

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

Joint Statement of the Federal Trade Commission and the Antitrust Division
of the U.S. Department of Justice to the Virginia Certificate of Public Need

Agencies have extensive experience investigating anticompetitive mergers and business practices by hospitals, insurers, pharmaceutical companies, physicians and other providers of health care goods and services. The Agencies also have provided guidance to the health care community on the antitrust laws, and have devoted significant resources to examining the health care industry by sponsoring various workshops and studies. Finally, through their competition advocacy programs, the Agencies have encouraged states to consider the competitive impact of various health care-related legislative and regulatory proposals, including CON laws.⁹

II. Virginia's COPN Laws

Virginia's COPN program requires providers to obtain a COPN from the State Health Commissioner (the "Commissioner") before initiating certain

COPN on the provision of a certain amount of charity care, the provision of care to persons with special needs, or the provision of health care services in a medically underserved area.¹² The program's goal is to "contain health care

III. Analysis of the Likely Competitive Effects of Virginia's COPN Laws

Competition in health care markets can benefit consumers by containing costs, improving quality, and encouraging innovation.¹⁹ Indeed, price competition generally results in lower prices for and, thus, broader access to health care products and services, while non

- x Remove or delay the competitive pressures that typically incentivize incumbent firms to innovate, improve existing services, or introduce new ones.²²

We urge the Work Group and the General Assembly to consider that Virginia's COPN law may be causing these results in Virginia to the detriment of health care consumers and to consider the benefit to patients if new facilities and services would be able to enter the market more easily. This new entry – and the

Repeal or retrenchment of Virginia's COPN law would eliminate or mitigate the opportunity for this type of exploitation of the CON process.

C. CON Laws Can Impede Effective Antitrust Remedies and Can Facilitate Anticompetitive Agreements

As the FTC's recent experience in *FTC v. Phoebe Putney* demonstrates, CON laws can entrench anticompetitive mergers by limiting the ability to implement effective structural remedies. *Phoebe Putney* involved a challenge to the merger of two hospitals in Albany, Georgia.²⁶ The FTC alleged that the merger had created a monopoly in the provision of inpatient general acute care hospital services sold to commercial health plans in Albany and its surrounding areas. The FTC was ultimately precluded from obtaining a remedy that would have restored competition to the marketplace because of Georgia's CON laws and regulations.²⁷ As the Commission explained, "[w]hile [divestiture] would have been the most appropriate and effective remedy to restore the lost competition in Albany and the surrounding six -county area from this merger to monopoly, Georgia's [CON] laws and regulations unfortunately render a divestiture in this case virtually impossible."²⁸ The Commission further noted that the case "illustrates how state CON laws, despite their original and laudable goal of reducing health care facility costs, often act as a barrier to entry to the detriment of competition and healthcare consumers."²⁹ Thus, the Work Group and the General Assembly should consider whether Virginia's COPN laws could prevent divestiture as an effective tool to remedy anticompetitive mergers in appropriate cases

²⁶ See generally *In re Phoebe Putney Health Sys., Inc.*, Dkt. No. 9348, available at <https://www.ftc.gov/enforcement/cases-proceedings/111-0067/phoebe-putney-health-system-inc-phoebe-putney-memorial>.

²⁷ The Eleventh Circuit affirmed the district court's dismissal of the case on state-action grounds and dissolved the stay that had prevented the parties from consummating the merger. The Supreme Court reversed, finding against state-action immunity. But, with the stay dissolved, the parties had consummated their merger before the state-action question was resolved by the federal courts. See *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003, 1011 (2013).

²⁸ Statement of the Federal Trade Commission at 1, *In re Phoebe Putney Health Sys., Inc.*, Dkt. No. 9348, (Mar. 31, 2015) available at https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf.

²⁹ *Id.* at 3.

Additionally, CON programs have facilitated anticompetitive agreements among competitors. For example, in 2006, a hospital in Charleston, West Virginia, used the threat of objection during the CON process to induce another hospital to refrain from seeking a CON for a location where it would have competed to a greater extent with the existing hospital's program.³⁰ In a separate but similar case, the informal urging of state CON officials led a pair of closely competing West Virginia hospitals to agree that one hospital would seek a CON for open heart surgery, while the other would seek a CON for cancer treatment.³¹ While the Division secured consent decrees prohibiting these agreements between s

selecting a provider (the patient) and the party paying all or most of the bill (the insurer), and the information asymmetries among provider, patient, and insurer. They therefore call for a regulatory regime requiring preapproval for health care

competitive incentives to invest. The Agencies have found no empirical evidence that CON laws have successfully restricted “over -investment.”³⁸

Finally, the best empirical evidence suggests that greater competition incentivizes providers to become more efficient.³⁹ Recent work shows that hospitals faced with a more competitive environment have better management practices.⁴⁰ Consistent with this, there is evidence suggesting that repealing or narrowing CON laws can reduce the per -patient cost of health care.⁴¹

B. Quality of Care Arguments Should Not Preclude COPN Reform

Proponents also have argued that CON laws improve the quality of health
ca

laws is generally unlikely to lower quality, and may, in fact, improve the quality of certain types of care.⁴⁶

C. More Targeted Policies May Be More Effective at Ensuring Access to Care and Would Not Inflict Anticompetitive Costs

Another argument advanced by proponents of CON programs is that the programs enable states to increase access to care for their indigent residents and in medically underserved areas. The general argument is that, by limiting competition, CON laws allow incumbent health care providers to earn greater profits – through the charging of higher prices and the preservation of their volume of lucrative procedures – than they would earn in a competitive environment. These incumbents can then use those extra profits to cross subsidize their provision of care to the indigent. Additionally, proponents maintain that regulators can use CON laws to restrict entry into well-served areas and encourage it in underserved areas. Virginia CON laws go further, explicitly providing that a CON may be conditioned on the applicant's agreement to provide a certain amount of indigent care, care to patients requiring specialized services, or care in medically underserved areas.⁴⁷

Though the Agencies appreciate the importance of ensuring access to health care for the indigent and in medically underserved areas, we urge the Work Group and the General Assembly to consider whether there are more effective or narrowly tailored ways in which to accomplish this public policy goal. As described in Section III.A., above, CON programs may restrict competition from potentially lower priced, higher quality, and more innovative providers. They also may reduce the ability of providers to respond to consumer demand. As a result, CON programs may impede providers from providing

⁴⁶ See Suhui Li & Avi Dor, How Do Hospitals Respond to Market Entry? Evidence from a Deregulated Market for Cardiac Revascularization, 24 HEALTH ECON. 990, 1006 (2015) (finding that repeal of Pennsylvania's CON program improved "the match between underlying medical risk and

access to all patients– including the indigent. Although CON laws may seek to promote indigent care, research shows that safety net hospitals are no stronger financially in CON states than in non- CON states.⁴⁸

Additionally, CON programs are a blunt tool for accomplishing the specific goal of providing care to the indigent and in medically underserved areas. They tend to sweep broadly, limiting competition for a wide variety of health care services. Although the Agencies do not endorse any particular mechanism for funding indigent care, we note that solutions more narrowly tailored to a state’s recognized policy goals may be substantially less costly to consumers, and ultimately more effective at achieving the desired social goals, than a CON regime.⁴⁹

V. Conclusion

The Agencies recognize that states must weigh a variety of policy objectives when considering health care legislation. But, as described above, CON laws raise considerable competitive concerns and generally do not appear to have achieved their intended benefits for health care consumers. For these reasons, the Agencies historically have suggested that states consider repeal or