

Office of Policy Planning
Bureau of Economics
Bureau of Competition

August 8, 2011

Hon. James L. Seward
Senator, 51st District
Legislative Office Building
Albany, NY 12247

Dear Senator Seward:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ are pleased to respond to your request for comments on the likely competitive effects of New York Assembly Bill 5502-B (“

FTC seeks to identify business practices and government regulations that may impede competition without offering countervailing benefits to consumers.

share. Second, costs will increase further – once those negotiations are concluded – if a health plan cannot create incentives for its beneficiaries to use a relatively low-cost mail order pharmacy. When costs increase there are negative effects for all those who pay for health care – individuals, companies, and all levels of government. As a Maryland study has shown, statutory impediments to mail-order provision of, for example, maintenance drugs, can be very costly for a state and its citizens.²⁸

Respectfully submitted,

Susan S. DeSanti, Director
Office of Policy Planning

Joseph Farrell, Director
Bureau of Economics

Richard A. Feinstein, Director
Bureau of Competition

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 us to submit these comments.

² Letter from Hon. James L. Seward to Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission (June 24, 2011).

³ Maintenance drugs are prescription drugs that are used to treat chronic illnesses or conditions and prescriptions for maintenance drugs often are written for long terms and/or repeat fills. Mail order pharmacies chiefly fill maintenance drug prescriptions, and incentives to use mail order tend to focus on such prescriptions. *See, e.g.*, FEDERAL TRADE COMMISSION, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES 16-19 (Aug. 2005) [hereinafter FTC PBM STUDY], *available at* <http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf>.

⁴ Federal Trade Commission Act, 15 U.S.C. § 45.

⁵ *See* 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.").

⁶ *See generally, e.g.*, FTC, An Overview of FTC Antitrust Actions In Health Care Services and Products (Sept. 2010), *available at* <http://www.ftc.gov/bc/110120hcupdate.pdf>; *see also* FTC, Competition in the Health Care

research. Information on the 2003 Hearings on Health Care and Competition Law and Policy is *available at* <http://www.ftc.gov/bc/healthcare/research/healthcarehearing.htm>.

⁸ 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 Hon. Mark Formby, Mississippi House of Representatives, Concerning Mississippi Senate Bill 2445 and the Regulation of Pharmacy Benefit Managers (Mar. 2011), *available at* <http://www.ftc.gov/os/2011/03/110322mississippiipbm.pdf>; 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>; FTC Amicus Curiae Brief in *In re Ciprofloxacin Hydrochloride Antitrust Litigation* Concerning Drug Patent Settlements Before the Court of Appeals for the Federal Circuit (Case No. 2008-1097) (Jan. 2008), *available at* <http://www.ftc.gov/os/2008/01/080129cipro.pdf>; FTC & DOJ, A DOSE OF COMPETITION, *supra* note 7.

⁹ *See* ~~FTC~~ PBM STUDY, *supra* note 3, at 25, 31-36; *see also* GENERAL ACCOUNTING OFFICE, EFFECTS OF USING PHARMACY BENEFIT MANAGERS ON HEALTH PLANS, ENROLLEES, AND PHARMACIES 9 (Jan. 2003) [hereinafter GAO REPORT], *available at* [h](#)

maintenance drugs. According to the Maryland report, greater use of mail order maintenance drugs – enabled by liberalizing Maryland insurance law – would save Maryland consumers 2-6% on retail drug purchases *overall*, and third-party carriers 5-10%. See MD. HEALTH CARE COMM. AND MD. INS. ADMIN., MAIL-ORDER PURCHASE OF MAINTENANCE DRUGS: IMPACT ON CONSUMERS, PAYERS, AND RETAIL PHARMACIES 2-3 (Dec. 23, 2005) [hereinafter MARYLAND REPORT]; cf. Carroll and Ambrose, *supra* note 15, at 939-40 (examining data from the early 1990s and finding pharmacy AWP laws associated with higher costs).

¹⁹ See *supra* note 3.

²⁰ See FTC PBM STUDY, *supra* note 3, at 25 (mail order prices lower, even after controlling for prescription size and drug selection) ; see also GAO REPORT, *supra* note 9, at 8-11 (reporting that PBMs negotiate substantial discounts with retail pharmacies, but achieve much greater savings using mail order pharmacies).

²¹ FTC PBM STUDY, *supra* note 3, at 35-36 (comparing prices for both 30- and 90-unit prescriptions, for each of three drug types filled by retailer-owned PBM mail order pharmacies, with those filled by retail non-mail