: Shared Nationwide Interoperability Roadmap DRAFT Version 1.0

Dear Dr. DeSalvo:

The staff of the Federal Trade Commission's ("FTC") Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics¹ submits this comment to the Office of the National Coordinator for Health Information Technology ("ONC") in response to ONC's call for public comments² regarding its draft Shared Nationwide Interoperability Roadmap ("Roadmap").³

FTC staff supports the development of the Roadmap, which lays out a ten-year plan to increase the adoption of interoperable health information technology systems ("health IT"). Increasing interoperability may foster innovation and competition in both health IT and health care. The FTC has a long history of engaging in study, enforcement, and advocacy regarding the potential competitive effects of interoperability and standardization. Based on this expertise, we offer several competition points for ONC to consider as it finalizes and implements the plan laid out in the Roadmap regarding: (1) creation of a supportive business environment that encourages interoperability; (2) shared governance mechanisms; and (3) the advancement of technical standards. Increased interoperability, accomplished through standardization, has benefited competition in

¹ These comments reflect the views from the staff in the FTC's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics. The letter does not necessarily represent the views of the FTC or of any Commissioner. The Commission has, however, voted to authorize staff to submit these comments.

² Office of the Nat'l Coordinator for Health Info. Tech., Interoperability Roadmap Public Comments, <http://www.healthit.gov/policy-researchers-implementers/interoperability-roadmap-public-comments> (last visited April 1, 2015).

³ OFFICE OF THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., SHARED NATIONWIDE INTEROPERABILITY ROADMAP DRAFT 1.0 (2015)

many industries. We respectfully suggest that ONC consider how best to promote competition and innovation when taking steps to speed the adoption of interoperability standards in the marketplace. In addition, as a federal agency that enforces numerous privacy and data security laws, the FTC has extensive experience related to the privacy and security of consumer data and appreciates the opportunity to provide comments on those issues as well.

I. INTEREST AND EXPERIENCE OF THE FTC

The FTC is an independent administrative agency responsible for maintaining competition and protecting consumers. The FTC has a long history of promoting competition in health care markets through a full range of study, enforcement, and advocacy activities. The FTC continues to monitor the impact of the development and introduction of new health IT technologies on competition in the health care industry. In March 2014, the FTC held the first workshop in an “Examining Health Care Competition” series. One panel focused entirely on advancements in health care technology, including electronic health records and health data exchanges.⁴ In February 2015, the FTC and the Antitrust Division of the U.S. Department of Justice co-hosted the second workshop in the series. The 2015 workshop focused on recent developments in health care provider and payment models, many of which relate to and are influenced by concurrent health IT developments.⁵

In addition to its experience in health care, the FTC has a long history of examining the role of standardization and interoperability in high technology markets, with a particular emphasis on competitive and innovation effects. The Commission has applied its study, policy, and advocacy expertise to collaboratively set standards for over thirty years.⁶ For example, the FTC has studied competition issues relating to interoperability in networked industries⁷ and considered how the evolution of interoperable technology can impact consumers of information technology.⁸ The FTC also has studied competition in markets shaped by interoperability, such as business-to-business (“B2B”) electronic marketplaces⁹ and the deregulated market for electricity.¹⁰ Most recently, the FTC has studied the impact of patented technologies on the

⁴ See Fed. Trade Comm’n, Event Description, Workshop on Examining Health Care Competition (March 20-21, 2014), <http://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition>.

⁵ See Fed. Trade Comm’n, Event Description, Workshop on Examining Health Care Competition (Feb. 24-25, 2014), <http://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition>.

⁶ See, e.g., FED. TRADE COMM’N BUREAU OF CONSUMER PROT., FINAL STAFF REPORT: STANDARDS AND CERTIFICATION (1983) [hereinafter *1983 Standards Report*]; Brief for United States & Fed. Trade Comm’n as Amici Curiae Supporting Respondent, *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492 (1987) (No. 87-157); *In re American Society of Sanitary Engineering*, 106 F.T.C. 324 (1985).

⁷ See FED. TRADE COMM’N STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996) [hereinafter *1996 Competition Policy Report*].

⁸ FED. TRADE COMM’N STAFF, PROTECTING CONSUMERS IN THE NEXT TECH-ADE (2008).

⁹ FED. TRADE COMM’N STAFF, ENTERING THE 21ST CENTURY: COMPETITION POLICY IN THE WORLD OF B2B ELECTRONIC MARKETPLACES (2000).

¹⁰ See, e.g., FED. TRADE COMM’N STAFF, COMPETITION AND CONSUMER PROTECTION PERSPECTIVES ON ELECTRIC POWER REGULATORY REFORM (2000).

interoperability standards prevalent in the telecommunication industry.¹¹ Moreover, in several cases, the FTC has brought enforcement actions against parties based upon misrepresentations made during the standard setting process.¹²

On the consumer protection side, the FTC has a long history of engaging in enforcement, research, and education regarding the privacy and security of consumer data. For example, the FTC has brought numerous cases against businesses alleging deceptive and unfair practices

We appreciate ONC's willingness to seek input from the FTC and other federal agencies when developing its vision for the future of health IT. FTC staff submits these comments in support of those continuing efforts.

II. BACKGROUND

for sharing and using a common clinical data set; (3) enhance incentives for sharing

(2) Health

policies, and practices.³⁵ The Roadmap proposes to promote a cooperative governance approach that will be inclusive of both public and private actors.³⁶ This includes implementing a common coordinated governance process that includes the participation of competitors and other market participants.³⁷

As ONC implements this Roadmap goal, it may wish to consider taking steps to ensure that coordinated governance by market participants does not unduly distort competition. In prior study, enforcement, and advocacy, the FTC has observed that, when market forces are replaced by coordinated action between market participants, competition may be suppressed.³⁸ In extreme cases, this coordination may be used by market participants to exclude new products or competitors. The Roadmap currently recognizes this concern and explains that, while it will encourage stakeholders to “make collective decisions between competing policies, strategies [and] standards,” it aims to do so “in a manner that does not limit competition.”³⁹

To assist ONC staff in identifying and preventing potential pitfalls, FTC staff offers several examples of anticompetitive conduct by industry members participating in collective standard setting and certification, drawn from some of the FTC’s advocacy and enforcement actions in this area. These activities include:

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It is important to note, however, that the effects of standardization on competition

reduce competition, minimize the role of consumers, and prescribe the direction in which a market will develop.⁵⁷

The Roadmap explains that different aspects of health IT systems can be standardized, ranging from vocabulary to security to infrastructure and services.⁵⁸ The benefits of interoperability, when compared to the benefits of promoting marketplace competition between alternative technologies, may suggest that both standardized and non-standardized approaches to discrete aspects of health IT may be beneficial. FTC staff recommends that ONC consider the benefits and risks of each approach as it identifies core technical standards to promote.

b. Lock In

In addition to affecting competition between technologies for inclusion in a standard, standardization also impacts the adoption of new technologies once a standard is set. Once a standard is adopted and implemented, an industry may become locked into its use, and the costs of adopting alternatives may be much higher than before standardization. This can harm both competition and consumers.

Prior to the adoption of a standard, alternative technologies compete to be included in the standard on the basis of features, quality, or price.⁵⁹

lays out a series of both short-term and long-term goals, FTC staff recommends that ONC consider how lock in effects caused by certain strategies to achieve the short-term goals could affect the realization of long-term goals.

c. Limiting Competition Between Standards

The Roadmap suggests that it will be beneficial for industry to converge on a limited set of dominant standards. While this approach may enable consumers to more easily switch between different products, thereby stimulating competition between products compatible with the dominant standard, it may also diminish competition between different standards.

The coalescence of industry around particular standards trades off reduced intersystem competition for increased intrasystem competition. Intersystem competition takes place when firms that employ different standards compete in the marketplace.⁶³ Intrasystem competition, in contrast, takes place between firms that have adopted the same standard.⁶⁴ In some instances, intersystem competition can benefit innovation. For example, the need to invent around others' proprietary standards may spur innovation to develop alternative technologies and goods that do not read on the proprietary standard.⁶⁵ Also, proprietary control over a closed system may provide an incentive to develop the standard and to provide sponsorship once it is adopted.⁶⁶ In other instances, however, intrasystem competition can benefit innovation by reducing consumers' costs of switching to alternative products, thus promoting entry of new technologies that are compliant with the chosen standard.⁶⁷

Different standards may offer different technical benefits and levels of sophistication. Marketplace competition is one means of identifying standards that offer

staff is encouraged by this approach. As ONC implements the Roadmap, we suggest that ONC staff continue to take these concerns into consideration.

D. Consumer Protection Considerations

FTC staff commends ONC for highlighting privacy and security in the Roadmap, and for collaborating with numerous stakeholders in the process of developing the decisions and actions set forth in the Roadmap. For example, the Roadmap, which
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Respectfully submitted,

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