


Cross-market hospital mergers under scrutiny as FTC collects data

 [modernhealthcare.com/mergers-acquisitions/cross-market-hospital-mergers-ftc-data](https://www.modernhealthcare.com/mergers-acquisitions/cross-market-hospital-mergers-ftc-data)

Alex Kacik

October 28, 2024

Federal and state regulators' push for more information on potential cross-market hospital mergers is setting up a showdown that could slow or potentially scuttle the increasingly common combinations.

Regulators are asking for more information from insurers and employers that work with organizations pursuing transactions between hospitals that are at least 50 miles apart, merger and acquisition advisers said. In many cases, the Federal Trade Commission has worked with state regulators to suss out the potential effects of cross-market hospital consolidation, the advisers added.

The information requests from the FTC, combined with new state laws bolstering oversight of healthcare deals, have delayed transaction closing dates. However, the agency has yet to formally intervene on such proposals.

“A challenge is not ready for prime time, but a test case will come at some point,” said Kenneth Vorrasi, an antitrust healthcare lawyer at law firm Faegre, Drinker Biddle & Reath.

Cross-market hospital combinations are increasingly common. More than half of the 1,500 hospitals targeted by health systems between 2010 and 2019 were in a different region than the acquirer, according to a 2022 study published in Health Affairs.

Providers typically haven't expected much antitrust opposition to acquisition proposals featuring minimal geographic overlap, and in some cases, health systems have turned to these deals after regulators rebuffed an in-market proposal.

North Carolina-based Advocate Health, for example, changed course after facing regulatory pushback for a proposal featuring overlapping service areas. Advocate Health has acquired two out-of-state systems since 2017, when it walked away from a proposed merger with NorthShore University Health System amid an FTC lawsuit to block the deal.

“Because of the FTC's success in challenging and blocking mergers and acquisitions of hospitals in markets where there is overlap, more have looked outside of their core markets including over state lines,” Vorrasi said.

The FTC hasn't scrutinized deal applications spanning broad geographies as closely as in-market transactions because patients typically don't view distant hospitals as substitutes, minimizing potential anticompetitive effects, antitrust experts said. But from the perspective

of large employers, cross-state hospitals may be substitutes.

Federal and state regulators' focus may be shifting as research on cross-market deals increases.

A growing number of studies suggest such systems may be able to leverage their market share in pricing negotiations with large employers and insurers.

These deals are getting more scrutiny because the FTC seems to believe its traditional, more narrow market definition doesn't capture all the potential effects of a proposed hospital merger, antitrust attorneys said. People are also traveling farther for care.

During the FTC's investigations of cross-market health system merger proposals, the agency has been asking for labor market data, such as employee and applicant wage and commuting patterns, as well as how far they typically travel for healthcare, advisers who have been involved in such deals said. Those inquiries are expected to become commonplace.

"The FTC is going to investigate labor markets in every case," said Lisl Dunlop, an antitrust healthcare attorney at law firm Axinn, Veltrop & Harkrider. "This puts a big burden on [organizations] that have to pull multiple years of employee data."

Both the Justice Department's and the FTC's updated merger guidelines and the FTC's revised premerger notification form include information requests on the labor market impacts of such deals. The updated guidelines and form also reference organizations that have made multiple acquisitions, which can apply to large health systems seeking scale across multiple geographies.

Regulators' probing indicates mergers spanning broad geographies will face more regulatory scrutiny, potentially spoiling consolidation plans, M&A experts said.

"Large multistate deals are getting more scrutiny than they ever have," said Alexis Gilman, an antitrust healthcare lawyer at law firm Crowell & Moring.

Health system leaders say cross-market scale allows the combined organization to cut costs by bundling purchases and other administrative functions. They say an expanded footprint, combined balance sheet and joint clinical expertise fuel technology and clinical research investments that will boost care and access.

However, many policy experts are skeptical of those claims and argue it's difficult to cut costs and improve operations across far-flung organizations. In addition, those types of mergers may decrease competition, health economists say.

The FTC maintains a strong track record in the relatively rare instances where the commission sues to block a hospital merger. Even if the agency's first potential lawsuit to block a cross-market proposal isn't successful, it will still send a clear message to the industry, antitrust experts said.

"It seems to me the current objective is really about making the news [and] changing public opinion," said Ge Bai, an accounting and health policy professor at Johns Hopkins University. "The FTC has a heavy hammer in their hand. ... They make it look like big is bad."

States aren't waiting for the FTC to regulate cross-market mergers.

More than a dozen states over the last two years have implemented merger notification laws, some of which authorize state attorneys general to conditionally approve or veto certain transactions.

In May, Minnesota implemented a law stipulating University of Minnesota healthcare facilities may not be controlled or owned by a for-profit entity or an out-of-state entity unless the attorney general determines it is in the public interest.

That law contributed to Sanford Health's and Fairview Health Services' decision to nix a merger proposal that would've formed a combined system based in Sioux Falls, South Dakota, where Sanford calls home. State policymakers were concerned that Sanford would cut services in the Minneapolis area, where Fairview is based.

New Mexico implemented a law in March requiring 120 days notice for healthcare transactions, giving state officials authority to approve transactions, approve them with conditions or deny them.

"States don't think it is the best policy to see and wait if the federal government steps in," said Brandon Bigelow, an antitrust lawyer at law firm Seyfarth. "More states are adopting these merger notification laws, and I anticipate that trend will continue."

Caroline Hudson contributed.