UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Mergers IV Division

December 22, 2015

John J. Dreyzehner, MD, MPH
State of Tennessee Department of Health
5th Floor, Andrew Johnson Tower
710 James Robertson Parkway
Nashville, TN 37243

Re: Request for Staff Advisory Opinion

Dear Dr. Dreyzehner:

The Federal Trade Commission has received your request for a staff advisory opinion pursuant to Rules 1.1-1.4 of the Commission Rules of Practice.[1] As you indicated, Tennessee's Hospital Cooperation Act of 1993 authorizes the Tennessee Department of Health to review applications for a certificate of public advantage ("COPA") submitted by merging hospitals and to issue a COPA if the benefits from the merger outweigh the harm.[2] In the context of the recently amended COPA legislation, you ask that FTC staff issue an advisory opinion on "whether the sale of a merged entity operating pursuant to a COPA would trigger an antitrust review when the new owner is not a party to the cooperative agreement or operating with active state supervision pursuant to the COPA."[3] During a subsequent telephone conversation between staff from the Tennessee Department of Health, staff from the Tennessee Attorney General Office, and FTC staff on September 15, 2015, you provided further clarification regarding the information contained in your letter, as well as the information you are seeking in a staff advisory opinion.

Based on your letter, our subsequent telephone conversation, and other publicly available information, we understand that the COPA law was enacted to address the proposed merger between Mountain State Health Alliance ("MSHA") and Wellmont Health System ("Wellmont") and that, if the merger is consummated, the combined entity would become the dominant hospital system in its service area. We further understand that, to receive approval of their COPA application, these hospitals must demonstrate by clear and convincing

[1] Fed. Trade Comm'n Rules of Practice 1.1-1.4, 16 C.F.R. §§ 1.1-1.4.
[2] Tenn. Code Ann. §§ 68-11-1301 – 1309, 2015 Tenn. Pub. Act, ch. 464.
[3] Letter from John J. Dreyzehner to Donald S. Clark, Secretary, Fed. Trade Comm'n, Request for advisory opinion regarding the effect of the sale of a merged hospital entity operating pursuant to a certificate of public advantage (June 25, 2015).

evidence that the likely benefits of the merger outweigh the disadvantages likely to result from the displacement of competition.

During our September 15th conversation, you indicated that the parties assert as justifications for the proposed merger certain improvements in the quality of health care services, more research opportunities, and potential efficiencies. Moreover, as you indicated during our conversation and as described in your letter, "one of the stated reasons for the merger [is] to avoid the purchase of one or both entities by a hospital corporation or system headquartered outside of the region served," so that control of these hospitals and the potential economic benefits of the transaction remain local. In our conversation, you refined your request, asking for staff's views about whether, if the merged entity received a COPA and was subsequently sold to a corporation headquartered outside the region, that subsequent merger would trigger either (1) federal antitrust review of the proposed merger between the buyer and the combined MSHA-Wellmont entity, or (2) a reexamination under federal antitrust laws of the underlying, consummated MSHA-Wellmont transaction covered by the COPA.

Commission Rules of Practice 1.1(a)-(b) provide that the Commission or its staff will consider requests for advice, where practicable, for a course of action that the requesting party proposes to pursue. Under these Rules, hypothetical questions will not be considered and the "proposed course of action must be sufficiently developed for the Commission or its staff to conclude that it is an actual proposal rather than a mere possibility."[4] Because your request for an advisory opinion involves a course of action that is hypothetical in nature, staff is unable to provide an advisory opinion at this time. We, nonetheless, can provide some information concerning the FTC's review of mergers and framework for its analysis that may be of assistance.

To determine whether a merger is likely to substantially lessen competition in the first place, the FTC staff analyzes the transaction using the approach outlined in the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines ("Merger Guidelines").[5] Essentially, FTC staff analyzes the degree of competition that exists between merging hospitals and how the consolidation would likely impact the prices and quality of health care services for consumers. Staff would typically be concerned if a merger were likely to substantially increase the merged hospitals' ability to exercise market power and negotiate higher reimbursement rates during negotiations with payers, which often leads to higher premiums, deductibles, and other out-of-pocket expenses for consumers. We would also be concerned if a merger were likely to reduce the incentive to maintain or improve quality of health care services and the level of innovation in a competitive market.

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[4] *See* 16 C.F.R. §§ 1.1(a)-(b). *See also* Guidance From the Bureau of Competition on Requesting and Obtaining an Advisory Opinion, *available at* https://www.ftc.gov/sites/default/files/attachments/competition-advisory-opinions/advop-general.pdf.

[5] The Guidelines are available at: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

FTC staff most closely analyzes transactions in which the hospitals offer similar services in an area with a limited number of other providers of those services, given that such transactions raise the greatest likelihood of consumer harm. Consistent with our extensive experience as well as the relevant case law and the Merger Guidelines, there is a strong presumption that mergers resulting in a firm with a very high market share in a geographic area are likely to harm consumers.[6]

Additionally, when FTC staff reviews mergers, staff considers the parties' claims of the efficiencies and other benefits likely to result from the merger and has considerable experience evaluating such claims. Under the Merger Guidelines, the FTC credits efficiencies that are substantiated, non-speculative, and "merger specific" (*i.e.*, efficiencies that can only be achieved with the merger, rather than independently or through some alternate transaction that does not raise the same competitive concerns). Such "cognizable" efficiencies, which may include cost savings or quality improvements, are considered against the likely harm to consumers resulting from the merger. The greater the potential anticompetitive effects from a merger, the greater the cognizable efficiencies need to outweigh the harm from the merger.[7] Efficiencies almost never justify a merger to monopoly or near-monopoly.[8] Maintaining a hospital's nonprofit status or maintaining local control over hospital operations and revenues are unlikely to be cognizable efficiencies under the antitrust laws.

In general, the Commission has jurisdiction to review both proposed and consummated hospital mergers to determine if the transaction has the effect of substantially lessening competition. However, the FTC typically seeks to remedy problematic mergers and acquisitions before they are consummated.[9] Once two companies have combined through a merger, it often becomes difficult to unwind the integration of the merging parties' assets. Historically, the FTC has faced difficulties in obtaining effective remedial relief after assets have been combined by a merger, including in hospital and other health care provider

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[6] The FTC has successfully challenged hospital mergers where the merging hospitals would possess a high large market shares, creating a presumption that the merged firms would have enhanced market power. *See, e.g., FTC v. ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, *32, *54 (finding that ProMedica's post-acquisition market share was 58.3% in general acute care services and stating that, "the increases in ProMedica's market shares create a strong presumption of enhanced market power."); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1077-78 (2012) (finding that the merged hospital system would have had 59.4% of the general acute care market and concluding, "based on these market share calculations . . . , that the combined entity in this case would control an undue percentage share of the relevant market.").

[7] Horizontal Merger Guidelines § 10 ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. . . . Efficiencies almost never justify a merger to monopoly or near-monopoly.").

[8] Horizontal Merger Guidelines § 10.

[9] In merger challenges, the Commission prefers "structural remedies (*i.e.*, an injunction preventing consummation of a merger or a divestiture of assets) rather than "conduct remedies (*i.e.*, remedies that regulate the conduct of a merged firm).

mergers. For example, in its *Evanston* case,[10] despite finding that the transaction resulted in competitive harm, the Commission determined that unwinding the anticompetitive consummated hospital merger by requiring a divestiture of the acquired hospital would have involved significant risks, including to patient safety, so no divestiture was ordered. In *Phoebe Putney*, the FTC was unable to obtain a divestiture that would remedy the anticompetitive effects of the consummated merger to monopoly because Georgia's Certificate of Need laws effectively precluded it.[11] Tennessee also has Certificate of Need laws that could pose a similar obstacle to effective relief here should it be deemed necessary.

Finally, as FTC staff expressed at the public hearing conducted by the Tennessee Department of Health on September 24, 2015, we welcome the opportunity to share our expertise in connection with your review of COPA applications. If the Department of Health is able and willing to share information with us regarding the specific benefits and efficiencies claimed by parties submitting COPA applications, we are available to help assess the likelihood that they can be achieved and whether they may outweigh the competitive disadvantages.

Sincerely,

/s/ Alexis Gilman
Alexis Gilman
Assistant Director, Mergers IV Division
Bureau of Competition

[10] *See In re Evanston Northwestern Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 (F.T.C. Aug. 6, 2007).
[11] Statement of the Federal Trade Commission In the Matter of Phoebe Putney Health System, Inc. at 3 (March 31, 2015), *available at* www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf.