

Blog Post

FTC Investigating the Competitive Effects of Certificates of Public Advantage

October 28, 2019

The Federal Trade Commission (FTC) has issued orders to five health insurers and two health systems requiring them to provide information that will assist the FTC in studying the competitive effects of certificates of public advantage (COPAs) with respect to prices, quality, access, and innovation in healthcare. The orders were sent on October 21 to Aetna, Anthem, Blue Cross Blue Shield of Tennessee, Cigna, United Healthcare, Ballad Health, and Cabell Huntington Hospital.

COPAs are state laws that allow healthcare providers to enter into cooperative arrangements that might otherwise raise competitive concerns, in circumstances where state regulators have determined that the likely benefits of the arrangement outweigh any potential competitive harm. When subject to a COPA, merging healthcare providers are exempt from federal antitrust scrutiny (typically by the FTC) pursuant to the “state action” doctrine.

For several years, the FTC has expressed concerns about whether COPAs are desirable and whether they achieve the states’ intended policy goals. Most recently, in 2017, the FTC opposed the use of a COPA that permitted the creation of Ballad Health, which was formed by the merger of two hospitals operating in Tennessee and Virginia – Wellmont Health System and Mountain States Health Alliance. In that

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transaction the merging parties agreed to a COPA with Tennessee and Virginia regulators that included rate regulation and commitments to improve quality, among other provisions. Notably, the FTC also opposed a COPA that West Virginia regulators granted to Cabell Huntington Hospital in 2016, and perhaps not surprisingly, Cabell Huntington Hospital, like Ballad Health, has received one of the FTC orders.

The action by the FTC follows a public workshop on COPAs (A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets), available [here](#), that the FTC held on June 18, 2019. There, the FTC heard from academics, health policy experts, healthcare industry stakeholders, and state regulators about the effects of COPAs on competition in healthcare markets. That workshop focused on three COPAs that were approved in the 1990s – including Benefis Health System in Montana, Palmetto Health in South Carolina, and Mission Health in North Carolina. As explained by the FTC, the information it receives from the insurers and providers that are the recipients of the recent orders will permit the FTC to conduct retrospective analyses of the Ballad Health and Cabell COPAs, and will serve as a resource for state governments who may be considering the use of COPAs.

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