



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Competition

May 18, 2011

Representative Elliott Naishtat
Texas House of Representatives
P.O. Box 2910
Austin, TX 78768-2910

Dear Representative Naishtat:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ are pleased to respond to your request for comments on the antitrust provisions of Texas Senate Bill 8 ("S.B. 8" or "the Bill"). The Bill, among other things, apparently intends to exempt certified "health care collaboratives" from state and federal antitrust laws. The exemption is aimed at immunizing a collaborative's contract negotiations with payors but appears to extend to a broad range of other activities as well. We are concerned that the antitrust provisions of the Bill, if enacted as passed by the Texas State Senate, are likely to lead to dramatically increased costs and decreased access to health care for Texas consumers. The review provisions in the Bill appear unlikely to prevent these harmful effects.

The Bill is not needed to allow procompetitive cooperative activities by health care providers, because antitrust law already permits collaboration that benefits consumers. To the extent that S.B. 8 is designed to authorize conduct not already permitted under the antitrust laws, it threatens to deprive health care consumers of the benefits of competition. In addition, the regulatory regime contemplated by the Bill may be insufficient to meet the rigorous standards required to confer state action immunity from the federal antitrust laws.

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 commerce.² Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental

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

regulations that may impede competition without also offering countervailing benefits to consumers.

Health care competition is critically important to the economy and consumer welfare. For this reason, anticompetitive conduct in health care markets has long been a key focus of FTC activity. The agency has brought numerous antitrust enforcement actions involving the health care industry.³ In addition, the Commission and its staff have given testimony,⁴ issued reports⁵ and engaged in advocacy to state legislatures regarding various aspects of competition in the health care industry. Of particular relevance, the Commission and its staff have long advocated against federal and state legislative proposals that would create antitrust exemptions for collective negotiations by health care providers when such exemptions are likely to harm consumers.⁶

³ See Federal Trade Commission, Overview of FTC Antitrust Actions in Health Care Services and Products, Sept. 2010, available at: <http://www.ftc.gov/bc/110120hcupdate.pdf>.

⁴ See Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Subcomm. On Courts and Competition Policy, On "Antitrust Enforcement in the Health Care Industry," Dec. 1, 2010; Prepared Statement of the Fed. Trade Comm'n Before the Subcomm. On Consumer Protection, Product Safety, and Insurance, Comm. on Commerce, Science & Transportation, On "The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care," July 16, 2009 (all testimonies available at: <http://www.ftc.gov/ocr/testimony/index.shtml>).

⁵ See FED. TRADE COMM'N, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION (Jun. 2009); FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005); FED. TRADE COMM'N AND DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (Jul. 2004) (all reports available at: <http://www.ftc.gov/reports/index.shtml>).

⁶ See FTC Staff Comment to Rep. Tom Emmer of the Minnesota House of Representatives Concerning Minnesota H.F. No. 120 and Senate Bill S.F. No. 203 on Health Care Cooperatives (Mar. 2009); 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); FTC Staff Comment Before the Puerto Rico House of Representatives Concerning S.B. 2190 to Permit Collective Bargaining by Health Care Providers (Jan. 2008) (all advocacies available at: http://www.ftc.gov/opp/advocacy_date.shtml); also Letter to Hon. Rene O. Oliveira, Concerning Texas Physician Collective Bargaining (May 1999) (available at: <http://www.ftc.gov/be/v990009.shtml>); also Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Concerning H.R. 1304, the "Quality Health-Care Coalition Act of 1999," June 22, 1999, available at: <http://www.ftc.gov/os/1999/06/healthcaretestimony.htm>.

The Texas Bill

S.B. 8 allows establishment of “health care collaboratives” -- organizations that may consist of physicians and other health care providers, including hospitals -- and is apparently intended to provide them with an exemption from the antitrust laws. That immunity would extend to a collaborative’s negotiations of all contracts with payors, both governmental and private.⁷ According to the Bill’s preamble, the antitrust exemption is considered necessary to “explore innovative health care delivery and payment models [and] to give health care providers the flexibility to collaborate and innovate to improve the quality and efficiency of health care.”⁸ The preamble also states that the Bill is not intended to authorize what would otherwise be per se violations of the antitrust law.⁹

To qualify as a health care collaborative, an organization must be certified by the Commissioner of the Texas Department of Insurance.¹⁰ To be certified, a collaborative must be able to demonstrate that it has processes in place to contain costs and evaluate health care quality. It must also show:

the willingness and potential ability to ensure that the health care services be provided in a manner that: (i) increases collaboration among health care providers and integrates health care services; (ii) promotes quality-based health care outcomes, patient engagement, and coordination of services; and (iii) reduces the occurrence of potentially preventable events.¹¹

⁷ S.B. 8, § 1.01(c) (Tex. 2011).

⁸ S.B. 8, § 1.01(a)(1) and (3) (Tex. 2011).

⁹ S.B. 8, § 1.01(c) (Tex. 2011).

¹⁰ S.B. 8, § 848.054 (Tex. 2011).

¹¹ S.B. 8, § 848.057 (Tex. 2011).

Under the Bill, the Department of Insurance must approve a health care collaborative upon finding that: (1) it is “not likely to reduce competition in any market for physician, hospital, or ancillary health care services” due either to the size of the health care collaborative or its composition; and (2) it is “not likely to possess market power.”¹² Within six months of approval, a health care collaborative must seek renewal of its certification based, among other factors, on a review of financial statements and an evaluation of the quality and cost of its health care services.¹³ The Bill appears not to require certification renewals after that point. The Department of Insurance, however, will be authorized to revoke a certification when there have been changes in market conditions or in a collaborative’s composition that are likely to reduce competition. The Attorney General must review the adequacy of the Department’s findings within 60 days, although the bill provides no standards for conducting the review.¹⁴

The Likely Effects of S.B. 8

The antitrust exemption in the Bill is unnecessary to promote health care benefits to consumers through collaboratives. This is because the antitrust laws *already* allow procompetitive collaborations among competitors. To the extent that the Bill goes beyond that and would allow coordinated activity among health care competitors beyond that permitted by the antitrust laws, it poses a substantial risk of consumer harm, by increasing costs and decreasing access to health care. Even with some oversight by the Department of Insurance and the Attorney General, that consumer harm may be difficult to prevent once a collaborative is certified.

(a) The Bill Is Unnecessary to Promote Arrangements That Will Benefit Consumers

Federal antitrust law already permits joint activity by health care collaboratives that is reasonably necessary to create efficiencies, improve quality of and access to health care, and have an overall procompetitive effect. Antitrust standards distinguish between effective clinical integration among health care providers that has the potential to achieve cost savings and improve health outcomes and anticompetitive collaboration and price fixing by health care providers, which is likely to increase health care costs. In fact, in order to promote such activity, the FTC and its staff and the Department of Justice (“DOJ”) have provided substantial guidance regarding how health care providers can integrate their clinical operations in such a way as to achieve cost savings and improve health care outcomes.¹⁵ We therefore see no need for new legislation to authorize

¹² Id.

¹³ S.B. 8, § 848.060 (Tex. 2011).

¹⁴ S.B. 8, § 848.059 (Tex. 2011).

¹⁵ Dep’t of Justice & Fed. Trade Comm’n, *Statements of Antitrust Enforcement Policy In Health Care* (1996), available at: <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>; TriState Health Partners, Inc., Letter from Markus Meier, FTC to Christi Braun, Ober, Kaler, Grimes & Shriver, April 13, 2009; Greater Rochester Independent Practice Association, Inc., Letter from Markus Meier, FTC to Christi Braun & John J. Miles, Ober, Kaler, Grimes & Shriver, September 17, 2007, letters available at:

collaboratives and collective negotiations.

(b) The Bill Poses a Substantial Risk of Consumer Harm

The Bill as written goes beyond the current law and appears intended to extend broad antitrust immunity to health care collaboratives. Regardless of any stated intent by a collaborative to improve health care quality and control costs, the practical effect of the Bill will be to exempt anticompetitive conduct from antitrust scrutiny. We think this would pose an unnecessary and substantial risk of consumer harm.

It is well-recognized that antitrust exemptions routinely threaten broad consumer harm for the benefit of a few. The bipartisan Antitrust Modernization Committee observed “[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.”¹⁶ Although the Bill would not exempt conduct that amounts to a “per se” violation of the antitrust laws, the Bill appears intended to shield a broad range of anticompetitive conduct from antitrust challenge. This may cover anticompetitive mergers and acquisitions as well as a range of agreements among competitors that, although not strictly speaking per se illegal, are so inherently likely to injure competition that they are condemned under the rule of reason absent any plausible procompetitive justification.¹⁷

In addition, it is not likely that the Department of Insurance’s consideration of competition concerns and the Attorney General’s review will protect consumers from the harmful effects of this legislation, for a number of reasons. The initial review of a health care collaborative is limited in scope, and even the more detailed review that may occur upon certificate renewal may not be sufficient. Further, it is not clear that the Department of Insurance has the necessary expertise to conduct the type of fact-intensive, time-consuming analysis of competition and market power needed to protect consumers. Even if the Department does find a problem, the grounds for revocation are limited. Indeed, if a health care collaborative uses its market power to increase prices for consumers, there is

<http://www.ftc.gov/bc/healthcare/industryguide/advisory.htm>; also Fed. Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, available at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. Most recently, the FTC and DOJ released a joint statement explaining how the reviewing antitrust agency will enforce U.S. antitrust laws against the new Accountable Care Organizations – groups of health care providers that, if they are likely to lower costs and cause improvements in the availability of health care, will be permitted under the Affordable Care Act of 2010 to operate. (Fed. Trade Comm’n and the Antitrust Division of the Department of Justice: Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating In the Medicare Shared Savings Program, available at: <http://www.ftc.gov/os/fedreg/2011/03/110331acofrn.pdf>).

¹⁶ Antitrust Modernization Commission, Report and Recommendations (April 2007) at 335, available at: http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

¹⁷ Many such agreements are considered to be “inherently suspect” because they are very likely to harm consumers, and thus receive summary condemnation. See *North Texas Specialty Physicians v. FTC*, 528 F.3d 352 (5th Cir. 2008); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005);

no provision for remedying this harm. Moreover, there is no mandatory review of a collaborative's status after the first year. Finally, the extent of and time allotted for the Attorney General's review are limited and the standards under which the Attorney General can find a determination inadequate are unclear. Thus, the review provisions are not adequate to protect consumers from the likely harm created by the Bill.

The Bill May Not Create State Action Immunity

The antitrust immunity that the Bill purports to confer on private health care collaboratives is effective only if the State of Texas has clearly articulated an intention to replace competition in this area with a regulatory scheme, and actively supervises this private conduct.¹⁸ The active supervision test seeks to determine “whether the State has exercised sufficient independent judgment and control so that the details [of the restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties.”¹⁹ As explained by the Supreme Court in *Patrick v. Burget*, state officials must “have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”²⁰

Here, the State's review proposed under the Bill does not appear sufficient to protect consumers from the potential anticompetitive effects of collaborations that do not further the goals of the legislation. Notably, the Bill does not appear to mandate *any ongoing* state supervision of health care collaboratives after the initial approval and one-time renewal processes. The State, for example, under the Bill as written, would not require that its officials review contracts and fee arrangements between collaboratives and payors to assess whether they in fact comport with State policy goals, and to remedy situations that may violate those goals. Parties claiming antitrust immunity under the state action doctrine bear the burden of establishing that they are entitled to such immunity. As the Supreme Court has made clear, this is a high bar. The regulatory program proposed by the Bill appears not to meet that bar.

Conclusion

Our analysis of S.B. 8 suggests that its passage poses a significant risk of increased health care costs and decreased access to care for Texas consumers. The antitrust immunity provisions in this legislation are unnecessary and will allow private health care collaboratives to engage in unsupervised anticompetitive conduct. In summary, FTC staff is concerned that this legislation is likely to foster anticompetitive conduct that is inconsistent with federal antitrust law and policy, and that such conduct could work to the detriment of Texas health care consumers.

¹⁸ *Parker v. Brown*, 317 U.S. 341, 351 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

¹⁹ *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621, 634 (1992).

²⁰ 486 U.S. 94, 101 (1988).

We appreciate your consideration of these issues.

Respectfully submitted,

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