Written Comments of America's Health Insurance Plans

Regarding Regulations Addressing Cooperative Agreements
Emergency Rules 1200-38-01.01 et seq.

Submitted for the Tennessee Department of Health Rulemaking Hearing
(September 24, 2015)

On behalf of America's Health Insurance Plans (AHIP), we write to ask that the Tennessee Department of Health (Department) take all steps necessary to protect consumers from anticompetitive hospital consolidation in the State of Tennessee. AHIP is the national association that represents health insurance plans providing health and supplemental benefits to the American people through employer-sponsored coverage, the individual insurance market and the Exchanges, and public programs such as Medicare and Medicaid.

AHIP and its members have a strong interest in ensuring that consumers benefit from competitive provider markets. AHIP has previously expressed concern about anticompetitive hospital consolidation, noting the impact of such consolidation on the cost of care, the quality of services, and the pace of innovation.

We note the reports that the proposed merger of Mountain States Health Alliance (MSHA) and Wellmont Health System (Wellmont) will lead to a hospital monopoly in certain portions of Tennessee and Virginia. AHIP understands that the parties are likely to seek a Cooperative Agreement/Certificate of Public Advantage (COPA) with respect to their transaction. One reason that parties seek a COPA with respect to mergers is to try to obtain "state action" antitrust immunity from the federal antitrust laws, and therefore preempt Federal Trade Commission (FTC) review of the merger.

While COPA schemes are adopted with the worthy goal of attempting to prevent, though regulation, harm to consumers from hospital mergers, it is impossible to provide the type of regulatory oversight that can fully substitute for competition. The FTC has consistently advised states that COPAs are both unnecessary to allow pro-competitive activities and instead are likely to lead to "increased health care costs and decreased access to health care services."[1]

In addition, two recent Supreme Court decisions, both involving health care providers, have made it clear that state action immunity is disfavored and therefore available to private parties in only very narrow

[1] While Tennessee has already passed a COPA statute, those FTC comments were in the context of applications submitted in a state, New York, which also had adopted such a COPA statute. This suggests that even in a state that has adopted a COPA scheme, concerns about such a scheme are relevant as the state adopts regulations and considers applications under those regulations.

circumstances.[2] The state must engage in a thorough and transparent approval process as well as provide active and ongoing supervision of the conduct in question. Unless this is done, even if a Cooperative Agreement is granted, the applicants will have no assurance that the grant of immunity will be sustained if subject to a legal challenge. The cost of this active and ongoing supervision a Cooperative Agreement will be significant. In the end, these costs will be placed on the State and citizens of Tennessee.

We respectfully suggest to the Department that the FTC guidance, the difficulty, cost, and uncertainty of obtaining state action immunity, and the record of consumer harm from anticompetitive hospital consolidation should weigh significantly in considerations of regulations and applications. The results of allowing an anticompetitive transaction to be consummated are enduring and the potential harm to consumers significant. While a strong regulatory framework may mitigate some concerns, it is impossible for it to address the multiple ways in which a monopolist can exercise market power to the detriment of consumers. The best approach is to prevent anticompetitive mergers and preserve competition in Tennessee. We encourage the Board to use the regulatory process to ensure that the COPA regulations preclude anticompetitive transactions and otherwise guard against anticompetitive activities.

We thank the Department for the opportunity to submit these comments.

Joe Miller, General Counsel
America's Health Insurance Plans
601 Pennsylvania Ave. NW, South Building, Suite 500
Washington, DC 20004

[2] In both decisions, the Court ruled in favor of the FTC in challenges to health care providers who claimed antitrust immunity under the state action doctrine. *See North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101, 1114-17 (2015); *FTC v. Phoebe Putney Health System, Inc*., 133 S.Ct. 1003, 1010 (2013) (*citing FTC v. Ticor Title Ins. Co*., 504 U.S. 621, 636 ("But given the antitrust laws' values of free enterprise and economic competition, 'state-action immunity is disfavored'"). These are just two examples of substantial body of law related to the state action doctrine.