GEORGE C. JEPSEN
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of The Attorney General
State of Connecticut

TESTIMONY OF
ATTORNEY GENERAL GEORGE JEPSEN
BEFORE THE COMMITTEE ON LABOR AND PUBLIC EMPLOYEES
MARCH 5, 2013

Good afternoon Senator Osten, Representative Tercyak and members of the Committee. I appreciate the opportunity to testify about House Bill 6431, *An Act Concerning Cooperative Healthcare Arrangements.* This bill is nearly identical to Senate Bill 182 from the 2012 session. My Office opposed that measure last year. For your convenience, I have attached a copy of my testimony from last year, which remains the position of my Office.

It is my understanding, however, that the proponents of HB 6431 have shared substitute language with the Committee. My Office has reviewed the proposed substitute language and I am opposed to that proposal as well. While certain aspects of the proposed substitute bill are different, fundamentally it raises the same concerns as the prior version.

The substitute bill the proponents have shared with the Committee would permit medical doctors, upon receiving a "certificate of public advantage" from the Office of the Healthcare Advocate, to enter into "cooperative arrangements" for a variety of purposes, including the negotiation of "fees, prices or rates with managed care organizations." The bill explicitly exempts such arrangements from state antitrust laws. It also purports to create a state regulatory scheme aimed at providing such arrangements with a "safe harbor" from federal antitrust laws under the "state-action" doctrine.

In 2011, the Co-Chairs and Ranking Members of the Judiciary Committee contacted representatives of the Federal Trade Commission ("FTC") to inquire about the legality and likely competitive impact of a similar proposal. In response, the FTC warned that the proposal likely would not create immunity from federal antitrust laws. The FTC also expressed concerns that the proposed bill would be "likely to lead to dramatically increased costs and decreased access to health care for Connecticut consumers." A copy of the FTC's letter is attached to this testimony. For the reasons that follow, the FTC's letter should inform this Committee again this year.

First, under the judicially created "state action" doctrine, a state may override the national policy favoring competition only where it expressly decides to govern aspects of its economy by state regulation rather than market forces. A state may not simply authorize private parties to violate the federal antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 351 (1943). Instead, it must actually substitute its own active control for the discipline that competition would otherwise provide. In order to meet the requisite elements of the start action doctrine, therefore, (1) the state legislature must clearly articulate a policy to displace competition with regulation,

and (2) state officials must actively supervise the private anticompetitive conduct. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 92 (1980).

The present proposal likely fails to meet either prong of the "state action" immunity doctrine. As to the first prong, the proposed substitute bill fails to articulate any clear public policy for displacing competition with regulation. It also lacks any articulated standards for the Healthcare Advocate to consider when deciding whether to grant, deny, revoke or modify a certificate. The Healthcare Advocate would need to have clear legislative guidance on what would constitute "interdependence and cooperation among physicians for the purpose of efficiently and/or effectively delivering medical care..." for example.

The proposal also lacks an adequate platform and set of criteria for continuing supervision and regulation of these cooperatives, as is required to meet the state action doctrine requirements set forth by the United States Supreme Court. Under that prong of the doctrine, state officials must have a meaningful opportunity to review the anticompetitive conduct of private parties and exercise discretion to disapprove those that do not meet the standards adopted. Here, the Healthcare Advocate appears bound by the terms of the original grant, and would be unable to ensure that the cooperative agreement continues to further state regulatory policies. The "biannual summary" and the ability to request information "regarding compliance" would not provide the Healthcare Advocate with the ability to exercise independent judgment and control. The agency with primary regulatory authority must have the authority to make sufficient inquiries to recognize and remedy undesirable consequences of anticompetitive activity

In addition, even if the proposal did provide the Healthcare Advocate with an adequate platform and set of criteria for granting certificates and actively supervising the cooperatives, I am not confident that her Office would have the resources necessary to perform that function. I criticized last year's bill, for instance, because it would have required my Office to conduct a detailed and complex review of the benefits of a particular healthcare cooperative arrangement within only 90 days of receiving an application. This year's proposed substitute bill would require the Healthcare Advocate to make a decision within 20 business days.

My Office has experience in complex antitrust investigations. A recently concluded investigation of the competitive impact of a proposed hospital merger in Connecticut took well over a year and included interviews of stakeholders, the study of hospital financial and planning documents and significant support from economists at the FTC. These are resource and time-intensive investigations. This bill would require a state agency with no antitrust expertise and insufficient time and resources to both: (a) conduct the prerequisite analysis necessary to identify and supervise the potential competitive and anticompetitive implications of a proposed cooperative; and (b) actively monitor and supervise the cooperatives. As you know, the Healthcare Advocate's mission is to assist consumers with health care issues through the establishment of effective outreach programs and the development of communications related to consumer rights and responsibilities as members of healthcare plans. Simply put, that office lacks the staff and expertise to conduct a complicated and ongoing antitrust analysis of the type contemplated by this bill.

Lastly, even if the legislature decided to provide the Healthcare Advocate with the resources necessary to perform the functions contemplated by the proposal, there would be significant and ongoing fiscal implications for the State above and beyond the potential costs associated with increased healthcare costs. In 2011, the Office of Fiscal Analysis ("OFA") considered the likely fiscal impact of a similar proposal. A copy of the 2011 OFA Fiscal Note for HB 6343 (2011) is attached to my testimony. At that time, the OFA concluded that the bill would result "in an estimated annual cost of $663,108 for four attorneys, one paralegal and one health care analyst in the Attorney General's office (AG) to certify and oversee authorized cooperative health care arrangements. This cost "would continue into the future subject to inflation and any violations of the bill's provisions." Moving these responsibilities to the Healthcare Advocate, which lacks the antitrust expertise of my Office, does nothing to diminish the anticipated costs. Rather, it would likely increase those expenses far beyond the $1,000.00 filing fee provided for under the proposed substitute bill.

For all of these reasons, I urge the Committee not to act favorably upon this proposal at this time. Thank you once again for the opportunity to testify about this proposal.

GEORGE C. JEPSEN
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Hartford, CT 06141-0120

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TESTIMONY OF
ATTORNEY GENERAL GEORGE JEPSEN
BEFORE THE COMMITTEE ON LABOR AND PUBLIC EMPLOYEES
FEBRUARY 28, 2012

Good afternoon Senator Prague, Representative Zalaski, and members of the Committee. I appreciate the opportunity to testify about SB 182, *An Act Concerning Cooperative Healthcare Arrangements.* While I understand and sympathize with the concerns of the proponents of this bill, I have serious reservations about the proposal from both a legal and fiscal perspective.

If enacted, this bill would permit otherwise unaffiliated physicians and other healthcare providers in the State, upon receiving a "certificate of public advantage" from the Office of the Attorney General, to enter into "cooperative arrangements" for a variety of purposes, including to negotiate "fees, prices or rates with managed care organizations." By its terms, the bill exempts such arrangements from state antitrust laws. It also purports to create a state regulatory scheme aimed at providing such arrangements with a "safe harbor" from federal antitrust laws under the "state-action" doctrine.

In 2011, an identical proposal, HB 6343, was raised and acted favorably upon by the Judiciary Committee. Subsequently, the Co-Chairs and Ranking Members of the Judiciary Committee contacted representatives of the Federal Trade Commission (the "FTC") to inquire about the legality and likely competitive impact of the proposal. In response, the FTC provided a detailed written response outlining the agency's concerns that the proposed bill would be "likely to lead to dramatically increased costs and decreased access to health care for Connecticut consumers." In addition, the FTC warned that the proposal likely would not create immunity from federal antitrust laws. A copy of the FTC's letter is attached to this testimony.

I share the FTC's view that this proposal fails to meet the test for "state-action" immunity from the federal antitrust laws. Under the judicially-created "state action" immunity doctrine, a state may override the national policy favoring competition only where it expressly decides to govern aspects of its economy by state regulation rather than market forces. A state may not simply authorize private parties to violate the antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 351 (1943). Instead, it must actually substitute its own active control for the discipline that competition would otherwise provide. In order to meet the requisite elements of the state action doctrine, therefore, (1) the state legislature must clearly articulate a policy to displace competition with regulation, and (2) state officials must actively supervise the private anticompetitive conduct. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* 445 U.S. 92 (1980).

The first prong, the clear articulation requirement, serves to ensure that the state has authorized departures from free market competition. Most often, articulation can be found through an express statutory provision that permits, but does not compel, anticompetitive conduct. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985). Broad grants of authority will not satisfy the clear articulation requirement. The proposed bill does not include a clearly articulated state policy to displace competition with regulation. As a result, it likely fails to meet the first prong of the *Midcal* test.

Nor does the proposed bill likely satisfy the second prong of the state-action immunity doctrine. This second prong, *Midcal's* active supervision requirement, ensures that the state action defense "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). Hence, in order for state supervision to be adequate for state action purposes, state officials must "exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 101. The Supreme Court has made it clear that the active supervision standard is a rigorous one, designed to ensure that "the State effectively has made [the challenged] conduct its own." *Id.* at 106. Active supervision requires that the state exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35 (1992).

The present proposal requires my Office to conduct a review and make a determination about the benefits of a particular healthcare cooperative arrangement within 90 days of receiving an application and limits ongoing supervision to reviewing annual reports submitted by the cooperative arrangements during the first three years of any such arrangements. Given the highly complex nature of the subject matter involved and the specialized expertise required, including economist support, the construct proposed in the bill does not allow my Office the time and resources necessary to conduct a thorough investigation into the competitive implications of an application and, thus, is not an adequate platform of continuing regulation. As a result, and as the FTC observed last year, the proposed bill likely fails to satisfy *Midcal's* active supervision prong.

In addition to these significant legal issues, this bill also would place enormous strains on the already limited resources of my Office. In 2011, the Office of Fiscal Analysis ("OFA") considered the likely fiscal impact of the bill. A copy of the 2011 OFA Fiscal Note for HB 6343 is attached to my testimony. The OFA stated that the bill would result "in an estimated annual cost of $663,108 for four attorneys, one paralegal and one health care analyst in the Attorney General's office (AG) to certify and oversee authorized cooperative health care arrangements. This cost includes $455,000 in Personal Services, $25,000 in Other Expenses, $75,000 in consultant fees and $108,108 to provide fringe benefits." This cost "would continue into the future subject to inflation and any violations of the bill's provisions." The $100 filing fee would do little to defray such costs.

In light of the State's current fiscal outlook, it is highly unlikely that the legislature will be able to provide my Office with the necessary resources to implement this proposal. Absent those additional resources, our antitrust lawyers would need to devote a substantial amount of

their time and effort to evaluating and supervising the healthcare cooperative arrangements contemplated by this bill.

Our Antitrust Department is responsible for some of my Office's most important cases and largest monetary recoveries. Since 2005, they have conducted investigations in a number of complex industries, including financial services, healthcare, insurance and pharmaceuticals. Those investigations have resulted in substantial recoveries for consumers and the State of Connecticut. Settlements with five insurance brokers, for instance, brought $3.5 million in restitution to Connecticut consumers and an additional $354,000 in civil penalties, which was paid directly to the general fund. Separate settlements with eight insurance carriers resulted in aggregate restitution of almost $300 million to consumers nationwide and an additional $35.5 million in civil penalties paid to the State of Connecticut's general fund. In the last fourteen months, my Office led the investigation and eventual settlement with five financial institutions that have paid approximately $350 million in connection with our ongoing joint, nationwide investigation into the municipal bond derivatives industry.

At the present time, our Antitrust Department is comprised of just six full-time and three part-time attorneys. Devoting four of these full-time attorneys to the activities contemplated by this proposal, which would equate to two-thirds of the full-time attorneys currently assigned to that department, would severely undermine my Office's ability to continue enforcing the State's antitrust laws.

For all of these reasons, I urge the Committee not to act favorably upon this proposal at this time. Thank you once again for the opportunity to testify about this proposal. I would be happy to answer any questions you may have.

OFFICE OF FISCAL ANALYSIS

Legislative Office Building, Room 5200

Hartford, CT 06106 ▯ (860) 240-0200

http: //www. cga. ct. gov/ofa

HB-6343

AN ACT CONCERNING COOPERATIVE HEALTH CARE ARRANGEMENTS.

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 12 $	FY 13 $
Attorney General	GF - Cost	555,000	555,000
Comptroller Misc. Accounts (Fringe Benefits)[1]	GF - Cost	108,108	108,108
Attorney General; Consumer Protection, Dept.	Various Funds - Revenue Gain	Less than 50,000	Less than 50,000
Comptroller Misc. Accounts (Fringe Benefits)[1]	GF & TF - Potential Cost	Indeterminate	Indeterminate
Social Services, Dept.	GF - Potential Cost	Indeterminate	Indeterminate

Note: GF=General Fund; TF=Transportation Fund

Municipal Impact:

Municipalities	Effect	FY 12 $	FY 13 $
Various Municipalities	Potential Cost	Indeterminate	Indeterminate

Explanation

The bill results in an estimated annual cost of $663,108 for four attorneys, one paralegal and one health care analyst in the Attorney General's office (AG) to certify and oversee authorized cooperative health care arrangements. This cost includes $455,000 in Personal Services, $25,000 in Other Expenses, $75,000 in consultant fees and $108,108 to provide fringe benefits. These employees would be necessary to review these arrangements and issue written decisions approving or denying applications for certificates of public advantage, which authorize health care providers to engage in conduct that could lessen health care competition. Hearings may be necessary to obtain background information. In addition, the AG must actively supervise authorized cooperative health care arrangements and review annual reports submitted by parties to authorized cooperative health care arrangements. It is anticipated that in excess of ten cooperative arrangements may occur.

The bill results in a potential revenue gain of less than $50,000 as it requires managed care companies to negotiate in good faith with health care providers holding a certificate of public advantage issued by the AG. A company that fails to do so faces a daily $25,000 civil fine and is in violation of the state's Unfair Trade Practices Act.

The state purchases healthcare services from insurers for individuals served by Medicaid and the state employee health plan. To the extent that the bill increases the cost of providers for which insurers procure services from, there may be an increased cost to the state. In addition, for the same reason identified, there may be an increased cost to municipalities to provide healthcare to the populations they serve.

The Out Years

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation and any violations of the bill's provisions.

[1] The fringe benefit costs for most state employees are budgeted centrally in accounts administered by the Comptroller. The estimated non-pension fringe benefit cost associated with personnel changes is 23. 76% of payroll in FY 12 and FY 13. In addition, there could be an impact to potential liability for the applicable state pension funds.

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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

June 8, 2011

Senators Eric D. Coleman and John A. Kissel
Representatives Gerald Fox and John W. Hetherington
Connecticut General Assembly
Room 2500 L.O.B.
300 Capitol Avenue
Hartford, CT 06106-1591

Dear Senators Coleman and Kissel and Representatives Fox and Hetherington:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] are pleased to respond to your request for comments on the antitrust provisions of House Bill No. 6343 ("H.B. 6343" or "the Bill"). The Bill, among other things, intends to exempt health care provider-members of certified "cooperative arrangements" from state and federal antitrust laws.[2] The exemption is aimed at immunizing a cooperative's contract negotiations with managed care organizations, but appears to extend to a broad range of other activities as well. We are very concerned that the antitrust provisions of the Bill, if enacted, are likely to lead to dramatically increased costs and decreased access to health care for Connecticut 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 collaborations that benefit consumers. To the extent that H.B. 6343 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 if that is indeed the intent of the Bill.

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[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] Although the Bill explicitly grants antitrust immunity only under Connecticut law, for purposes of this letter we assume that the immunity is intended to extend to federal antitrust law as well. *See Town of Hallie v. City of Eau Claire*, 471 US 34, 42 (1985) (state legislature's explicit statement recognizing anticompetitive conduct and expectation of antitrust immunity is not necessary for state action doctrine immunity to apply).

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.[3] Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental 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.[4] In addition, the Commission and its staff have given testimony,[5] issued reports,[6] 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.[7]

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

[4] *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.

[5] *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/oer/testimony/index.shtml).

[6] *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.shtm).

[7] *See* FTC Staff Comment to the Hon. Elliott Naishtat Concerning Texas S.B. 8 to Exempt Certified Health Care Collaboratives From the Antitrust Laws (May 2011); 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.shtm). *See also* Letter to Hon. Rene O. Oliveira, Concerning Texas Physician Collective Bargaining (May 1999) (available at: http://www.ftc.gov/be/v990009.shtm); 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 Connecticut Bill

H.B. 6343 allows the establishment of "cooperative arrangements" – agreements among health care providers – and apparently intends to provide them with an exemption from the antitrust laws upon approval by the Connecticut Attorney General. That immunity would extend to "sharing, allocating or referring patients, personnel, instructional programs, support services or facilities or medical, diagnostic or laboratory facilities or procedures, or negotiating fees, prices or rates with managed care organizations, and includes, but is not limited to, a merger, acquisition or joint venture."[8] The Bill also prohibits managed care organizations from refusing to negotiate "in good faith" with parties in a certified cooperative arrangement. A managed care organization that violates this prohibition is subject to a penalty of up to $25,000 per day.[9]

To qualify as a cooperative arrangement under the Bill, the health care providers must apply for and receive a "certificate of public advantage" from the Connecticut Attorney General.[10] The Attorney General's review of an application must consider the benefits of the arrangement, including "enhancement of the quality of health services to consumers; gains in cost efficiency of providing health services; improvement in utilization of and access to health services and equipment; and avoidance of duplication of health resources."[11] The Attorney General must compare these benefits against any disadvantages, including "the potential reduction in competition; the adverse impact on quality, access or price of health care services to consumers; and the availability of arrangements that achieve the same benefits with less restriction on competition."[12] The Attorney General must then determine whether the "benefits outweigh the disadvantages" and approve or deny the application within ninety days of receiving it.[13]

The Attorney General is also responsible for overseeing the cooperative arrangements by reviewing annual progress reports.[14] If, through this review, the Attorney General determines that the benefits of the cooperative arrangement no longer outweigh the disadvantages, he must hold a hearing to determine whether to revoke or modify the certificate.[15] The Attorney General, however, may not "modify or revoke a certificate of public advantage more than three years after the initial issuance" of the certificate.[16]

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[8] H.B. 6343 § 1(a)(1) (Conn. 2011).

[9] H.B. 6343 § 1(e) (Conn. 2011).

[10] H.B. 6343 § 1(b) (Conn. 2011).

[11] H.B. 6343 § 1(c)(2) (Conn. 2011).

[12] *Id.*

[13] H.B. 6343 § 1(c)(1) (Conn. 2011).

[14] H.B. 6343 § 1(c)(4) (Conn. 2011).

[15] H.B. 6343 § 1(c)(5) (Conn. 2011).

[16] *Id.*

The Likely Effects of H.B. 6343

The antitrust exemption in the Bill is unnecessary to promote health care benefits to consumers through cooperative arrangements. This is because the antitrust laws *already* allow procompetitive collaborations among competitors. The Bill, which is designed to allow coordinated activity among health care competitors beyond that permitted by the antitrust laws, poses a substantial risk of consumer harm by increasing costs, impeding innovation, and decreasing access to health care. Even with oversight by the Attorney General, that consumer harm may be difficult to prevent once a cooperative is certified.

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

Federal antitrust law already permits joint activity by health care providers that benefits consumers. First, even providers' price agreements are lawful when reasonably necessary to create efficiencies (such as reducing the cost or improving the quality of health care provided to patients), and have an overall procompetitive effect. For example, antitrust standards distinguish between effective clinical integration among health care providers that has the potential to achieve cost savings and improve health outcomes and those provider arrangements that exist merely to give the providers greater bargaining leverage with health plans. Both the FTC and its staff and the U. S. Department of Justice have provided substantial guidance to providers to make clear that the antitrust laws do not prevent health care providers from engaging in beneficial collaborations. [17] The antitrust laws are designed to stop actions that raise prices or inhibit new forms of competition; they do not block activities that benefit consumers. We therefore not only see no need for legislation to authorize collective fee negotiations that would arguably benefit consumers, we are also concerned that any new legislation may instead have the effect of immunizing agreements among providers, and potentially harm consumers.

Second, no antitrust exemption is needed to permit health care providers to

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[17] See, e.g., 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: http://www.ftc.gov/bc/healthcare/industryguide/advisory.htm. *See 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/2011/03/110331acoftn.pdf..

discuss their concerns regarding health plan practices, whether among themselves or with health plans. We understand that some supporters of the Bill may be under the impression that any such discussions would violate the antitrust laws. But that is not the case. Health care professionals may, under existing antitrust law, engage in collective advocacy, both to promote the interests of their patients and to express their opinions about other issues, such as payment delays, dispute resolution procedures, and other matters.[18]

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

The Bill is intended to extend antitrust immunity to a broad range of agreements among health care providers to eliminate competition. Regardless of any stated intent by a health care provider 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."[19] The Bill appears intended to shield a broad range of potentially anticompetitive conduct from antitrust challenge. Such anticompetitive conduct may include cooperative agreements not to compete with regard to patients, procedures, personnel, or support services, agreements on the fees providers will accept from health plans, and agreements that will have the effect of eliminating beneficial competition through merger.

In addition, the Bill's requirement that managed care organizations negotiate with parties to a cooperative agreement – backed up with a potential civil penalty of $25,000 per day for a failure to negotiate "in good faith" – compounds the likely consumer harm.[20] This requirement not only will decrease the incentives of cooperatives to

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[18] The 1996 *Statements of Antitrust Enforcement Policy In Health Care* issued by the Commission and the Department of Justice explain the ways in which antitrust law permits health care providers to collectively provide both fee and non-fee related information to health plans. (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) *See also* Letter to Gregory G. Binford (February 6, 2003) (advisory opinion explaining that physicians' proposed formation of advocacy group to collect and disseminate information about health plan policies and procedures, including fees paid to local physicians compared to fees paid in other areas, did not appear likely to have anticompetitive effects). See also American Medical Assn, Model Managed Care Contract (4th Ed. 2005), available at http://www.ama-assn.org/ama1/pub/upload/mm/368/mmcc_4th_ed.pdf.

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

[20] Antitrust jurisprudence recognizes a party's long-established right to exercise its discretion over with whom it deals. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

compete on price and quality, but also threatens the ability of health plans to effectively use selective contracting, a key mechanism for promoting quality and cost-containment goals. Furthermore, the lack of clarity surrounding what constitutes "good faith" negotiation in this context may discourage plans from actively pursuing programs and contract terms that would benefit consumers. Moreover, determining liability based on a failure to negotiate in "good faith" could require courts to assess the reasonableness of prices and other terms of dealing, a role for which they are ill-suited.[21]

It will be difficult, if not impossible, for the Attorney General's review to protect consumers from the harmful effects of this legislation. First, it is not clear that the Attorney General has the necessary funds or available resources to conduct the type of fact-intensive, time-consuming market analysis needed to evaluate the competitive effects of a health care cooperative during the certification process. The time allotted for the Attorney General's review is limited to ninety days and the standards under which the Attorney General may assess the cooperatives are unclear. Second, the Attorney General's ability to remedy the harm caused by an anticompetitive cooperative, once formed, is limited. The Attorney General's oversight relies solely on his or her review of a cooperative's annual "progress report." Moreover, even if the Attorney General finds a cooperative arrangement has caused consumer harm, the power to address such problems is circumscribed by the limited remedy (revocation or modification of certification) as well as the limited grounds for exercising that remedy. Thus, if a cooperative has used its market power to increase prices without countervailing benefit, there is no means to remedy that harm. Third, once three years have passed since a cooperative's certification, the Attorney General has no power to modify or revoke the purported antitrust immunity conveyed by the certification, regardless of the circumstances. Thus, the review provisions will not protect consumers from the likely harm created by the Bill.

The Bill Likely Will Not Create State Action Immunity

The federal antitrust immunity that the Bill apparently purports to confer on cooperative arrangements is effective only if the State of Connecticut has clearly articulated an intention to replace competition in this area with a regulatory scheme, and actively supervises this private conduct.[22] 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."[23] 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."[24]

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[21] *Verizon Comme'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

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

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

[24] 486 U.S. 94, 101 (1988).

Here, the State's review proposed under the Bill does not appear sufficient to meet the requirements of the state action doctrine. Notwithstanding the requirement that annual progress reports be filed by the health care providers during the initial three-year period, the Bill seemingly would not require State officials to review particular contracts and fee arrangements between groups of providers and payers to assess whether they comport with State policy goals (including but not limited to the goals stated under section 1(c)(2) of the Bill), and to remedy on an ongoing basis situations that may violate those goals. Notably also, the Bill does not appear to mandate *any* state monitoring and review of cooperative arrangements three years after the initial issuance of a certificate. As the Supreme Court has made clear, parties claiming state action immunity face a high bar. The regulatory program proposed by the Bill appears not to clear that bar.

Conclusion

Our analysis of H.B. 6343 suggests that its passage would pose a significant risk of increased health care costs and decreased access to care for Connecticut consumers. The antitrust immunity provisions in this legislation are unnecessary and would allow groups of private health care providers 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 Connecticut health care consumers.

We appreciate your consideration of these issues.

Respectfully submitted,

Susan S. DeSanti, Director
Office of Policy Planning

Joseph Farrell, Director
Bureau of Economics

Richard A. Feinstein, Director
Bureau of Competition