3242

The Hospital + Healthsystem Association of Pennsylvania

Leading for Better Health

September 30, 2019

Antitrust Section
Office of Attorney General
Strawberry Square, 14th Floor
Harrisburg, Pennsylvania 17120

Dear Attorney General Shapiro:

The Hospital and Healthsystem Association of Pennsylvania (HAP), which represents approximately 240 member hospitals and health systems across the commonwealth, appreciates the opportunity to provide comments to the Pennsylvania Office of the Attorney General's (OAG) proposed Regulation Package 59-10, which proposes to amend 37 Pa. Code by adding Chapter 3111 (relating to unfair market trade practices). As discussed below, the proposed regulations raise a number of important legal issues and, if approved, could negatively impact the hospital industry in Pennsylvania.

The primary concern with the proposed regulations is that they seek to regulate conduct that goes well beyond what is authorized by the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). The UTPCPL currently includes, within the definition of "unfair methods of competition" and "unfair or deceptive acts or practices," 21 types of business conduct, including a "catchall" provision that outlaws "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." Antitrust violations are not included in the 21 enumerated acts. Indeed, in the Notice of Proposed Rulemaking, the OAG concedes that the goal of the UTPCPL is to "thwart fraud," as opposed to anticompetitive conduct. The absence of antitrust violations from the list of illegal acts suggests that the General Assembly did not intend for the UTPCPL to reach such violations.

Moreover, although the OAG claims that the new regulations are consistent with a federal antitrust statute and Section 5 of the Federal Trade Commission Act (FTC Act), and that "Section 5 of the [FTC Act] is virtually the same as Section 3 of the [UTPCPL]," the OAG overlooks an important distinction between the two statutes. While the language of Section 5 of the FTC Act and Section 3 of the UTPCPL is nearly identical—they both outlaw "unfair methods of competition" and "unfair or deceptive acts or practices"—Section 5 of the FTC Act, unlike the UTPCPL, does *not* include a list of acts deemed illegal. Thus, the UTPCPL is narrower than Section 5 of the FTC Act. The catchall provision of the UTPCPL, which the OAG cites in support of its interpretation, is limited to "*fraudulent or deceptive* conduct," as opposed to anticompetitive conduct. While it is reasonable for courts to interpret antitrust violations as encompassed within Section 5 of the FTC Act, the same logic does not apply to the UTPCPL.

While the OAG claims that the new regulations are intended to merely "clarif[y] operative terms of the [UTPCPL]," in fact, they add entirely new terms not found in the UTPCPL. They now include a new term, "unfair *market trade practices*," and include this term in the definition of the terms that *are* in the UTPCPL, namely, "unfair methods of competition and unfair or

deceptive acts or practices." The regulations then define "unfair market trade practices" to include an entirely new list of illegal acts, all of them antitrust violations. There are ten antitrust violations listed: resale price maintenance; price-fixing; market allocation; tying; reciprocal dealing; refusals to deal; monopolization; attempted monopolization; joint monopolization, and incipient conspiracies to monopolize. All of these acts are illegal under federal law, but not under Pennsylvania state law. The new regulations, therefore, significantly expand the types of business conduct that are subject to enforcement by the Pennsylvania Attorney General, and by private parties, far beyond the limited list of unfair methods of competition identified in the UTPCPL.

By promulgating these regulations, the Office of the Attorney General is attempting to achieve by regulation what the Pennsylvania General Assembly has repeatedly declined to do through legislation. Since the enactment of the UTPCPL in 1968, the Pennsylvania General Assembly has tried, on 26 different occasions, to extend the provisions of the UTPCPL to include antitrust violations. Those efforts have failed every time. HAP therefore is concerned that these regulations constitute an attempt to usurp the legislative process, *i.e.*, to achieve by regulation powers for the Pennsylvania Attorney General that are not supported by the will of the people as expressed through their elected representatives.

In addition to seeking to regulate conduct beyond what is authorized by statute, these regulations could have a significant negative effect upon hospitals in Pennsylvania because they add a duplicative antitrust enforcement authority. The federal Clayton Act currently allows the Pennsylvania Attorney General to bring an action to block a merger of two hospitals on the ground that the merger is anticompetitive. But, because there is no state antitrust statute, the Pennsylvania Attorney General has been limited in the antitrust enforcement actions it could bring against hospitals. With these new regulations, the Pennsylvania Attorney General, and private parties, would be able to challenge activities that have been subject to enforcement by the federal antitrust enforcement authorities, including the following:

- Hospital joint ventures involving high technology or other expensive health care equipment, or involving specialized clinical or other expensive health care services
- Health care providers' collective provision of information, fee-related and non-fee-related, to health care payors
- Health care providers' participation in exchanges of price and cost information
- Health care providers' joint purchasing agreements
- Affiliations of competing health care providers (multiprovider networks)
- Agreements between health care providers and insurers restricting insurers from steering patients to rival providers
- Agreements among health care providers restricting competition for each others' employees (so-called "no poach" agreements)
- Agreements among health care providers to limit marketing in certain areas or communicate about their marketing activities

- Exclusive contract arrangements between health care providers and insurers
- Agreements among health care providers to allocate services

Finally, because hospitals typically compete in local, as opposed to national markets, the regulations increase the risk that hospitals will face a state enforcement action that would not meet the threshold of potential harm for a federal enforcement action.

Again, thank you for the opportunity to comment on the OAG's proposed rulemaking. HAP appreciates the opportunity to offer its views and concerns.

If you have any questions or concerns regarding the contents of this letter or this matter in general, please feel free to contact either Jeffery Bechtel, senior vice president, health economics and policy, at (717) 561-5325 or Warren Kampf, senior vice president, advocacy and external affairs, at (717) 561-5235.

Sincerely,

Jeffrey Bechtel
Senior Vice President
Health Economics and Policy

Warren Kampf
Senior Vice President
Advocacy and External Affairs