Written Statement of Wellmont Health System and Mountain States Health Alliance in Response to the Notice of Rulemaking Hearing filed July 14, 2015 relative to the Hospital Cooperation Act of 1993 as amended in 2015

September 23, 2015

The parties to this statement are appreciative of the Department's quick and thorough publication and filing of the proposed rules on the issuance of a Certificate of Public Advantage ("COPA"). The rules are lucid and understandable. Thus, the parties have comments from a legal standpoint on only two matters. The first is the requirement that a Plan of Separation be filed with the application for a Certificate of Public Advantage (the "Application"). The statute does not require a Plan of Separation to be filed with the Application, and such requirement presents very real logistical and planning difficulties. The second is the required submission of confidential competitive information that will be disclosed to the public. This requirement creates a serious conflict with long-standing principles of federal antitrust law.

I. A Plan of Separation is not required by the Statute to be filed with the Application for a Certificate of Public Advantage.

The proposed rules at 1200-38-01-.02(2)(a)(17) state that "The Department [of Health] shall require a Plan of Separation be submitted with the Application [for a Certificate of Public Advantage]. The Plan of Separation shall be updated annually by the parties to the Cooperative Agreement. The parties shall provide an independent opinion from a qualified organization verifying the Plan of Separation can be operationally implemented without undue disruption to essential health services provided by the parties...."

The proposed rules further provide at 1200-38-01-.06(3): "Update Plan of Separation. The parties to the Cooperative Agreement shall update the parties' Plan of Separation annually and submit the updated Plan of Separation to the Department. The parties shall provide an independent opinion from a qualified organization which states the Plan of Separation may be operationally implemented without undue disruption to essential health services provided by the parties."

For reasons explained below, it is respectfully suggested that the requirement in the rules of submitting a Plan of Separation with the Application for a Certificate of Public Advantage is not required by the Hospital Cooperation Act and is not consistent with the Act's language in Section 68-11-1303(g). It is further suggested that the requirement is superfluous as part of the Application, because the Cooperative Agreement will not take effect if the Application is denied, leaving the parties to the agreement in their original state. Petitioners request that the rules be modified to conform to Section 68-11-1303(g).

The Hospital Cooperation Act nowhere provides that a Plan of Separation be submitted as part of an Application for a Cooperative Agreement. The first mention of a Plan of Separation in the Act is found in Section 68-11-1303(g), which deals with the Department's monitoring responsibilities after it has issued a certificate of public advantage and the Cooperative

Agreement has been implemented. According to subsection (g), if the Department subsequently determines that the likely benefits of a certified agreement no longer outweigh any disadvantages resulting from the agreement, the Department may seek modification and then termination of the certificate. It is only in such circumstances that subsection (g) requires a Plan of Separation, stating that the certificate of public advantage shall remain in effect *"until such time as the certificate of public advantage holder has submitted*, the department has approved, and the certificate holder has completed *a plan of separation."* (emphasis added)

The most reasonable reading of this statutory language is that the certificate holder should not be required to prepare and submit a Plan of Separation until the Department has determined to terminate the certificate. This interpretation makes practical sense. Any such plan would need to be developed based upon the circumstances at the time of separation. The nature of the Cooperative Agreement, the amount of time it has been in effect, and the nature of the disadvantages that led the Department to terminate the certificate would be factors likely to be considered in developing a practical Plan of Separation. Developing an effective plan would also depend on the nature of the parties' business operations at the time of termination, the economic conditions at the time of termination, the nature of the potential reduction in competition at the time of termination, and the competitive circumstances of other health systems and services operating in and around the region that are not controlled by the parties. Accordingly, it is appropriate that the statute requires that the Plan of Separation be submitted only after the Department has concluded that separation is required.

The language of Section 68-11-1306(b) must also be noted as part of this analysis. That subsection provides if the parties to a Cooperative Agreement fail to carry their burden of proof and the Department declines to issue a certificate, then the "agreement is invalid and has no further force or effect, except that the department's active supervision shall continue until the Plan of Separation in § 68-11-1303(g) has been determined by the department to be complete." The first part of this language reaffirms the self-evident proposition that if the Department refuses to issue a certificate, then a Cooperative Agreement submitted to the Department for approval is invalid. In such a situation, the remainder of the statutory language is surplusage. If the Department never issues a certificate, and the Cooperative Agreement never takes effect, then there is nothing for the Department to actively supervise, nothing to separate, and no Plan of Separation required. The Department should not rely on this statutory language to import an unnecessary requirement into the Application process.

If the Department deems such an inclusion necessary, then the rules should clarify that any Plan of Separation can be stated in general terms of process and structure. Following the implementation of a Cooperative Agreement, any Plan of Separation will be dependent on economic and operational issues at the time of implementation, which are best evaluated at the time the Department makes its determination. The rules should acknowledge that any proposed plan will recognize that changing market conditions and actions taken to implement the Cooperative Agreement will affect the form, structure and scope of any separation, which may vary from the pre-consolidation state, so that a plan proposed in accordance with these rules will focus more on process than detail. The rules should also recognize and allow that a plan as implemented may differ significantly from the proposed plan. The rules should also

acknowledge that the "independent opinion" required by the rules may be provided by a management consulting firm, as well as other "qualified organizations."

II. The Joint Submission and Public Disclosure of Competitively Sensitive Information Required By the Proposed Rules Conflicts with Federal Antitrust Law and Subjects the Parties to Potential Antitrust Liability.

The proposed rules at 1200-38-01-.02(2)(a) require hospitals seeking a COPA to exchange and submit competitively sensitive information as part of the Application, and contemplate at 1200-38-01-.02(3)(e) that this information will be available to the general public. These provisions conflict with federal antitrust laws, which prohibit competitors from exchanging competitively sensitive information except in narrow circumstances. The exchange and public disclosure of this information could tend to reduce competition and expose hospitals seeking a COPA to potential antitrust liability. Rule 1200-38-01-.02(3)(e) is neither required nor contemplated by T.C.A. §68-11-1303, and as noted is contrary to long-standing federal law. Thus, the parties respectfully request that rules be modified to address this significant federal law issue.

A. Federal Antitrust Law Prohibits Competitors from Exchanging Competitively Sensitive Information Except in Narrow Circumstances.

Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1"), prohibits anticompetitive collusion between competitors. A violation of Section 1 is potentially a felony carrying criminal penalties of up to ten years in jail and up to $100 million in fines. Section 1 also carries potential civil penalties, including treble damages and attorney's fees, and these civil penalties can be enforced by private plaintiffs.

Section 1 has been interpreted to prohibit exchanges by competitors of competitively sensitive information except in narrow circumstances. Information that is competitively sensitive includes (1) customer or product-specific price, cost, or discount information, (2) analyses or formulas used to determine costs or prices, (3) strategies or policies related to competition, (4) forward-looking business plans, including plans for marketing, sales, promotions, capital investments, expansion or contraction, budgeting, and new products, and (5) any other confidential business information which could be used to reduce competition. *See generally,* ABA Section of Antitrust Law, Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange (2006), at 23-37. Typically, competitively sensitive information may only be exchanged by competitors in the context of a larger, pro-competitive endeavor, and even then only with reasonable safeguards implemented to prevent the misuse of data.

In *United States v. Container Corporation of America*, 393 U.S. 333 (1969), for example, the United States Supreme Court held that cardboard container manufacturers violated Section 1 of the Sherman Act by exchanging customer-specific price information, even though there was no finding that the parties had actually agreed on the prices to charge customers. The Supreme Court held, "The exchange of price data tends toward price uniformity." *U.S. v. Container Corp. of Am.*, 393 U.S. at 337. Specifically, competition was harmed because "the exchange of prices made it possible for individual defendants confidently to name a price equal to that which their

competitors were asking" and "limit any price cuts to the minimum necessary to meet competition." *Id.* at 339-340 (Fortas, concurring). Thus, the exchange of competitively sensitive information was found to harm competition - and was thus illegal - even in the absence of any intent to engage in hard-core antitrust violations such as price-fixing.

The Federal Trade Commission ("FTC") and the United States Department of Justice ("DOJ"), the two agencies charged with enforcing federal antitrust law, have issued specific guidance regarding the exchange of competitively sensitive information by healthcare providers. Noting that there are sometimes legitimate reasons for healthcare providers to exchange competitively sensitive information, the FTC and DOJ announced a narrow "safety zone" in which providers may participate in exchanges of price, cost, wage, salary or benefit information without risk of antitrust liability. In order to qualify for this safety zone, the exchange must meet the following conditions:

(1) the collection of information must be managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);

(2) the information that is shared among or is available to the competing providers furnishing the data must be more than three months old; and

(3) for any information that is available to the providers furnishing data, (a) there must be at least five providers reporting data upon which each disseminated statistic is based, (b) no individual provider's data may represent more than 25 percent on a weighted basis of that statistic, and (c) any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any individual provider.

See FTC and DOJ Statements of Antitrust Enforcement Policy In Healthcare, Statement 6 at 50. The FTC and DOJ argue these conditions are necessary because "information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services." *Id.* at 49.

Exchanges of information that fall outside of this narrow safety zone are not automatically illegal, but are closely evaluated by the FTC and DOJ "to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange." *Id.* at 51. The FTC and DOJ warn, "Exchanges of future prices for provider services or future compensation of employees are very likely to be considered anticompetitive." *Id.*

In the context of corporate mergers, the FTC and DOJ have brought enforcement actions aimed at punishing and preventing exchanges of competitively sensitive information that were not reasonably necessary for the parties to evaluate the merger. For example, the FTC held that parties to one merger had violated Section 1 of the Sherman Act when the buyer had obtained

from the seller, prior to the consummation of the transaction, "non-aggregated, customer-specific information." *In the Matter of Insilco Corp.*, 125 F.T.C. 293, 294-95 (1998). The FTC held that this exchange was a problem because it "would likely have been detrimental to competition in the relevant markets if the acquisition had not been consummated." The FTC and DOJ have typically required that exchanges of competitively sensitive information in the context of a merger (a) be reasonably related to a party's understanding of future earnings and prospect, and (b) be subject to a non-disclosure agreement that limits use of the information to conducting due diligence and prohibits disclosure of the information to employees that are directly responsible for pricing, marketing, or sales of the competing products. *See United States v. Gemstar-TV Guide Int'l*, 2003-2 Trade Cas. (CCH). ¶ 74,082 at 96,765 (D.D.C. 2003).

It is clear that the federal antitrust laws regarding the exchange of competitively sensitive information need to be carefully considered when determining what information the Department will require the parties to exchange for the COPA Application.

B. The Proposed Rules Require the Exchange of Competitively Sensitive Information and Are In Conflict With Federal Antitrust Laws.

The proposed rules contemplate that the parties will jointly submit a single Application for a COPA, and require at 1200-38-01-.02(2)(a)(5) that each party will submit a "verified statement signed by [its] Chairperson of the Board of Directors and Chief Executive Officer ... attesting to the accuracy and completeness of the enclosed Application." Thus, the proposed rules require that the parties collaborate in all aspects of the Application process. Although collaboration and joint certification are appropriate for many elements of the Application, the requirement for collaboration and certification is problematic when applied to the required submission by each party of certain competitively sensitive information.

The proposed rules provide that the parties will jointly submit the following potentially competitively sensitive information:

- "A copy of the current annual budget for each party to the Cooperative Agreement," *see* 1200-38-01-.02(2)(a)(13)(vii)(II);

- "A detailed explanation of the projected effects including expected change in volume, price and revenue as a result of the Cooperative Agreement," *see* 1200-38-01-.02(2)(a)(13)(vii)(III);

- "Identification of all insurance contracts and payer agreements in place at the time of the Application and a description of pending or anticipated changes that would require or enable the parties to amend their current insurance and payer agreements;" *see* 1200-38-01-.02(2)(a)(13)(vii)(III)(I);
- "A description of how pricing for provider insurance contracts are calculated" *see* 1200-38-01-.02(2)(a)(13)(vii)(III)(II); and

- "Identification of existing or future business plans, reports, studies or other documents of each party that: (I.) Discuss each party's projected performance in

the market, business strategies, capital investment plans, competitive analyses and financial projections including any documents prepared in anticipation of the Cooperative Agreement;" *see* 1200-38-01-.02(2)(a)(13)(vii)(IV).

The proposal that hospitals seeking a COPA submit a single Application containing all of the above elements requires that the hospitals exchange competitively sensitive information, even though federal antitrust laws would likely prohibit them from doing so. Specifically, the proposed rules at 1200-38-01-.02(2)(a)(13)(vii)(III)(I) and (II) require the parties to exchange and submit non-aggregated customer-specific price information similar to those found to violate federal antitrust law in *Container Corporation of America* and *Insilco*. The proposed rules at 1200-38-01-.02(2)(a)(13)(vii)(IV) also potentially require the parties to exchange information regarding future prices for provider services or future compensation of employees – conduct which the FTC and DOJ have held "very likely to be considered anticompetitive." Depending on the level of detail required by the Department, exchange of the budget required at 1200-38-01-.02(2)(a)(13)(vii)(II) and the description of anticipated effects of the Cooperative Agreement in 1200-38-01-.02(2)(a)(13)(vii)(III) could similarly violate Section 1.

In the event that a COPA is denied, the parties will have access to this information, which—as explained by the FTC and DOJ—could tend to facilitate collusion. Even in the absence of overt collusion, access to this type of information tends to stabilize prices because competitors know the minimum prices needed to obtain business, and can avoid granting concessions beyond that level. Thus the COPA Application process may have the unintended result of increasing prices for healthcare and reducing quality of care.

C. The Certification Requirement Heightens Antitrust Risks.

The proposal at 1200-38-01-.02(2)(a)(5) that each party attest to the accuracy and completeness of the entire Application exacerbates the potential violation of federal antitrust laws by requiring each party to familiarize itself with the other party's competitively sensitive information. In fact, the parties may be required to exchange competitively sensitive information beyond that submitted to the Department in order to ensure the completeness and accuracy of the material generated by the other party. For example, the proposed rules require that the budget submitted by each party be prepared according to GAAP, with all assumptions documented. The requirement that each party attest to the accuracy of the other's content may require significant investigation by each party into the budget of the other, whether it complies with GAAP, and whether it adequately identifies all assumptions used.

D. The Proposed Rules Go Beyond What is Reasonably Necessary to Evaluate the Cooperative Agreement.

The proposed rules further conflict with federal antitrust laws because they do not attempt to limit the submission and exchange of competitively sensitive information to that which is necessary to evaluate the proposed Cooperative Agreement. The Hospital Cooperation Act contemplates a wide variety of potential Cooperative Agreements, ranging from total mergers to the sharing of personnel or facilities. The potential competitive impact of a given Cooperative Agreement depends greatly on type of proposal, the identity of the parties, and the

nature of the markets affected. Nevertheless, the proposed rules are drafted broadly to require the submission of financial information and business plans that may have little to no bearing on the impact of the proposed Cooperative Agreement. Furthermore, the proposed rules do not appear to allow the parties flexibility to submit aggregated, non-customer specific data of the sort that qualifies for the FTC and DOJ's safety zone.

Due to the significant antitrust concerns that exist in this particular merger, the parties have taken special precautions restricting the exchange of competitively sensitive materials during the due diligence process. Accordingly, the parties have not had access to the competitively sensitive information of the other party requested in the Application. The proposed rules conflict with federal antitrust policy, which requires that the potential anticompetitive results of exchanges of anticompetitive information be outweighed by its benefits, and may expose the parties seeking a COPA to potential antitrust liability.

E. The Public Disclosure of Competitively Sensitive Documents Could Have Additional Anticompetitive Consequences.

In addition to requiring that the parties to the COPA Application exchange broad categories of competitively sensitive information, the proposed rules at 1200-38-01-.02(3)(e) contemplate that "the Application and accompanying documents are public records ... subject to public inspection." Therefore, it will be possible for the parties' direct competitors and other participants in the industry to obtain detailed information regarding the parties' pricing, costs, budgeting, and future business plans. The public availability of such information could have anticompetitive consequences for the same reason that the exchange of information between the parties themselves could have anticompetitive consequences, except that the impact would be broader because it is no longer just the parties who would have access to the information. For example, in a market in which there are three hospitals, two of which seek a COPA, the third hospital could obtain the Application through the Public Records Act and use that information to stabilize prices and guide other competitive choices. Furthermore, the two hospitals seeking a COPA could be placed at a competitive disadvantage to the third hospital. Thus, the public disclosure of the Application and accompanying documents could have significant anticompetitive consequences and is contrary to federal antitrust law.

F. The Proposed Rules Can Be Modified in Two Respects to Avoid These Significant Antitrust Concerns.

In light of the significant antitrust concerns and potential public harm that would result from the exchange and public disclosure of competitively sensitive information as part of a COPA application, the parties propose that the Department revise the proposed rules in two respects.

First, to avoid the premature exchange of competitively sensitive information between the parties to a Cooperative Agreement, the rules could be modified to allow each applicant to attest to the accuracy of its own competitively sensitive information but not require the applicant to attest to the accuracy of the other party's competitively sensitive information. There is nothing in the Hospital Cooperation Act that would appear to prohibit such a requirement.

Second, to avoid the public disclosure of competitively sensitive information, the rules could be modified to remove the requirement that such information be filed with the application. Instead, the Department could defer to the Attorney General to subpoena and review the information, with expert assistance if appropriate, as part of evaluating any potential reduction in competition resulting from a Cooperative Agreement. The Attorney General could then share its conclusions with the Department.

In this manner, the information underlying the conclusions would not be subject to disclosure under the state's open records requirements. Upon receiving the conclusions, the Department could then decide whether it needed to review the underlying information, with the understanding that the information might become public once provided to the Department.

A regulatory procedure that allows the Attorney General to subpoena competitively sensitive information and relies on the Attorney General to analyze that information would be consistent with the Hospital Cooperation Act. The Act states that the Department "shall consult with the attorney general and reporter regarding its evaluation of any potential reduction in competition resulting from a Cooperative Agreement." Tenn. Code Ann. § 68-11-1303(f). The Act also provides that the Attorney General "may require by subpoena" the production of documents "for the purpose of investigating whether the Cooperative Agreement satisfies the standards" of the Act. *Id.* § 68-11-1305(a).

Any subpoena issued by the Attorney General pursuant to the Act could be designated to fall within the scope of the Attorney General's investigatory authority under Tennessee Code Title 8, Chapter 6, Part 4. Under those provisions, the Attorney General may issue a civil investigative demand for documents in connection with the performance of his official duties "where the state of Tennessee is a party litigant, or there is reasonable cause to indicate it will be a party litigant." *Id.* § 8-6-401; *see also id.* § 8-6-402(a). That situation exists under the Hospital Cooperation Act, which gives the Attorney General authority to consult with the federal government regarding the Attorney General's evaluation of the Cooperative Agreement's impact on competition and the power to seek judicial relief to enjoin the operation of a Cooperative Agreement. *Id.* §§ 68-11-1303(f), 68-11-1305(b). Documents obtained pursuant to a civil investigative demand are required by statute to be confidential and cannot be publicly divulged except in the discharge of the Attorney General's duties or in legal proceedings in which the state is a party. *Id.* § 8-6-407.

The minor complications of such a procedure would more than outweigh the public harm that could occur if such a procedure is not adopted. The Attorney General has an obligation under the Act to evaluate the anticompetitive elements of a Cooperative Agreement and the authority to subpoena records, so this proposal does not place any new burden on that office. The Department is directed by the Act to consult with the Attorney General in evaluating the application, so this proposal does not place any new burden on the Department. The proposal simply seeks to structure the analysis and consultation in such a way as to avoid disclosures that could create serious federal antitrust concerns. Accordingly, the parties ask that the Department revise the proposed rules in this or a similar manner.

III. Conclusion.

The parties appreciate the opportunity to submit written comments on the proposed rules and respectfully ask the Department to carefully consider the requirements for a Plan of Separation and the submission of confidential competitive information. In addition, the parties note that pursuant to Rule 1200-38-01-.03(3) the Commissioner has authority to establish and change the Index and Measures. The parties consider it important that the Index and Measures, once established, not be eliminated or modified except by joint agreement of the Commissioner and applicant parties. The parties look forward to continued discussions with the Department with regard to these matters.

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