

Office of Policy Planning
Bureau of Economics
Bureau of Competition

March 9, 2016

The Hon. Mike Pushkin
West Virginia House of Delegates
Room 150R, Building 1
State Capitol Complex
Charleston, WV 25305

Re: West Virginia Senate Bill 597

Dear Delegate Pushkin

The staffs of the Federal Trade Commission

health care competition and health care consumers in West Virginia. These provisions may also tend to decrease the quality of health care services in West Virginia. Our main concerns areas follows:

- First, the antitrust laws permit health care collaborations that benefit consumers. As the federal Antitrust Agencies have explained, many competitor collaborations – including health care provider collaborations and mergers—are efficient and procompetitive, and are therefore lawful.
- Second, because the antitrust laws already prohibit procompetitive health care collaborations, the Bill’s main effect would be to foster precisely those mergers and collective negotiations that would generate efficiencies and therefore would pass muster under the antitrust laws. Therefore, the collaborative agreements contemplated by the Bill would likely increase health care costs, diminish incentives to improve quality, and decrease access to health care services for West Virginia consumers.

I. Interest and Experience of the Federal Trade Commission

Congress has charged the Federal Trade Commission (“FTC” or “Commission”) with enforcing the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces Section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition or tend to create a monopoly. Competition is at the core of America’s economy, 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. Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental and regulations that may substantially lessen competition.

Actions of the authority shall be exempt from antitrust action under state and federal antitrust laws. Any actions of hospitals and health care providers under the authority's jurisdiction, when made in compliance with orders, directives, rules, approvals or regulations issued or promulgated by the authority, shall likewise be exempt. Health care providers shall be subject to the antitrust guidelines of the federal trade commission and the department of justice.¹³

Thus, the Bill apparently seeks to confer an exemption from the antitrust laws on "any" actions by hospitals and other health care providers that under the jurisdiction of the newly constituted West Virginia Health Care Authority (the "Authority") and comply with the Authority's regulations or administrative decisions.

Proposed Section 20B-28 contemplates "cooperative agreements" – including but not limited to mergers and acquisitions – among health care providers, as long as one of the providers is "a teaching hospital which is a member of an academic medical center."¹⁴ The other party or parties to the cooperative agreement need only be one or more other hospitals, or other health care providers.¹⁵ These cooperative agreements presumably would vary widely depending on the parties and might broadly contemplate "the sharing, allocation, consolidation by merger or other combination of assets, or referral of patients, personnel, instructional programs, support services, and family medical, diagnostic, or laboratory facilities or procedures or other services traditionally offered by hospitals or other health care providers."¹⁶

According to the Bill, such agreements are supposed to be desirable "if the likely benefits of such agreements outweigh any disadvantages attributable to a reduction in competition."¹⁷ In particular,

[T]he goal of any cooperative agreement would be to:

- (A) Improve access to care;
- (B) Advance health status;
- (C) Target regional health issues;
- (D) Promote technological advancement;
- (E) Ensure accountability of the cost of care;
- (F) Enhance academic engagement in regional health;
- (G) Preserve and improve medical education opportunities;
- (H) Strengthen the workforce for health-related careers; and
- (I) Improve health entity collaboration and regional integration, where appropriate.¹⁸

In addition, the Bill stipulates various ways in which such cooperative agreements and antitrust exemptions should comply with competition guidance and policy statements issued by the Antitrust Agencies. For example,

[i]f the cooperative agreement involves a combination of hospitals through merger, consolidation or acquisition, the qualified hospital must have been awarded a certificate of need for the project by the authority . . . [and] [i]n reviewing a certificate of need application the authority shall give deference to the policy statements of the Federal Trade Commission¹⁹.

Moreover, as noted above, the provision that purports to confer an exemption from the antitrust laws on health care providers stipulates that those providers “shall be subject to the antitrust guidelines of the federal trade-j -0.01 Tc 1008 Tc -0.(s4am[a]4(b EM)

attempts to confer state action immunity – is likely to harm West Virginia's health care consumers, including patients as well as both public and private third

VI. Conclusion

Competitor collaborations, mergers, and acquisitions, can be procompetitive, benefitting patients and payors alike. Interest in such “cooperative agreements” among health care providers is understandable and, indeed, important. As we have explained, however, both in this comment and in numerous antitrust guidance documents, the antitrust laws already permit efficient and pro-consumer collaborations among competing health care providers, and already permit efficient and pro-consumer mergers. The Bill’s apparent attempt to confer antitrust immunity, therefore, unnecessary for legitimate collaborations and, if effective, would encourage groups of private health care providers to engage in blatantly anticompetitive conduct.

In summary, FTC staff are concerned that this legislation is likely to foster mergers and conduct that are anticompetitive, inconsistent with federal antitrust law and policy, and liable to cause serious harm to West Virginia health care consumers.

We appreciate your consideration of these issues.

Respectfully submitted,

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Attachments

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

² Letter from the Hon. Mike Pushkin, West Virginia House of Delegates, to Marina Lao, Director, Fed. Trade Comm’n Office of Policy Planning (March 9, 2016). Specifically, we write regarding provisions of

the Committee Substitute for Senate Bill 597 by Senators Ferns and Plymale, Originating in the Senate Committee on Health and Human Resources; reported on February 16, 2016, H.R. 2016 (after S. 597).

³ *Id.* at § 1629B-28.

⁴ *Id.* at § 1629B-26.

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

⁶ Clayton Act, 15 U.S.C. § 8.

⁷ *Standard Oil Co. v. FC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

⁸ *See Nat’l Soc. of Prof. Engineers 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.”).

⁹ *See generally* Fed. Trade Comm’n, An Overview of FTC Antitrust Actions In Health Care Service3(a)-2.922tt34(ey)8(20

Health Care Cooperative (Mar. 2009) <http://www.ftc.gov/opp/advocacy/V090003.pdf> FTC Staff
Comment to the Hon. William J. Seitz Concerning Ohio Executive Order 2008-26 to Establish Collective
Bargaining for Home Health Care Workers (Feb. 2008)
<http://www.ftc.gov/os/2008/02/V080001homecare.pdf> FTC Staff Comment Before the Puerto Rico House
of Representatives Concerning S.B. 2190 to Permit Collective Bargaining by Health Care Providers
(2008) <http://www.ftc.gov/os/2008/02/v080003puerto.pdf> http://www.ftc.gov/opp/advocacy_date.shtml See also Prepared Statement of the Fed. Trade Comm'n
Before the H. Comm. on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet
Concerning H.R. 1946, the Preserving Our Hometown Independent Pharmacies Act of 2011, H.R. 29,
2012, <http://www.ftc.gov/os/testimony/120329pharmacytestimony.pdf>

¹³ S. 597 at § 16-29B-26. With regard to “antitrust guidelines,” see *infra* note 19.

¹⁴ *Id.* at § 16-29B-28(a)(2).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at § 16-29B-28(c).

¹⁸ *Id.* at § 16-29B-28(d)(2).

Miles, Ober, Kaler, Grimes & Shriver, R⁶ Greater Rochester Independent Practice Association, Inc. Advisory Opinion, Sept. 17, 2007 https://www.ftc.gov/sites/default/files/documents/advisory_opinions/greaterrochesterindependentpracticeassociationinc./gripa.pdf

²² U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, *supra* note 21, at 2.

²³ Edith Ramirez, *Antitrust Enforcement in Health Care – Controlling Costs, Improving Quality*, 371 NEW ENG. J. MED. 2245 (2014) <http://www.nejm.org/doi/pdf/10.1056/NEJMp1408009>. See also Deborah L. Feinstein, Dir., Bureau of Competition, Remarks at the Fifth National Accountable Care Organization

southwestern Puerto Rico after the program's regional administrator . . . refused to accede to Respondents' demands to restore a cut in reimbursements for certain patients eligible for benefits under both Medicare and Mi Salud ("dual eligibles"). After Respondents terminated their service agreements with Humana, they refused to treat any of Humana's Mi Salud patients.

the Matter of Práxedes E. Alvarez Santiago, M.D., Daniel Pérez Brisebois, M.D., Jorge Grillasca Palou, M.D., Rafael Garcia Nieves, M.D., Francis M. Vázquez Roura, M.D., Angel B. Rivera Santos, M.D., Cosme D. Santos Torres, M.D., and Juan L. Vilaró Chardón, M.D., FTC File No. 120098, G4402 (Complaint), 2 (May 3, 2013),