UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Competition

June 4, 2013

The Hon. Catherine Osten and the Hon. Peter Tercyak, Co-Chairs
Labor and Public Employees Committee, Connecticut General Assembly
Legislative Office Building, Room 3800
Hartford, CT 06106

Re: Request for Comment on H.B. 6431

Dear Senator Osten and Representative Tercyak:

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 comment on the potential competitive impact of Connecticut House Bill 6431, "An Act Concerning Cooperative Health Care Arrangements," as amended by LCO Number 6504 ("H.B. 6431" or "the Bill").[2] The Bill provides for the formation of "health care collaboratives" comprising otherwise independent health care practitioners. The Bill would authorize these and similar "prospective" entities to jointly negotiate prices and other terms with health plans. It also attempts to immunize these joint negotiations from scrutiny under the antitrust laws.

FTC staff recognize that collaborations among physicians and other health care professionals can be fruitful. At the same time, we write to express strong concerns that the Bill is based on inaccurate premises about the antitrust laws and the value of competition among physicians. If enacted, it will very likely benefit only participating physicians, who seek to enhance their bargaining power in selling their services, while harming health care competition and health care consumers in Connecticut.

- First, the antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit health care consumers. As explained in extensive guidance issued by the federal Antitrust Agencies, competitor collaborations – including health care provider collaborations – often are entirely consistent with the antitrust laws.

- Second, a central purpose of the Bill appears to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients.

- Third, because procompetitive health care collaborations already are permissible under the antitrust laws, the Bill's main effect would be to foster precisely those types of collective negotiations that would *not* generate efficiencies and therefore would *not* pass muster under the antitrust laws. The joint negotiations contemplated by the Bill are likely to lead to increased health care costs and decreased access to health care services for Connecticut consumers.

This Bill raises competition concerns similar to those raised by proposals for "Cooperative Health Care Arrangements" considered in prior sessions of the Connecticut General Assembly. As you may know, FTC staff reviewed one such bill in 2011,[3] and the analysis in that letter (attached) still applies. Connecticut Attorney General George Jepson's recent testimony before your committee, in opposition to the Bill as introduced, reflects many of the same concerns.[4]

I. 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 or affecting commerce.[5] Competition is at the core of America's economy,[6] and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation.[7] Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental laws and regulations that may impede competition without also providing countervailing benefits to consumers.

Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct in health care markets has long been a key focus of FTC law enforcement,[8] research,[9] and advocacy.[10] Of particular relevance, the Commission and its staff have long advocated against federal and state legislative proposals that seek to create antitrust exemptions for collective negotiations by health care providers, as such exemptions are likely to harm consumers.[11]

II. The Connecticut Bill

As noted above, the Bill (as amended) provides for the formation of "health care collaboratives" – certain collaborations or joint ventures of otherwise independent health care practitioners.[12] The Bill further provides that any such collaborative, and any "prospective health care collaborative," may jointly negotiate price and other terms with health plans.[13] All health plans – broadly defined to include any entity, large or small, "that pays for health care services"[14] – would be required to negotiate with such collaboratives "in good faith,"[15] subject to mandatory mediation by a state-designated mediator should negotiations prove unsuccessful.[16] Health plans – but not collaboratives – would be subject to large monetary penalties for failing to negotiate as required.[17] Finally, the Bill appears to intend that these joint negotiations will occur unconstrained by the antitrust laws.[18]

III. The Bill Is Unnecessary Because the Antitrust Laws Already Permit Efficient Health Care Collaborations

A fundamental premise of the Bill is that efficient, procompetitive collaborations among otherwise independent health care providers are prohibited under the antitrust laws, to the detriment of health care consumers. Testimony by numerous physician groups supporting the Bill stated, "federal antitrust laws prohibit Connecticut physicians from collective discussions about certain critical aspects of care coordination," including the kinds of negotiations necessary to form Accountable Care Organizations ("ACOs"),[19] as contemplated by the Patient Protection and Affordable Care Act ("ACA").[20] This premise is simply and categorically wrong.

The antitrust laws already recognize, and have long stood for the proposition, that competitor collaborations can be procompetitive. To assist the business community in distinguishing between lawful and potentially harmful forms of competitor collaboration, the FTC and its sister federal antitrust agency, the U.S. Department of Justice ("DOJ") (together, "the Antitrust Agencies"), have issued considerable guidance over the years. Key sources of guidance include the Antitrust Agencies' general guidelines on collaborations among competitors,[21] as well as joint statements specifically addressing the application of the antitrust laws to the health care industry, including physician network joint ventures and other provider collaborations.[22] In addition, FTC staff have issued and made public numerous advisory opinion letters containing detailed analyses of specific proposed health care collaborations.[23] These letters have helped the requesting parties avoid potentially unlawful conduct as they seek to devise new ways of responding to the demands of the marketplace. They also have provided further guidance to the health care industry as a whole.

ACOs neither need, nor deserve, special treatment under the antitrust laws. ACOs are intended to comprise "providers who are jointly held accountable for achieving measured quality improvements and reductions in the rate of spending growth."[24] Antitrust analysis recognizes and takes into account procompetitive effects such as cost savings and quality improvements, and in this manner is entirely consistent with the goals

of the ACO program. Many ACOs already have been formed, both for participation in Medicare's Shared Savings Program (introduced by the ACA) and for offering services to commercial markets. In January 2013, the Centers for Medicare and Medicaid Services ("CMS") announced that more than 250 ACOs already had been established under its own programs,[25] with roughly half being "physician-led organizations that serve fewer than 10,000 beneficiaries."[26] Hundreds of additional ACO-type organizations reportedly have formed outside the Medicare program.[27] This empirical evidence belies claims that antitrust concerns are chilling the development of physician-sponsored ACOs.

The Antitrust Agencies have been closely involved in providing guidance concerning both Medicare and commercial ACO formation, to ensure that the prospect of antitrust liability does not impede the formation of beneficial ACOs.[28] As CMS noted in publishing the final ACO rules, CMS and the Antitrust Agencies "worked very closely … to develop policies to encourage participation and ensure a coordinated and aligned inter- and intra-agency program implementation."[29] On the same day the CMS ACO rules were published, the Antitrust Agencies released a joint statement explaining their enforcement policy approach to ACOs "to ensure that health care providers have the antitrust clarity and guidance needed to form procompetitive ACOs that participate in both Medicare and commercial markets." [30] In addition, the FTC/DOJ ACO policy statement establishes a process for newly formed ACOs to seek expedited antitrust guidance if they are concerned about potential antitrust exposure.[31] As of April 2013, two provider groups had availed themselves of this option.[32] The Antitrust Agencies continue to engage in interagency collaboration, as well as consultation with physician groups and other stakeholders.[33]

Thus, the antitrust laws do not stand in the way of health care providers in Connecticut who form ACOs or other collaborative arrangements that are likely to reduce costs and benefit health care consumers through improved efficiency and improved coordination of care.

IV. Conferring Additional Bargaining Power on Groups of Otherwise Competing Physicians Poses a Substantial Risk of Consumer Harm

Given that efficient collaborations among health care providers already are consistent with the antitrust laws, FTC staff are concerned that the Bill will only serve to encourage conduct that likely would *not* pass muster under the antitrust laws because it would reduce competition, raise prices, and provide relatively small or no benefits to consumers. Any effort to shield such harmful conduct from antitrust enforcement – including attempts to confer state action immunity – is likely to harm Connecticut health care consumers.

In its 2007 report, the bipartisan Antitrust Modernization Commission succinctly stated a widely recognized proposition: "[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."[34] In other words,

antitrust exemptions threaten broad consumer harm while benefitting only certain market participants.

Yet, health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from payers, asserting that immunity for joint bargaining is necessary to "level the playing field" so that providers can create and exercise countervailing market power.[35] In a 2004 report on health care competition, the Antitrust Agencies jointly responded to and countered this argument:

> Some physicians have lobbied heavily for an antitrust exemption to allow independent physicians to bargain collectively. They argue that payors have market power, and that collective bargaining will enable physicians to exercise countervailing market power. The Agencies have consistently opposed these exemptions, because they are likely to harm consumers by increasing costs without improving quality of care. The Congressional Budget Office estimated that proposed federal legislation to exempt physicians from antitrust scrutiny would increase expenditures on private health insurance by 2.6 percent and increase direct federal spending on health care programs such as Medicaid by $11.3 billion.[36]

The Bill under consideration in Connecticut arguably would permit precisely this form of anticompetitive bargaining between independent health care providers.[37]

V. Antitrust Exemptions That Immunize Otherwise Anticompetitive Conduct Pose a Substantial Risk of Consumer Harm and Are Disfavored

The U.S. Supreme Court recently reiterated its long-standing position that, "given the antitrust laws' values of free enterprise and economic competition, 'state-action immunity is disfavored.'"[38] This principle applies with equal force in the health care industry, where consumers benefit from vigorous competition, and where anticompetitive conduct can cause significant harm.[39] As discussed above, antitrust law permits many forms of procompetitive collaborations among health care providers. Antitrust laws also serve the important function of protecting health care consumers from pernicious forms of joint conduct, which is why antitrust immunity for otherwise-anticompetitive provider collaborations is likely to harm consumers. Given the substantial risk that the Bill will encourage the formation of inefficient and anticompetitive collaborations among health care providers, we urge Connecticut legislators not to attempt to shield them from the antitrust laws by attempting to invoke the state action doctrine.

Conclusion

Our analysis of H.B. 6431, as amended, suggests that its passage would pose a significant risk of harm to Connecticut consumers. The Bill's attempt to confer antitrust immunity is unnecessary for legitimate collaborations and, if effective, would encourage groups of private health care providers to engage in blatantly 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,

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Howard Shelanski, Director
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Richard A. Feinstein, Director
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Attachments

[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] Letter from the Hon. Catherine Osten and the Hon. Peter Tercyak, Connecticut General Assembly, to Andrew I. Gavil, Director, Office of Policy Planning, Fed. Trade Comm'n, May 20, 2013.

[3] FTC Staff Comment to Senators Coleman and Kissel and Representatives Fox and Hetherington, Connecticut General Assembly, Concerning Connecticut H.B. 6343, Intended To Exempt Members of Certified Cooperative Arrangements From the Antitrust Laws (June 2011), *available at* http://www.ftc.gov/os/2011/06/110608chc.pdf.

[4] Testimony of Attorney General George Jepson Before the Comm. on Labor and Pub. Employees (Mar. 5, 2013) (regarding AG's opposition to H.B. 6431, as introduced); *see also* Testimony of Attorney General George Jepson Before the Comm. on Labor and Pub. Employees (Feb. 28, 2012) (regarding AG's opposition to prior "cooperative health care arrangements" bill, S.B. 182).

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

[6] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

[7] *See Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978) (The antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

[8] *See generally* Fed. Trade Comm'n, An Overview of FTC Antitrust Actions In Health Care Services and Products (Mar. 2013), *available at* http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf; *see also* Fed. Trade Comm'n, Competition in the Health Care Marketplace: Formal Commission Actions, *available at* http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm.

[9] *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE ("DOJ"), IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf [hereinafter FTC & DOJ, IMPROVING HEALTH CARE]. The report was based on, among other things, 27 days of formal hearings on competitive issues in health care, an FTC sponsored workshop, independent research, and the Agencies' enforcement experience.

[10] FTC and staff advocacy may comprise letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, amicus briefs, or reports. *See, e.g.*, FTC Staff Letter to the Honorable Theresa W. Conroy, Connecticut House of Representatives, Concerning the Likely Competitive Impact of Connecticut House Bill 6391 on Advance Practice Registered Nurses ("APRNs") (Mar. 2013), *available at* http://www.ftc.gov/os/2013/03/130319aprnconroy.pdf (competitive impact of statutorily required "collaborative practice agreements" for nurse practitioners); FTC and DOJ Written Testimony Before the Illinois Task Force on Health Planning Reform Concerning Illinois Certificate of Need Laws (Sept. 2008), *available at* http://www.ftc.gov/os/2008/09/V080018illconlaws.pdf; Brief of the Fed. Trade Comm'n as Amicus Curiae, St. Joseph Abbey, et al. v. Castille, 712 F.3d 215 (5th Cir. 2013) (No. 11-30756) (refuting argument that the policies of FTC funeral rule support restrictions of sort challenged by petitioner); FTC & DOJ, IMPROVING HEALTH CARE, *supra* note 9.

[11] *See, e.g.*, FTC Staff Comment to Senators Coleman and Kissel and Representatives Fox and Hetherington, Connecticut General Assembly, *supra* note 3; 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), *available at* http://www.ftc.gov/os/2011/05/1105texashealthcare.pdf; 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), *available at* http://www.ftc.gov/opp/advocacy/V090003.pdf; 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), *available* at http://www.ftc.gov/os/2008/02/V080001homecare.pdf; FTC Staff Comment Before the Puerto Rico House of Representatives Concerning S.B. 2190 to Permit Collective Bargaining by Health Care Providers (Jan. 2008); *available at* http://www.ftc.gov/os/2008/02/v080003puerto.pdf (all advocacies *available at* http://www.ftc.gov/opp/advocacy_date.shtm). *See also* Prepared Statement of the Fed. Trade Comm'n Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property, Competition, and the Internet Concerning H.R. 1946, the "Preserving Our Hometown Independent Pharmacies Act of 2011," Mar. 29, 2012, *available at* http://www.ftc.gov/os/testimony/120329pharmacytestimony.pdf.

[12] H.B. 6431 §§ 1-2.

[13] *Id.* at § 2(a).

[14] *Id.* at § 1(4) ("'Health plan' means an entity that pays for health care services, including, but not limited to, commercial health insurance plans, self-insurance plans, health maintenance organizations, managed care organizations, as defined in section 38a-478 of the general statutes, or any insurer or corporation subject to the insurance laws of this state.").

[15] *Id.* at § 4(d)(1).

[16] *Id.* at § 4(b), (b)(1)-(3).

[17] *Id.* at § 4(d)(1)-(2) (providing that civil penalties up to $25,000 per day, per each distinct violation, may apply to any health plan that violates pertinent provisions).

[18] *Id.* at §2(a) (stipulating that joint negotiations may take place "[n]otwithstanding the antitrust laws"). The raised bill purports "[t]o permit health care providers to enter into cooperative arrangements that would not be subject to certain antitrust laws," Conn. Gen. Assembly, Raised H.B. No. 6431, Session Year 2013, *available at* http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB6431&which_year=2013#. According to an analysis by the General Assembly's Office of Legislative Research, the Bill would, at the least, "generally exempt [approved collaboratives] from state antitrust laws." Conn. Gen. Asembly OLR Bill Analysis, *available at* http://www.cga.ct.gov/2013/BA/2013HB-06431-R000217-BA.htm.

[19] Conn. State Medical Soc'y, Am. Coll. Surgeons Conn. Chapter, Am. Coll. Physicians Conn. Chapter, Conn. Orthopaedic Soc'y, Conn. Soc'y of Eye Physicians, Conn. Dermatology & Dermatologic Surgery Soc'y, Conn. ENT Soc'y, & Conn. Urology Soc'y, Testimony in Support of House Bill 6431 An Act Concerning Cooperative Health Care Arrangements, Presented to the Labor & Pub. Employees Comm. (Mar. 5, 2013).

[20] Pub. L. No. 111-148, § 3022, 14 Stat. 119, 395 ("Affordable Care Act").

[21] Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[22] Fed. Trade Comm'n & U.S. Dep't of Justice Statements of Antitrust Enforcement Policy In Health Care (1996), *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm. *See, e.g.*, *id.* at Statement 8 (physician network joint ventures), Statement 7 (joint purchasing arrangements among providers of health care services), and Statement 6 (provider participation in exchanges of price and cost information).

[23] *See, e.g.*, Letter from Markus H. Meier, Fed. Trade Comm'n to Michael E. Joseph, Esq., McAfee & Taft, Re: Norman PHO Advisory Opinion, Feb. 13, 2013, *available at* http://www.ftc.gov/os/2013/02/130213normanphoadvltr.pdf; Letter from Markus H. Meier, FTC to Christi Braun, Ober, Kaler, Grimes & Shriver, Re: TriState Health Partners, Inc. Advisory Opinion, Apr. 13, 2009, *available at* http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf; Letter from Markus Meier, FTC to Christi Braun & John J. Miles, Ober, Kaler, Grimes & Shriver, Re: Greater Rochester Independent Practice Association, Inc. Advisory Opinion, Sept. 17, 2007, *available at* http://www.ftc.gov/bc/adops/gripa.pdf.

[24] Mark McClellan et al., *A National Strategy to Put Accountable Care into Practice*, 29 HEALTH AFFAIRS 982, 982 (2010).

[25] Ctrs. Medicare & Medicaid Servs., Press Release, *More Doctors, Hospitals Partner to Coordinate Care for People with Medicare* (Jan. 10, 2013), *available at* http://www.cms.gov/apps/media/press/release.asp?Counter=4501&intNumPerPage=10&checkDate=&checkKey=&srchType=1&numDays=3500&srchOpt=0&srchData=&keywordType=All&chkNewsType=1%2C+2%2C+3%2C+4%2C+5&intPage=&showAll=&pYear=&year=&desc=&cboOrder=date.

[26] *Id.* In addition, "[a]pproximately 20 percent of ACOs include community health centers, rural health clinics and critical access hospitals that serve low-income and rural communities." *Id.*

[27] For example, David Muhlestein has estimated "428 total ACOs now existing in 49 states." David Muhlestein, *Continued Growth of Public and Private Accountable Care Organizations*, HEALTH AFFAIRS BLOG (Feb. 19, 2013) (counting, e.g., ACOs formed solely on the private side and those negotiated directly with state Medicaid programs), *available at* http://healthaffairs.org/blog/2013/02/19/continued-growth-of-public-and-private-accountable-care-organizations/; *cf.* McClellan et al., *supra* note 24, at 983 (describing

diverse ACOs including, as of 2010, a Brookings/Dartmouth Accountable Care Collaborative comprising "approximately sixty provider systems across the country.").

[28] *See generally* Susan S. DeSanti, *ACO Antitrust Guidelines: Coordination Among Federal Agencies*, 11-2 ANTITRUST SOURCE 1 (DEC. 2011).

[29] Dep't Health & Human Servs., Ctrs. Medicare & Medicaid Servs. ("CMS"), 42 CFR Part 425, Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations (Final Rule), 76 Fed. Reg. 67802, 67804 (Nov. 2, 2011).

[30] Fed. Trade Comm'n & U.S. Dep't. of Justice Working Group Issues Summary of Activities Since October 2011 Release of ACO Antitrust Enforcement Policy (Apr. 10, 2013), *available at* http://www.ftc.gov/bc/healthcare/aco/mssp-summary.pdf. The policy statement itself is, Fed. Trade Comm'n and U.S. Dep't of Justice: Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67026 (Oct. 28, 2011) [hereinafter FTC/DOJ ACO Policy Statement] (explaining Agency views on operations of ACOs in private health care markets as well as the Medicare Shared Savings Program).

[31] FTC/DOJ ACO Policy Statement, *supra* note 30, at 67030-31.

[32] Fed. Trade Comm'n & U.S. Dep't. of Justice Working Group Issues Summary, *supra* note 30.

[33] The CMS final rule, and the FTC/DOJ policy statement, followed extensive research and consultation by the agencies with key stakeholders in the health care community. For example, in 2010, the FTC, CMS, and HHS jointly sponsored a public workshop to explore ACO-related issues, with formal participation by physician groups, payers, institutional providers, regulators, and academics, among others, and with written comments solicited from the public at large. Information regarding the "Workshop Regarding Accountable Care Organizations and Implications Regarding Antitrust, Physican Self-Referral, Anti-Kickback and Civil Monetary Penalty Laws," held at CMS on Oct. 5, 2010, with links to the agenda, public comments, and workshop transcripts, can be found at http://www.ftc.gov/opp/workshops/aco/index.shtml#webcast. The Commission held a second public workshop to explore ACO formation issues – including issues raised by the proposed FTC/DOJ ACO policy statement – in May 2011. Information regarding the FTC's May 9, 2011 workshop, "Another Dose of Competition: Accountable Care Organizations and Antitrust," can be found at http://www.ftc.gov/opp/workshops/aco2/index.shtml.

[34] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 335 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[35] In general, the Supreme Court has flatly rejected the notion that members of the learned professions should be free from antitrust scrutiny: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975); *see also Nat'l Soc'y Prof'l Engineers*, 435 U.S. 679, 695 (1978) (Supreme Court rejection of argument that competition itself poses a "potential threat . . . to the public safety"); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

[36] FTC & DOJ, IMPROVING HEALTH CARE, *supra* note 9, at 14. For example, a recent FTC enforcement action concerned "an agreement among eight independent nephrologists in southwestern Puerto Rico to fix the prices and the conditions under which they would participate in 'Mi Salud,' the Commonwealth of Puerto Rico's Medicaid program for providing healthcare services to indigent residents. In furtherance of their conspiracy, Respondents collectively terminated their participation in the Mi Salud program in southwestern Puerto Rico after the program's regional administrator . . . refused to accede to Respondents' demands to restore a cut in reimbursements for certain patients eligible for benefits under both Medicare and Mi Salud ("dual eligibles"). After Respondents terminated their service agreements with Humana, they refused to treat any of Humana's Mi Salud patients." *In the Matter of* Práxedes E. Alvarez Santiago, M.D., Daniel Pérez Brisebois, M.D., Jorge Grillasca Palou, M.D., Rafael Garcia Nieves, M.D., Francis M. Vázquez Roura, M.D., Angel B. Rivera Santos, M.D., Cosme D. Santos Torres, M.D., and Juan L. Vilaró Chardón, M.D., FTC File No. 121-0098, C-4402 (Complaint), 2 (May 3, 2013), *available at* http://ftc.gov/os/caselist/1210098/130503prnephrologistscmpt.pdf.

[37] In addition, the asymmetric "good faith" negotiation requirement and threat of very large fines, applicable to all health plans, large and small (*supra* note 17), will likely decrease the incentives of cooperatives to compete on price and quality. It will also likely impede the ability of health plans to use selective contracting, a key mechanism for promoting quality and cost-containment goals.

[38] FTC v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003, 1010 (2013) (quoting FTC v. Ticor Title Ins. Co., 504 U. S. 621, 636 (1992)); *see also* North Carolina State Bd. of Dental Examiners v. FTC, No. 12-1172 (4th Cir. May 31, 2013) (no state action immunity for dental board that sought to exclude non-dentist competitors in teeth whitening services).

[39] *FTC v. Phoebe Putney*, 133 S. Ct. at 1015 (state legislature's objective of improving access to affordable health care does not logically suggest contemplation of anticompetitive means, and "restrictions [imposed upon hospital authorities] should be read to suggest more modest aims."). As the U.S. Court of Appeals for the Fourth Circuit has observed, "[f]orewarned by the [Supreme Court's] decision in *National Society of Professional Engineers* . . . that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'" *Virginia Acad. of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 485 (4th Cir. 1980).