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

commerce.[3] Competition is at the core of America's economy,[4] and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation.[5] Pursuant to its statutory mandate, the FTC seeks to identify business practices, laws, and regulations that may impede competition without providing countervailing benefits to consumers.

Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct in health care markets has long been a key focus of FTC law enforcement,[6]

purchasers can allow for more informed purchasing decisions.[21] At the same time, without appropriate safeguards, information exchanges among competitors can facilitate collusion.

Moreover, the goals of antitrust are consistent with the goals of the Patient Protection and Affordable Care Act ("ACA")[22] and Oregon's new PCTI. Antitrust is not a barrier to health care providers and other industry participants who seek to form procompetitive collaborative arrangements and transform health care delivery in ways that are likely to reduce costs and benefit health care consumers through increased efficiency, improved coordination of care, and greater innovation.

B. Antitrust Exemptions That Immunize Otherwise Anticompetitive Conduct Pose a Substantial Risk of Consumer Harm and Are Disfavored

Because antitrust law permits procompetitive collaborations and information exchanges among health care providers, no special "exemption" or "immunity" from existing antitrust laws is necessary to ensure that such procompetitive collaborations or information exchanges occur. The U.S. Supreme Court recently reiterated its long-standing position that "the antitrust laws' values of free enterprise and economic competition" make such special exemptions or immunities "disfavored."[23] There is no reason to treat the health care industry differently with regard to application of the antitrust laws. In the health care industry, just like in other industries, consumers benefit from vigorous competition and are harmed by anticompetitive conduct.[24]

Health care providers have repeatedly sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from payers, asserting that immunity for joint bargaining is necessary to level the playing field so that providers can create and exercise countervailing market power.[25] In a 2004 report on health care competition, the federal antitrust agencies jointly responded to and countered this argument, explaining that antitrust exemptions "are likely to harm consumers by increasing costs without improving quality of care."[26] In its 2007 report, the bipartisan Antitrust Modernization Commission 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."[27] In other words, antitrust exemptions threaten broad consumer harm while usually benefitting only a relatively few market participants.

Furthermore, FTC officials have noted that state legislation aimed at exempting health care providers engaging in collaborative activities from antitrust scrutiny may "encourage providers to negotiate collectively with health plans in order to extract higher rates, in effect allowing providers to fix their prices. By permitting conduct that would ordinarily violate antitrust laws, the bills would lead to higher prices and lower-quality care – undercutting the very objectives they aim to achieve."[28] While FTC officials have acknowledged that "[c]ollaboration designed to promote beneficial integrated care can benefit consumers," they also have warned that "collaboration that eliminates or reduces price competition or allows providers to gain

concerns can arise if integration involves a substantial portion of the competing providers of any particular service or specialty[.]"[29] SB 231A appears so broad as to invite competitors and other interested persons in any area of the state to exchange all manner of competitively sensitive information – perhaps even including current and future pricing information – which could facilitate or enable providers to increase the price and reduce the supply of health care services and goods. Indeed, SB 231A may even insulate unintegrated health care providers from liability for engaging in concerted negotiations with payers.

Given that efficient collaborations and information exchanges among health care providers (or other competitors) that are likely to benefit consumers already are consistent with the anti~~-~~trust laws, FTC staff is concerned that SB 231A will encourage precisely the types of

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Negotiations by Health Care Providers (Oct. 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-john-j.bonacic-concerning-new-york-s.b.3186-allow-health-care-providers-negotiate-collectively-health-plans/111024nyhealthcare.pdf; FTC Staff Comment to Sens. Coleman and Kissel and Reps. Fox and Hetherington, Conn. Gen. Assembly, Concerning Connecticut H.B. 6343, 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-senatorscoleman-andkissel-and-representativesfox-and-hetherington-concerning.b.6343intended-toexempt-members-certified-cooperative-arrangements-antitrust-laws/110608chc.pdf; FTC Staff Comment to the Hon. Elliott Naishtat Concerning Tex. S.B. 8 to Exempt Certified Health Care Collaboratives from the Antitrust Laws (May 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.elliot-naishtat-concerning-texas-s.b.8-exempt-certified-health-care-collaboratives-antitrust-laws/1105texashealthcare.pdf; FTC Staff Comment to Rep. Tom Emmer of the 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; FTC Staff Comment to the Hon. William J. Seitz Concerning Ohio Executive Order 2007-23S to Establish Collective Bargaining for Home Health Care Workers (Feb. 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.william-j.seitz-concerning-ohio-executive-order-2007-23s-establish-collective-bargaining-home-health-care/v080001homecare.pdf; FTC Staff Comment before the P.R. House of Reps. Concerning S.B. 2190 to Permit Collective Bargaining by Health Care Providers (Jan. 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-puerto-rico-house-representatives-concerning-s.b.2190-permit-collective-bargaining-health-care-providers/v080003puerto.pdf. All advocacies are available at https://www.ftc.gov/policy/advocacy/advocacy-filings.

[10] For more information on SB 231A and the Primary Care T(r)-7(or)0sf informa(m)-ary Car3 Tc 0 173 ry repre

[16] To assist the business community in distinguishing between lawful and potentially harmful forms of competitor collaboration, the FTC and its sister federal antitrust 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.