

CLIENT ALERT

FTC's Unabated Focus on Competition Impacts Health Care Reform and Makes Deals Risky...But Not Impossible

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A Surge in Enforcement Activity

The Affordable Care Act and health care reform have set in motion a broad array of changes. The health care exchanges and an expanded Medicaid program are bringing many new individuals into the health care system, creating potential access issues and questions regarding the provision of high quality and lower cost care. New payment models are being tested, from Accountable Care Organizations and bundled payments, to capitated payments and managed care. These changes are encouraging providers to find new ways to collaborate and integrate so that they can provide coordinated care within their communities.

Yet significant activity by the Federal Trade Commission (FTC) will continue to impact the health care industry and specifically how health care reform will evolve in the future. While the FTC actively investigates hospital and physician mergers, they have also indicated a desire to fully understand the shift towards integration in the health care marketplace that has only accelerated because of the Affordable Care Act.

On March 20-21, the FTC will hold a public workshop to study recent activities and trends that may affect competition in the health care industry. The workshop will explore current developments related to innovations in health care delivery, professional regulations, and price transparency for health care services, among other topics. The workshop is open to the public, and the FTC also seeks public comment to be considered as the Commission prepares for the workshop and a potential subsequent report or policy paper. If you and your company have been grappling with many of these challenging issues and have valuable experience and insight to share with the government, we encourage you to submit comments.

Beyond the workshop announcement, Edith Ramirez, Chairwoman of the FTC, recently re-emphasized that "ensuring vigorous competition" between health care providers is a top priority for her agency. This declaration comes on the heels of Ramirez trumpeting the FTC's "winning streak" on health care transactions, a streak that has only grown in the past year as FTC investigations into hospital mergers and acquisitions of provider groups continue against the backdrop of industry consolidation.

For example, in January, HCA and Ascension Health announced that they were calling off their transaction due to ongoing FTC review of the deal. HCA Midwest Health System is the Kansas City area's largest health care system, operating ten hospitals that control about twenty-two percent of the market. HCA Midwest planned to acquire two hospitals from Ascension Health in the area, increasing its market share to approximately twenty-eight percent. The proposed deal would have put HCA Midwest further ahead of the next-largest hospital group, which operates seven hospitals in the area and controls about sixteen percent of the market.

In calling off the transaction, HCA and Ascension Health pointed to the FTC's lack of regulatory approval for the deal, a familiar refrain in recent months. In January 2014 alone the FTC demonstrated its continued commitment to closely examine consolidation as the agency continued to open cases without regard for size or stage. For example, the agency forced the

retrospective unwinding of a hospital's \$25 million purchase of a provider group in Idaho, a transaction not large enough to be reportable under the Hart-Scott-Rodino Act. In addition, the FTC forced a large health system in Alabama and South Carolina to divest two hospitals as a prospective condition on its \$7.6 billion acquisition of a competing health system.

These cases illustrate the FTC's broad and significant impact on the health care system just as the industry looks to integration to achieve the goals of the Affordable Care Act. And as evidenced by the notice for the public workshop, it is clear that the FTC also recognizes its significant power to impact health care reform.

Making the Deal Work

The FTC's unwavering focus on the health care industry does not mean the end of acquisitions by health care entities. But with the enforcement landscape shifting while the Affordable Care Act continues to reshape the healthcare industry, firms should consider the following challenges and strategies going forward:

- The FTC will likely review *all* mergers and acquisitions in the health care industry, regardless of size, and may conduct retrospective reviews of recently completed transactions. No transaction is immune from the FTC's antitrust scrutiny, so early analysis of a transaction's competitive effects is of paramount importance.
- Parties to a transaction should promote the efficiencies and cost-savings of the proposed deal, *not* the market size or dominance of the combined entity. And the expected efficiencies produced by a transaction should be clearly articulated in advance with an explanation for why they can be achieved only through the specific deal. The FTC is focusing its efforts on transactions that it believes will give a combined entity the leverage to negotiate higher reimbursement rates from insurance companies and, ultimately, consumers. The parties must be able to demonstrate why the transaction promises to improve consumer health outcomes and reduce bottom line costs of quality care through achievable, merger-specific efficiencies.
- While parties focus on antitrust compliance, they must also grapple with a challenging and evolving regulatory environment to determine the proper ways to integrate. Parties that are entering into new financial relationships can trigger the fraud and abuse laws such as the Stark Law and the Anti-kickback statute. Licensing, accreditation, and credentialing laws at the state and federal level can also create significant barriers to integration. Finally, new payment models, including putting providers at risk for achieving quality and cost goals, may prove that parties have a higher level of clinical and financial integration, but at the same time, could expose entities to economic challenges for which they are not prepared.
- Creative solutions will be needed to ensure that participants in healthcare markets are able to achieve the goals of healthcare reform while they maintain compliance with the antitrust laws, the Stark Law, the Anti-kickback statute and other state and federal rules.

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