

## FTC reaffirms strong concerns regarding hospital consolidations

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In a March 13, 2014, Federal Trade Commission (FTC) blog post, the Bureau of Competition reaffirmed the FTC's strong concern about consolidation among hospitals that would leave patients with few competitive options for vital services. The blog post highlights three important "insights" derived from an FTC review of past hospital mergers that have shaped the FTC's current approach to hospital merger enforcement:

- Nonprofit hospitals respond to competitive forces much like for-profit hospitals and typically do not abstain from exercising market power gained from a merger.
- The methods used by the courts in prior cases to define the geographic market of the hospitals in question could lead to those markets being overly broad and less likely to identify what the FTC views as the anticompetitive effects from a proposed hospital merger.
- The hospital markets are complex and require specifically designed analytic tools, such as hospital merger simulation, to help assess whether a merger will increase the merged hospital's leverage with health plans and result in higher prices. The FTC has discounted the impact of earlier analytic tools as formalistic and not accurate.

In recent years, the FTC has challenged a completed hospital merger and three proposed hospital mergers, and was prepared to challenge three other hospital mergers but for the fact that the parties abandoned their plans. The blog post points out that, unlike mergers in many other industries, most hospital mergers cannot be fixed by spinning off certain services or facilities because most hospital mergers involve the acquisition of a single hospital facility. Thus, a merger involving the acquisition of a single hospital cannot be resolved by divesting part of the hospital and, therefore, it can be considered an "all or nothing" merger issue.

A recent contrasting example is the proposed consent agreement arising out of the prospective merger of two nationwide hospital systems, Community Health Systems (CHS) and Health Management Associates (HMA). The proposed settlement would require CHS to sell the HMA hospitals in Gadsden, Alabama, and Hartsville, South Carolina. The proposed divestitures of these two hospitals include all services and operations that are affiliated with the hospitals to be divested, including outpatient facilities. The required divestitures will provide the Commission-approved buyer with all it needs to compete immediately and effectively in each market, with the same scope of operations as HMA offered before the transaction.

The FTC's overarching view on hospital mergers is that "patients strongly prefer to receive basic hospital care as close to home as possible and stay within the area where they live or work." Based on this conclusion, the FTC asserts that it "will continue to work to preserve competition among hometown hospitals."

### The Takeaway

A proposed hospital merger involving nonprofit hospitals will receive the same type of antitrust review by an antitrust enforcement agency as would a proposed merger of for-profit hospitals. A proposed hospital merger that is likely to receive a review, even cursory, by the FTC or any other antitrust enforcement agency requires that the parties be prepared as early as possible to address any anticipated antitrust-related issues prior to the filing of the Hart-Scott-Rodino (HSR) pre-merger notification or prior to closing the transaction if no HSR is required. This will increase the opportunity to provide the best

responses to concerns raised during the antitrust review and will avoid being solely reactive in responding to the antitrust issues.

# Authors

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