

FTC and DOJ to Host Second Public Workshop on Health Care Competition

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Last March, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) began a public workshop series entitled, "Examining Health Care Competition." On February 24 and 25, 2015, the FTC will physically host the second workshop in this series, co-hosted again by the Antitrust Division of the DOJ. Last year's workshop explored trends and innovation in the health care industry that may affect competition.¹ The upcoming workshop will study recent developments related to health care provider organization and payment models that may affect competition and consumer protection in the provision of health care services.

Since the first workshop, the FTC has secured several high-profile health care antitrust wins in the ProMedica² and St. Luke's³ cases, and has staked out in a number of speeches by FTC Commissioners and the head of the Bureau of Competition an aggressive enforcement position in which antitrust should not give way to other health care policies.⁴ While the DOJ has been less publicly activist, there has been no suggestion that their enforcement views will vary.

According to the notice issued on January 23, 2015 by the agencies, this second workshop is designed to examine changes in the way health care services and products are delivered and reimbursed — changes possibly accelerated by the Patient Protection and Affordable Care Act (ACA). The agencies' goal for the workshop is to identify and examine the potential competitive implications of strategies currently used by providers and payors seeking to reduce costs and improve quality. The FTC and DOJ seek input from public stakeholders in advance of and following the workshop. Public comments can be submitted prior to the workshop (by February 16, 2015), and in response to the workshop (by April 30, 2015). In particular, the agencies invite comments on the following:

- The kinds of changes occurring with respect to health care provider organization and payment models.
- The economic, quality enhancing, technological, regulatory, and legislative factors that may be influencing such changes.
- Additional empirical research that would be helpful in evaluating these topics.
- Early observations of accountable care organizations (ACOs).
- Alternatives to traditional fee-for-service payment models.
- Trends in provider consolidation.
- Provider network and benefit design.
- Early observations of health insurance exchanges.

The full text of the notice announcing the workshop, with additional detail on potential topics to be discussed and comments sought, is available [on the FTC's website](#). Prior to the upcoming workshop, the FTC and DOJ will post the agenda on their websites.

Industry stakeholders in the health care antitrust enforcement debate are likely to utilize the workshop to advocate a range of conflicting policy positions and empirical support. The agencies, particularly the FTC, seem comfortable with their aggressive enforcement position, and those who believe that a lighter enforcement touch is appropriate will need to move beyond rhetoric and a bow to the ACA's policy goals to have any chance at gaining traction with their arguments.

As we did with last year's workshop, Mintz Levin's Antitrust Practice will be following the workshop closely and will continue to provide reports and analysis.

Endnotes

¹ A summary of the first workshop in this series is available here: <http://www.mintz.com/newsletter/2014/Advisories/3823-0314-NAT-AFR/index.html>.

² *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014), (upholding an FTC decision condemning a hospital acquisition and ordering a full divestiture of the acquired assets), *petition for cert. filed*, (U.S. Dec. 22, 2014) (No. 14-762).

³ *St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys.*, 2014 WL 407446 (D. Idaho Jan. 24, 2014) (condemning a hospital's acquisition of a physician practice and ordering divestiture of the acquired assets), (9th Cir. argued Nov. 19, 2014) (No. 14-35173).

⁴ See, e.g., Julie Brill, Commissioner, Fed. Trade Comm'n, "Competition in Health Care Markets," Keynote Address at the 2014 Hal White Antitrust Conference (June 9, 2014); Deborah L. Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, "Antitrust Enforcement in Health Care: Proscription, Not Prescription," Remarks at the Fifth National Accountable Care Organization Summit (June 19, 2014).

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