



Office of Policy Planning
Bureau of Competition
Bureau of Economics

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

September 24, 2015

Malaka Watson, Esq.
Tennessee Department of Health
710 James Robertson Parkway, 5th Floor
Nashville, Tennessee 37243
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 that may result from the Cooperative Agreement."⁴ The statutory authority for these rules states that the Tennessee Department of Health shall consult with the Tennessee Attorney General's office regarding its evaluation of any potential reduction in competition resulting from a Cooperative Agreement, and that the Tennessee Attorney General's office may consult with the FTC during this process.⁵

Among the benefits to be considered by the Tennessee Department of Health when reviewing the COPA applications are:

- 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;
- avoidance of duplication of hospital resources;
- improvement to population health; and
- access to hospital services for medically underserved populations.⁶

Among the disadvantages to be considered by the Tennessee Department of Health when reviewing the COPA applications are:

- adverse impact on the ability of payers to negotiate appropriate payment and service arrangements with providers;
- reduction in competition among providers;
- adverse impact on patients in the quality, availability, and price of health care services; and
- availability of alternative arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages.⁷

FTC staff has significant expertise in evaluating proposed hospital and other health care provider mergers, including assessing whether the potential benefits of a transaction outweigh the potential anticompetitive harms. Indeed, many of the stated benefits and disadvantages that the Tennessee Department of Health must consider are among those the FTC assesses when evaluating mergers between hospitals and other health care providers. Balancing these interests often involves a comprehensive and complex analysis of various market factors, including: the merging parties' overlapping services; market shares and market concentration levels; the closeness of competition between the merging parties; barriers to entry by other providers; economic analysis based on patient discharge and pricing data; efficiencies; and other potential merger benefits, such as cost savings or quality improvements. Our analysis usually considers information, documents, and data from a wide variety of sources, including the merging parties, third-party health care providers, health plans, and employers.

The FTC has substantial experience and devotes considerable resources to gather sufficient data and conduct detailed analyses to fully understand the likely competitive effects of all mergers, including proposed hospital combinations. In our experience, mergers between close competitors in highly concentrated health care provider markets are more likely to result in significant consumer harm than a merger in a less concentrated market. Settled antitrust jurisprudence establishes, for example, that a proposed merger that would result in a monopoly or near-monopoly is likely to raise serious antitrust concerns. Against the likely anticompetitive harm, we assess the efficiencies and procompetitive benefits likely to result from a merger. The antitrust agencies credit those efficiencies that are "merger-specific" (i.e., only likely to be achieved as a result of the merger and unlikely to be achieved through another manner or relationship having less anticompetitive effects), substantiated, and non-speculative.

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 *undermine* 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,

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Stephen Weissman, Deputy Director
Bureau of Competition

Francine Lafontaine, Director
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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, *available at* 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 Collaboratives from the Antitrust Laws (June 2013),

https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf.

⁹ *See* Deborah L. Feinstein, Dir., Bureau of Competition, Remarks at the Fifth National Accountable Care Organization Summit in Washington, DC: Antitrust Enforcement in Health Care: Proscription, not Prescription (June 19, 2014),

https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf (noting that the federal antitrust agencies have challenged very few of the thousands of health care provider mergers, joint ventures, and other types of collaborations that have occurred in recent years, and have “brought those challenges only after rigorous analysis of market conditions showed that the acquisition was likely to substantially lessen competition.”).

¹⁰ *See* Tennessee Proposed Rules, Chapter 1200-38-01-02.