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## Trump Administration Calls for Heightened Scrutiny of Competition in the Healthcare Industry

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The Department of Health and Human Services (the “Department”), in conjunction with the Treasury Department, the Federal Trade Commission, and the Department of Labor, recently issued a report<sup>1</sup> describing a number of concerns regarding competition in the healthcare industry and recommending certain reforms to address those concerns. The report, titled “Reforming America’s Healthcare System Through Choice and Competition” (the “Report”), identifies several issues, including:

### REDUCED COMPETITION DUE TO INCREASING CONCENTRATION

The Report points to potential anticompetitive effects of mergers by competing hospitals and physician practices, noting that the reduction in competition tends to result in higher prices for patients.<sup>2</sup> According to the Report, competition among hospitals and physician practices is typically highly localized and therefore the elimination of even one competitor could potentially result in a highly concentrated market.<sup>3</sup> The Report further notes that, in addition to higher prices for patients, consolidation may also allow health care providers to negotiate higher reimbursement rates from insurers, potentially leading to increased insurance costs for consumers.<sup>4</sup>

The Department has recommended further research into the impact of both horizontal and vertical mergers on competition and pricing, particularly as it pertains to the consolidation of physician practices.<sup>5</sup> Healthcare providers should be aware that this will likely continue to be an area of scrutiny for the antitrust agencies in the near future.

### STATE REGULATIONS AFFECTING COMPETITION

The Report also identifies several barriers to entry created by state regulations, which tend to limit physicians’ ability to provide certain types of care, operate in certain areas, or even enter the market at all.<sup>6</sup> In particular, the Report points to the restrictions imposed by state licensing,



reimbursement, and scope-of-practice regulations which, if overbroad, may reduce the availability and quality of the care patients receive.<sup>7</sup>

In addition, the Report addresses the potential anticompetitive effects of state “certificate-of-need” (“CON”) laws on healthcare providers and finds that CON laws may increase the cost of market entry and impose significant regulatory hurdles on providers seeking to enter certain markets.<sup>8</sup> The Report also examines the role of state “certificate-of-public-advantage” (“COPA”) laws in protecting otherwise anticompetitive agreements between healthcare providers from antitrust scrutiny under the state action doctrine, even if their overall result is to lessen competition.<sup>9</sup>

### LIMITS ON FTC JURISDICTION

The Report further recommends Congress amend the FTC Act to allow FTC review of potentially anticompetitive conduct by non-profit healthcare providers.<sup>10</sup> Although the FTC is empowered to evaluate mergers by non-profit healthcare providers under Section 7 of the Clayton Act, Section 5 of the FTC Act, the agency’s primary enforcement mechanism for challenging anticompetitive conduct, provides it with jurisdiction over “persons, partnerships, or corporations.”<sup>11</sup> Under the current language of the statute, a “corporation” includes only those entities “organized to carry on business for [their] own profit or that of [their] members.”<sup>12</sup> Although the DOJ already has the authority to investigate allegations of anticompetitive conduct, the FTC’s inability to do so under the FTC Act has resulted in an inefficient system, whereby the FTC must refer any anticompetitive conduct it uncovers to the DOJ for further investigation.

The FTC has already made moves to address concerns made in the Report - the FTC recently revised its approach to mergers involving non-profit healthcare providers under the Hart-Scott-Rodino Act to require premerger notification of transactions involving non-profit entities even where there is no change in the providers’ boards of directors.<sup>13</sup> Changes to the FTC Act will require Congressional action, but given the Administration’s focus on health care concentrations, it is possible such a change will have support in Congress.

### TAKEAWAYS

- The Report’s conclusions are not surprising. The Trump Administration has focused a great deal of attention on anticompetitive mergers, particularly in the healthcare field. As such, many antitrust practitioners anticipated the Report’s recommendations of heightened scrutiny of healthcare consolidations.
- The antitrust agencies’ concern over increased concentration extends beyond simple mergers and acquisitions. Providers should be cognizant of the potential antitrust concerns raised by joint ventures, affiliation agreements, joint operating companies, management agreements, and other forms of collaboration.



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<sup>1</sup> See REFORMING AMERICA’S HEALTHCARE SYSTEM THROUGH CHOICE & COMPETITION, U.S. DEP’T OF HEALTH & HUMAN SERVICES (2018). The report was commissioned in response to Executive Order 13813, wherein the Trump Administration directed the Department to “facilitate the development and operation of a health care system that provides high-quality care at affordable prices for the American people by promoting choice and competition.” *Id.* at 1.

<sup>2</sup> *Id.* at 20-21.

<sup>3</sup> *Id.* at 21.

<sup>4</sup> *Id.* at 22.

<sup>5</sup> *Id.* at 29.

<sup>6</sup> *Id.* at 30.

<sup>7</sup> *Id.* at 31-34.

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* at 57. The state action doctrine permits anticompetitive conduct where the state has clearly articulated its intention to displace competition in favor of the regulation and the state provides active supervision of the regulatory scheme. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

<sup>10</sup> REFORMING AMERICA’S HEALTHCARE SYSTEM THROUGH CHOICE & COMPETITION, *supra* note 1, at 59-61.

<sup>11</sup> 15 U.S.C. § 45(a)(2).

<sup>12</sup> 15 U.S.C. § 44.

<sup>13</sup> *Control no longer controlling for HSR reporting of not-for-profit combinations*, FTC (Oct. 26, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/10/control-no-longer-controlling-hsr-reporting-not-profit>.