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Submitted electronically via joe.hilbert@vdh.virginia.gov

Subject: Anthem Blue Cross and Blue Shield Recommendations on Virginia Certificate of Public Need (COPN) Law Reforms

Dear Chairwoman Hardy, Fellow COPN Work Group Members and Staff of the Virginia Department of Health:

Anthem appreciates the opportunity to participate on the Certificate of Public Need (COPN) Work Group as well as the opportunity to submit our recommendations related to Virginia COPN law reforms. Health insurers, like Anthem, and consumers depend on competition between health care providers to ensure that health care services are provided at the best price possible and widely available. Further, as in all industries, it is competition that drives quality improvement in the services offered as the market participants must illustrate their value to attract consumers and providers of care. Unfortunately, Virginia's COPN law replaces competition with regulation and this regulatory system is clearly designed to limit competition in the health care marketplace. These anti-competitive effects have had a significant impact on Anthem and its members, including those enrolled in Medicare and Medicaid products.

Hospitals and other health care providers compete along many dimensions, all of which can be adversely affected by a reduction in competition. These include the following, but not limited to:

- Prices and contracted rates.
- Innovative payment approaches. Government and private payers are looking to innovative "value-based" payment approaches to replace the fee-for-service system that has been ineffective in controlling costs and assuring quality. The willingness of providers to enter into such innovative approaches often depends on whether competing providers in their market are planning to do so.¹

¹ See generally Richard M. Sheffler, *Accountable Care Organizations: Integrated Care Meets Market Power*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW, Vo. 40 No. 4 August 2015, available at <http://jhppl.dukejournals.org/content/early/2015/06/09/03616878-3149964.full.pdf+html> (finding that in California ACO growth can be attributed to two market characteristics: (1) "the degree of [market] penetration of HMOs is positively associated with ACO entry and the growth of covered lives. This suggests that ACOs might be a competitive response to HMOs" and (2) "the market power of hospitals is associated with lower ACO entry and growth"). See also Presentation by David Muhlestin, Senior Director of Research & Development Leavitt Partners, *Overview of the ACO Landscape at the Examining Health Care Competition Workshop* (February 24-25, 2015), presentation available at <https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-carecompetition> (discussing how the growth in ACOs is partly attributable to providers reacting to competitors creating ACOs and similar innovative delivery systems).

- Quality. Hospitals and other health care providers compete with each to provide better clinical care, as reflected in lower mortality and morbidity, complications, better outcomes, and a host of other measures.
- New technologies and services. As with any industry that seeks to attract customers, hospitals compete by providing the latest medical technology, which is particularly important in light of the fast pace of advances in the health field.
- Access and locations. Health care providers, when faced with competition, will open new sites and make them available for longer hours.
- Amenities and patient satisfaction. Food, cleanliness, responsiveness to patients and visitors, and similar attributes are all dimensions which can suffer in an environment in which patients have few or no other alternatives.
- Competition to attract and retain employees. Hospitals compete with each other with respect to the wages, benefits and working environments they offer their employees.
- Competition from non-physician providers, allied health professionals and others who seek to contract with health care providers. Entities that need to enter into contracts or otherwise form relationships with those systems will have no other place to turn.

The Federal Trade Commission (FTC) has repeatedly stated that Certificate of Need (CON) laws do not achieve their intended purpose and instead, “create or increase barriers to entry and expansion to the detriment of health care competition and consumers; and undercut consumer choice, stifle innovation, and weaken the market’s ability to contain health care costs.”²

Virginia’s COPN program currently regulates 19 different services, devices, and procedures, which is more than the national average, and ranks 11th most restrictive in the United States.³ We encourage Virginia to follow a similar path as North Carolina with its recent decision to reform its CON law beginning in 2016, with the intent of full elimination.

Anthem recommends significant reform of Virginia’s COPN law. We recommend building on the Joint Commission on Health Care’s 2000 Certificate of Public Need Deregulation Plan. That plan included three phases of reforms to the VA COPN law. We recommend deregulation in two phases as follows:

Phase 1

- MRI
- CT
- PET
- Non-cardiac nuclear imaging
- Lithotripsy

² Koren Wong-Ervin, Federal Trade Commission Remarks, Virginia’s Certificate of Public Need Work Group Meeting, August 19, 2015.

³ Christopher Koopman & Thomas Stratman, *Certificate-of-Need Laws: Implications for Virginia* (Mercatus Center at George Mason University, February 2015)

Phase 1 continued

- Cardiac catheterization
- Radiation therapy
- Gamma knife surgery
- Ambulatory surgery centers
- Mental health and substance use disorder facilities

Phase 2

- General acute care hospital beds and services
- Obstetrical services
- Neonatal special care

The items listed above would no longer be subject to approval under the COPN law, except for the charity requirement discussed below. This deregulation will enable existing and new market entrants to offer services based on market needs instead of the centralized health planning model of COPN. Further, the COPN law should not apply to new medical technologies and advancements. Anthem proposes that mental health and substance use disorder facilities be included in phase one due to the well documented shortage of these services.

Anthem recommends Virginia COPN regulations remain in place for nursing facilities, organ transplants and open heart surgery.

With these recommended COPN reforms, Virginia should establish charity requirements that apply consistently to all providers who wish to offer services that are no longer subject to COPN approval. Currently, charity care is measured based on the provider's charges for the service, which both inflates the true value of charity care offered and leads to inconsistent comparisons across providers. The proposed charity care requirement should be based on a consistent fee schedule such as Medicare or the volume of charity services offered. Also, providers should commit to retain access for patients who receive services under the Medicaid and Medicare programs. The Commonwealth must make the commitment to provide the necessary oversight and monitoring of these charity care and government-sponsored program requirements. These resources already exist as the Department of Health staff can be repurposed from their traditional role administering COPN to the oversight of charity care requirements.

Virginia is going down a dangerous path to simultaneously supplant competition with COPN regulations and implement the Certificate of Public Advantage (COPA) law. During the 2015 General Assembly Session, House Bill 2316 was passed which adds a new Section 15.2-5384.1 to the Code of Virginia. Under this new section, health care providers can apply for a "Cooperative Agreement" which, if approved and actively supervised by the Virginia Commissioner of Health, would allow the providers to enter into mergers and other arrangements that are anticompetitive and would otherwise violate federal and state antitrust laws. As such, Virginia's Certificate of Public Advantage law enables extreme market consolidation amongst providers while at the same time preventing new market entrants under the current COPN law. We believe that these two laws are incompatible and will result in further erosion of competition amongst health care providers. The adverse interplay of these two statutes is one more reason why change is needed to COPN.

We believe competition in health care, or any industry, improves quality and reduces costs. Competition best protects the public interest by providing the fruits of a competitive marketplace – including lower costs, higher quality, and a choice of different providers to serve their healthcare needs. We commend the Virginia General Assembly for their efforts to make these important reforms to ensure the long-term sustainability of the Commonwealth’s health care delivery system.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Burke King". The signature is written in a cursive style with a prominent initial "C" and a long, sweeping tail.

C. Burke King