



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

Office of Policy Planning
Bureau of Competition
Bureau of Economics

September 24, 2015

Malaka Watson, Esq.
Tennessee Department of Health
710 James Robertson Parkway, 5th Floor
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Email: malaka.watson@tn.gov

Re: Tennessee Rules Implementing Laws Relative to Cooperative Agreements and the Granting of Certificates of Public Advantage Pursuant to the Hospital Cooperation Act of 1993, T.C.A §§ 68-11-1301 through 68-11-1309, Proposed Chapter 1200-38-01

Dear Ms. Watson:

The staff of the Federal Trade Commission's ("FTC") Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ respectfully submits this public comment regarding Tennessee's rules implementing laws relative to Cooperative Agreements and the granting of Certificates of Public Advantage ("COPA") as promulgated by the Tennessee Department of Health, pursuant to the Hospital Cooperation Act of 1993.² FTC staff welcomes the opportunity to consult with the Tennessee Attorney General's Office and the Tennessee Department of Health during their review of any COPA application to help ensure that any substantive determination as to the potential effects of a COPA includes a rigorous competition analysis based on well-accepted legal and economic principles.

According to the proposed rules under consideration, the Tennessee Department of Health is authorized to issue a COPA for a Cooperative Agreement³ "if it determines the Applicants have demonstrated by clear and convincing evidence that the likely benefits resulting from the Cooperative Agreement outweigh any disadvantages attributable to a reduction in competition

- enhancement in quality of hospital care;
- preservation of hospital facilities to ensure access to care;
- gains in cost-efficiency of hospital services provided;
- improvements in utilization of hospital resources and equipment;
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Consideration of whether credible efficiencies can offset a merger’s anticompetitive harm depends not only on the magnitude of those efficiencies, but also on the extent to which those efficiencies are likely to be passed through to consumers. Thus, the greater the potential adverse competitive effect of a merger – as with a merger to monopoly or near-monopoly – the greater must be the cognizable efficiencies, and the more they must be passed through to customers to pass muster under the antitrust laws. This methodology is appropriate when applying a “clear and convincing” evidentiary standard, as the Tennessee Department of Health is required to do.

As the Tennessee Department of Health likely is aware, and as we wish to emphasize, FTC staff has previously expressed concerns about COPA programs and other antitrust exemptions. The FTC has consistently advocated that legislation purporting to grant antitrust immunity is unnecessary to encourage procompetitive collaborations among health care providers.⁸ Rather, the antitrust laws are consistent with the laudable public policy goals of improving quality, reducing costs, and improving patient access for health care services. The FTC only seeks to prohibit under the antitrust laws those collaborations that are likely to \cup these goals and result in harm to consumers, including higher prices without any offsetting quality improvements.⁹ Consequently, efforts to shield such conduct from antitrust enforcement are likely to harm Tennessee health care consumers, no matter how rigorous or well-intentioned the regulatory scheme may be.

Nevertheless, we recognize that the Tennessee Department of Health must promulgate rules to implement Tennessee’s amended hospital cooperation legislation. FTC staff is willing to provide any expertise and information that we are authorized to share in connection with the review of COPA applications by the Tennessee Attorney General’s office and the Tennessee Department of Health. Likewise, to the extent that the Tennessee Attorney General’s office and the Tennessee Department of Health are able to share, FTC staff investigations may benefit from receiving information and materials submitted as part of any COPA application.¹⁰ Respectfully, we urge that these concepts of permissible sharing of information and expertise between the Tennessee Department of Health, the Tennessee Attorney General’s office, and the FTC be incorporated in the promulgated rules.

Respectfully submitted,

Marina Lao, Director
Office of Policy Planning

Stephen Weissman, Deputy Director
Bureau of Competition

Francine Lafontaine, Director
Bureau of Economics

¹ These comments express the views of the FTC’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. These comments do 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. The Commission also authorized staff to provide oral comments at today’s meeting of the Tennessee Department of Health. See http://share.tn.gov/sos/rules_filings/07-13-15.pdf.

² See Tennessee Hospital Cooperation Act of 1993, as amended, Tenn. Code Ann. §§ 68-11-1301 – 1309 (2015); Tennessee Proposed Rules, Chapter 1200-38-01, a v http://share.tn.gov/sos/rules_filings/07-13-15.pdf.

³ Tennessee Proposed Rules, Chapter 1200-38-01-01 (8) (“‘Cooperative Agreement’ means an agreement among two (2) or more hospitals for the consolidation by merger or other combination of assets, offering, provision, operation, planning, funding, pricing, contracting, utilization review or management of health services or for the sharing, allocation or referral of patients, personnel, instructional programs, support services and facilities or medical, diagnostic or laboratory facilities or procedures or other services traditionally offered by hospitals, including any parent or subsidiary at the time the transaction occurs or at any time thereafter.”).

⁴ Tennessee Proposed Rules, Chapter 1200-38-01-05 (1).

⁵ See Tenn. Code Ann. § 68-11-1303 (e).

⁶ See Tennessee Proposed Rules, Chapter 1200-38-01-03 (2) (a) 1.-7.

⁷ See Tennessee Proposed Rules, Chapter 1200-38-01-03 (2) (b) 1.-4.

⁸ See, e.g., FTC Staff Comment to Sen. Michael H. Ranzenhofer and Assemblyman Thomas Abinanti, N.Y. State Legislature, Concerning S.B. 2647 and A. 2888, Intended to Exempt Certain Public Health Entities from the Antitrust Laws (June 2015),

https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-york-state-senator-ranzenhofer-new-york-state-assemblyman-abinanti-concerning/150605nypublichealthletter.pdf;

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 Payers 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-provide-federal/150519oregonstaffletter.pdf;

FTC Staff Comment to New York State Department of Health, Concerning Certificate of Public Advantage Applications, Intended to Exempt Performing Provider Systems from the Antitrust Laws (Apr. 2015),

https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf;

FTC Staff Comment to Sen. Catherine Osten and Rep. Peter Tercyak, Conn. Gen. Assembly, Concerning H.B. 6431, Intended to Exempt Health Care CollabJ ETa -23.778 -1-2(w)-6(y)6(o)-6(r)1(kh)-6(3rL(3r]TJ 0s)5(r)75(.)-r)75olt(m)15(1(CJ