

Is the Return of Physician-Owned Hospitals Imminent?

Recent congressional actions and a white paper authored by officials from the Department of Justice (DOJ), Federal Trade Commission (FTC), and the American Medical Association (AMA) are pushing for the removal of barriers for physician-owned hospitals (POHs), potentially paving a path by which these controversial facilities can be established and expanded going forward.

Approximately 250 hospitals across the U.S. are completely or partially physician owned (comprising less than 5% of all hospitals).¹ These POHs can offer a variety of services, from general care to specialty services such as cardiovascular or orthopedic care, known as “focused factories.” Over the past several decades, healthcare providers and policymakers have claimed that POHs have a negative impact on the healthcare industry, arguing that: (1) POHs “cherry-pick” the most profitable patients; (2) the quality of care provided at POHs is substandard; and, (3) conflicts of interest exist due to the financial incentive for physician owners to refer patients to their POHs.² Such concerns have led to policies restricting the purview of POHs in their communities, such as limiting the application of POH exceptions in the Stark Law and the Anti-Kickback Statute, and most recently, the Patient Protection and Affordable Care Act’s (ACA’s) prohibition on new or expanded POHs.³

However, the negative outlook on POHs seems to have softened in recent years, as studies have been published challenging the claims asserted above,⁴ and the government has turned its focus to promoting competition in the healthcare sector. This focus has manifested through a number of strategic moves in the healthcare antitrust space over the past couple of years. As discussed in other Health Capital Topics articles:

- The Biden Administration has issued numerous executive orders to promote competition, particularly in the healthcare industry;⁵
- The FTC is currently reworking its merger guidelines, which are anticipated to result in stricter oversight;⁶
- Emboldened FTC scrutiny of hospital mergers has resulted in a number of scrapped hospital deals over the past year or more;⁷
- The FTC published a policy paper and fact sheet asserting that the use of Certificates of Public Advantage laws (COPAs) by states in regulating healthcare mergers can negatively impact healthcare costs, quality of care, and hospital staff wages;⁸ and

- The FTC published a proposed rule that would ban employers from imposing non-competes on their employees.⁹

The report, a draft of which was released on February 5, 2023 and has not been peer reviewed,¹⁰ seeks to maximize the government’s increasing focus on healthcare competition by offering “a competition policy perspective that focuses on restrictions on market competition created by the recent ban on POH growth and expansion.”¹¹ Specifically, the authors assert that the entry of more POHs in the healthcare market would promote:

- “Care delivery innovation and the development of specialized care models – Physicians are well-positioned to innovate in care delivery, redesigning care around a specific area of medicine or process...
- Workforce recruiting and retention – Giving physicians an ownership stake, akin to employee stock ownership plan models, can improve recruiting and retention
- Combatting monopsony power in labor markets – POHs present a counterweight to rising physician corporate employment and hospital monopsony power in labor markets, leading to increased competition in markets for physician services
- Increased patient choices for medical services – An increased number of community hospitals in addition to the development of specialty hospitals would increase competition, driving down prices and raising quality through price and non-price competition
- Increased competition in hospital service markets – Increased price, quality, and innovation for hospital services serving patients and for payors constructing networks including hospital services.”¹²

Citing the above, as well as “decades of research demonstrating that competition results in lower costs, improved quality, and greater innovation,” the report concludes by urging Congress to repeal the ban on POHs.¹³

On February 21, 2023, Senators Bill Cassidy (R-La.) and James Lankford (R-Okla.), both of whom are physicians, introduced the *Patient Access to Higher Quality Health Care Act* (cosigned by ten additional senators), to rescind the ACA’s ban on the creation and expansion of POHs.¹⁴ A similar bill is expected to be introduced in the House of Representatives.¹⁵ Senators Cassidy and Lankford stated that “[l]ifting this ban will increase competition among hospitals, decrease costs, and expand access to quality care for more Americans, especially those with Medicare and Medicaid.”¹⁶

Physician-Led Healthcare for America (formerly known as Physician Hospitals of America), a trade association for physician-owned hospitals, applauded the introduction of the bill, stating that “[n]ow more than ever, we need to introduce competition into our healthcare market in order to help reverse the dramatic cost escalations and hospital bed insufficiencies being exacerbated by our health system rapidly consolidating into monopsonies.”¹⁷ Similarly, the American Medical

Association (AMA) underlined the need for such a bill: “Physician-led hospitals meet community needs by focusing on the most important relationship in health care—the patient-physician relationship. Yet, the combination of current law and hospital consolidation is making these success stories rare....After witnessing hospital closures—especially in rural areas—patients must wonder what Congress is doing about it.”¹⁸ Conversely, the American Hospital Association (AHA) expressed its opposition to the bill, asserting that “Congress should maintain current law; preserve the ban on physician self-referrals to new physician-owned hospitals; and retain restrictions on the growth of existing physician-owned hospitals.”¹⁹

Whether these moves by Congress and DOJ and FTC officials are sufficient to result in a reversal of laws that are over a decade old remains to be seen. But if the ban on POHs is ultimately repealed, it could be a paradigm change in the U.S. healthcare delivery system.

1 “Physician-Led Hospitals: The Patient-Physician Relationship” Physician-Led Healthcare for America, <https://physiciansled.com/physician-owned-hospitals/> (Accessed 3/22/23); “Cassidy, Lankford, Colleagues Push for Greater Health Care Access for Louisianans, the Nation” Bill Cassidy, M.D., United States Senator for Louisiana, February 22, 2023, <https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-lankford-colleagues-push-for-greater-health-care-access-for-louisianans-the-nation> (Accessed 3/22/23).

2 “Access, Quality, and Costs of Care at Physician Owned Hospitals in the United States: Observational Study” By Daniel M. Blumenthal, et al., *British Medical Journal*, Vol. 351 (September 2, 2015), <https://www.bmj.com/content/bmj/351/bmj.h4466.full.pdf> (Accessed 3/22/23), p. 1.

3 “Physician-Owned Hospitals” Centers for Medicare & Medicaid Services, https://www.cms.gov/medicare/fraud-and-abuse/physicianselfreferral/physician_owned_hospitals#:~:text=Section%206001%20of%20the%20Affordable.prohibited%20from%20expanding%20facility%20capacity. (Accessed 3/22/23).

4 See, e.g., “Cost and Quality of Care in Physician-Owned Hospitals: A Systemic Review” By Ted Cho et al., Special Study, Mercatus Center, George Washington University, available at: <https://www.mercatus.org/system/files/miller-cost-and-quality-of-care-in-poh-special-study-v1a.pdf> (Accessed 3/22/23), p. 7-12.

5 “Biden Administration to Overhaul Vertical Merger Guidelines” Health Capital Topics, Vol. 15, Issue 4 (April 2022), https://www.healthcapital.com/hcc/newsletter/04_22/HTML/INTEGRATION/convert_vertical-integration-topics.php (Accessed 3/22/23).

6 *Ibid.*

7 “FTC Scrutiny Results in Several Scrapped Hospital Deals” Health Capital Topics, Vol. 15, Issue 6 (June 2022), https://www.healthcapital.com/hcc/newsletter/06_22/HTML/FTC/convert_ftc-health-capital-topics.php (Accessed 3/22/23).

8 *Ibid.*

9 “FTC Proposes Banning Non-Compete Clauses” Health Capital Topics, Vol. 16, Issue 1 (January 2023), https://www.healthcapital.com/hcc/newsletter/01_23/HTML/NO

NCOMPETE/convert_noncompete-proposed-rule-topics-article.php (Accessed 3/22/23).

10 The paper also clarified that the DOJ and FTC officials that co-authored the paper did not represent the views of their respective agencies.

11 “Hospital Competition and Restrictions on Physician-Owned Hospitals” By Brian J. Miller, Jesse Ehrenfeld, Michael Smith, and Matthew Mandelberg,, February 5, 2023 Draft, p. 2.

12 Monopsony is defined as a market situation in which there is only one buyer.
“Hospital Competition and Restrictions on Physician-Owned Hospitals” By Brian J. Miller, Jesse Ehrenfeld, Michael Smith, and Matthew Mandelberg, American Enterprise Institute, February 14, 2023, <https://www.aei.org/research-products/report/hospital-competition-and-restrictions-on-physician-owned-hospitals/> (Accessed 3/22/23).

13 Brian J. Miller, Jesse Ehrenfeld, Michael Smith, and Matthew Mandelberg,, February 5, 2023 Draft, p. 57-58.

14 “Lankford, Colleagues Push for Greater Health Care Access for Oklahomans, the Nation” James Lankford, United States Senator for Oklahoma, February 21, 2023, <https://www.lankford.senate.gov/news/press-releases/lankford-colleagues-push-for-greater-health-care-access-for-oklahomans-the-nation-> (Accessed 3/22/23).

15 “Cassidy, Lankford, Colleagues Push for Greater Health Care Access for Louisianans, the Nation” Bill Cassidy, M.D., United States Senator for Louisiana, February 22, 2023, <https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-lankford-colleagues-push-for-greater-health-care-access-for-louisianans-the-nation> (Accessed 3/22/23).

16 *Ibid.*

17 Lankford, United States Senator for Oklahoma, February 21, 2023.

18 *Ibid.*

19 “Fact Sheet: Physician Self-referral to Physician-owned Hospitals” American Hospital Association, February 2023, <https://www.aha.org/system/files/media/file/2023/02/Fact-Sheet-Physician-Self-Referral-to-Physician-owned-Hospitals.pdf> (Accessed 3/22/23).



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