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May 11, 2017

RE: AN ACT to amend the public health law,
in relation to extending the authority of
the commissioner of health to issue
certificates of public advantage

S.5342 (Hannon)
A.7748 (Gottfried)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The New York State Conference of Blue Cross and Blue Shields Plans strongly oppose enactment of this Bill, which extends the authority of the Commissioner of Health to issue Certificates of Public Advantage (COPAs) that exempt health care providers from federal and state antitrust laws. This Bill blatantly ignores the public opinions of the Federal Trade Commission (FTC), which concluded in their public opposition to applications submitted under the COPA process that New York's "antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit health care consumers."¹

In 2011, the Legislature enacted New York's "Improved Integration of Health Care and Financing" law, which authorized the state to encourage appropriate collaborative arrangements among healthcare providers.² Importantly, Article 29-F provides for State action immunity under state and federal antitrust laws with respect to arrangements where the benefits of collaboration resulting from activities undertaken by healthcare providers (and others) outweigh the disadvantages resulting from a reduction in competition. Under regulations adopted by the Department of Health, collaborating parties may apply to obtain a COPA, which grants antitrust protections. In response to the DOH regulation, the FTC concluded that New York's COPA process is "based on two fundamentally flawed premises: that efficient, procompetitive collaborations among otherwise independent health care providers are prohibited under the antitrust laws, and that the COPA regulations are necessary to achieve such collaborations."³

¹ Office of Policy Planning, Federal Trade Commission, *Certificate of Public Advantage Applications Filed Pursuant to New York Public Health Law, 10 NYCRR, Subpart 83-1* (April 22, 2015), available at 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

² N.Y. Pub. Health Law §§ 2999aa–2999bb (McKinney 2015).

³ *Id.*

This legislation ignores the recent opinion of the FTC. The FTC has conclusively stated that health care collaborations that benefit patients do not need exemption from existing antitrust laws. In fact, the FTC stated that the main effects of the State's COPA regulations are "to immunize conduct that would not generate efficiencies and therefore would not pass muster under the antitrust laws. Therefore, COPAs are likely to lead to increased health care costs and decreased access to health care services for New York consumers."⁴ The FTC concluded New York's COPA regulations are "unnecessary to promote the goals of health care reform" and expressed concern that the scheme is likely to foster anticompetitive conduct to the detriment of New York health care consumers."⁵

This Bill seeks to extend New York's foray into providing antitrust protections to certain health care providers under the guise of promoting collaboration to benefit patients. However, the FTC has unequivocally stated that collaboration among health care providers that benefit patients are lawful and do not need protection from state and federal antitrust laws. In reality, this Bill is an attempt to promote anticompetitive market activity and continue the State's COPA process that has already been called into question. Thus, this Bill would only result in promoting anticompetitive activities that have already been determined to be detrimental to patients, such as collective bargaining with third party payors, unfettered exercise of pricing power, and market manipulation. The Legislature should not advocate for the extension of this ill-conceived and unnecessary process that will serve to harm, rather than benefit, patients and consumers.

For the foregoing reasons, the Blue Cross and Blue Shield Plans urge that this bill not be enacted.

Respectfully submitted,

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4850-5308-8325, v. 2

⁴ *Id.*

⁵ *Id.*