

CLIENT ALERT

Federal Trade Commission Studies Competitive Impact of Physician Group and Healthcare Facility Mergers

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Earlier this year, the Federal Trade Commission (“FTC”) announced that it would conduct a retrospective study of the competitive effects of completed mergers of physician practice groups and healthcare facilities.¹ The FTC offered little detail about the expected contours of its study, apart from disclosing that it had already issued information requests to the six largest U.S. health insurers for data on reimbursement claims for medical services rendered by physician groups and healthcare facilities that merged between 2015 through 2020, across 15 states.²

The FTC recently shed more light on the scope of its study in an April 14, 2021 blog post on the FTC website.³ Specifically, the FTC disclosed that its retrospective review will:

- Examine how horizontal mergers (*i.e.*, combinations of competing physician practices, outpatient surgical centers, or imaging laboratories) have impacted *prices* for medical services and/or *non-price outcomes*, including patients’ healthcare outcomes;⁴

¹ *FTC to Study the Impact of Physician Group and Healthcare Facility Mergers*, FEDERAL TRADE COMMISSION (Jan. 14, 2021), [here](#).

² *Id.* The request notably excluded facilities in New York State and California.

³ Michael Vita, Deputy Director Research and Management, Bureau of Economics, *Physician Group and Healthcare Facility Merger Study*, FEDERAL TRADE COMMISSION (Apr. 14, 2021), [here](#).

⁴ *Id.*

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- Assess the competitive impact of vertical combinations, particularly hospital acquisitions of physician practice groups;⁵
- Exclude from consideration hospital mergers that have already been the subject of eight or more prior retrospective studies;⁶ and
- Generate a series of research papers to be released on a rolling basis over the course of what is expected to be a multi-year study period.⁷

Recipients of FTC requests for information or civil investigative demands should exercise care in reviewing the materials that they produce to the FTC. Although the FTC's stated purpose of issuing its retrospective demands is summarized above, the FTC is sensitive to the competitiveness of practices by firms in an industry.

The FTC's retrospective review is authorized by Section 6 of the FTC Act, which empowers the agency to "conduct wide-ranging studies that do not have a specific law enforcement purpose,"⁸ including by compelling study targets to produce information.⁹ While the FTC has exercised this authority to review the competitive impact of past mergers in a host of industries for over 35 years,¹⁰ this retrospective study is the outgrowth of an initiative launched by former FTC Chairman Joseph Simons in September 2020 to "revamp [the FTC's] merger retrospective program."¹¹

This initiative was in no small part focused on the healthcare industry, which has long been a primary subject of the FTC's enforcement efforts. In the lead-up to the launch of this initiative, both Mr. Simons and Commissioner (now acting Chair) Rebecca Kelly Slaughter emphasized the critical role that past retrospective studies have played in the agency's merger enforcement strategy in the healthcare sector.¹² Then-Chairman Simons noted that, in the wake of numerous FTC losses in challenges to hospital mergers, the findings from hospital retrospective studies were "critical in subsequent hospital

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 15 U.S.C. § 46(a); see also *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FEDERAL TRADE COMMISSION (Oct. 2019), [here](#).

⁹ Dissenting Statement of Commissioner Noah Joshua Phillips, *Social Media Service Providers Privacy 6(b) Matter No. P205402* (Dec. 14, 2020), [here](#).

¹⁰ *Overview of the Merger Retrospective Program in the Bureau of Economics*, FEDERAL TRADE COMMISSION, [here](#).

¹¹ *FTC's Bureau of Economics to Expand Merger Retrospective Program*, FEDERAL TRADE COMMISSION (Sept. 17, 2020), [here](#); see also *Overview of the Merger Retrospective Program in the Bureau of Economics*, FEDERAL TRADE COMMISSION, [here](#).

¹² Remarks of Commissioner Rebecca Kelly Slaughter, *Merger Retrospective Lessons from Mr. Rogers*, FEDERAL TRADE COMMISSION (Apr. 12, 2019), [here](#) (noting that hospital merger retrospectives "resulted in a new strategy for successfully challenging anticompetitive hospital mergers").

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merger challenges.”¹³ He further observed that, following those retrospective studies of consummated hospital mergers, “the FTC was able to obtain thirteen federal injunctions in hospital cases from 2008 to 2018, compared with only two from 1997 to 2007.”¹⁴

Against this backdrop, the FTC’s new retrospective review appears likewise calculated to bolster the vitality of the FTC’s merger enforcement efforts with respect to combinations of physician groups and healthcare facilities. The FTC might use insurance claims data to determine, among other things, whether particular mergers increased prices (in the form of higher insurance reimbursement rates to the merger parties post-merger) or resulted in adverse non-price outcomes, such as worsening patient outcomes, as potentially reflected in records of patient facility visits over time.

The FTC’s particular focus on physician group and healthcare facility mergers is consistent with the agency’s active enforcement in these areas in recent years. In just the last few months, for instance, the parties to the proposed merger of Atrium Health Navicent, Inc. and Houston Healthcare System, Inc. in Georgia abandoned the transaction after the FTC threatened to challenge it (March 2021)¹⁵ and the FTC sued to block Hackensack Meridian Health, Inc.’s proposed acquisition of Englewood Healthcare Foundation in New Jersey (December 2020).¹⁶ Physician practice and outpatient surgical center mergers have also drawn FTC scrutiny, albeit to a lesser extent than hospital mergers.¹⁷

This focus on healthcare practices and facilities has been paired with the FTC’s consistent focus on pharmaceutical mergers, which also appears to be a likely subject of retrospective reviews. In March 2021, in the context of the launch of a transatlantic working group to analyze the competitive effects of pharmaceutical mergers, FTC Acting Chair Slaughter stated that the FTC may soon review past pharmaceutical mergers to assess whether the agency “made obvious mistakes” in declining to challenge certain transactions.¹⁸

Given this background and that FTC retrospective reviews have tended to spur increased enforcement in the sectors under review, there is ample reason to expect that physician group and healthcare facility mergers will be met with more aggressive FTC enforcement in the future. Close monitoring of the FTC’s planned research papers based on its retrospective will be critical to understanding the likely trajectory of the FTC’s future enforcement actions in this sector.

¹³ Prepared Opening Remarks of Chairman Joseph J. Simons, *Hearings on Competition and Consumer Protection in the 21st Century Merger Retrospectives*, FEDERAL TRADE COMMISSION (Apr. 12, 2019), [here](#).

¹⁴ *Overview of the Merger Retrospective Program in the Bureau of Economics*, FEDERAL TRADE COMMISSION, [here](#).

¹⁵ *Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger*, FEDERAL TRADE COMMISSION (Mar. 3, 2021), [here](#).

¹⁶ *FTC Challenges Hackensack Meridian Health, Inc.’s Proposed Acquisition of Competitor Englewood Healthcare Foundation*, FEDERAL TRADE COMMISSION (Dec. 3, 2020), [here](#).

¹⁷ See, e.g., *In the Matter of H.I.G. Bayside Debt & LBO Fund and Crestview Partners*, Docket No. C-4494 (Dec. 22, 2014); *Saint Alphonsus Medical Ctr.–Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019).

¹⁸ Jens-Olrik Murach et al., *Increased Antitrust Scrutiny of Pharma Deals* (Mar. 19, 2021), [here](#).

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