

FTC Discourages Certificates of Public Advantage Laws

On August 15, 2022, the Federal Trade Commission (FTC) published a policy paper and fact sheet regarding the use of Certificates of Public Advantage laws (COPAs) by states in regulating healthcare mergers. Specifically, the FTC asserts that COPAs can negatively impact healthcare costs, quality of care, and hospital staff wages.¹ This Health Capital Topics article will discuss the policy paper and how this publication appears to fit in with the FTC’s recent moves to increase competition in healthcare.

Description of COPAs

The FTC defines COPAs as “regulatory regimes adopted by state governments intended to displace competition among healthcare providers, and immunize mergers and collaborations from antitrust scrutiny.”² States will often use COPAs to permit certain hospital mergers to occur despite antitrust concerns, assuming that their regulatory oversight will mitigate any anticompetitive effects while allowing the hospital to attain certain efficiencies.³

COPAs were signed into law beginning in the 1990s. While numerous states have COPA legislation on the books, nine of those states have approved hospital mergers pursuant to a COPA.⁴ Other states (including those who have previously put COPAs into use) have repealed COPA legislation; in fact, “[a]lmost all of the COPAs established prior to 2015 have expired or were repealed.”⁵ However, an unfortunate byproduct of those legislative repeals, according to the FTC, is that the “state regulatory oversight of the hospital systems that were allowed to merge under COPAs” was also eliminated.⁶

Description of FTC Policy Paper

The FTC operates as “an independent, bipartisan agency with a dual mission of promoting competition and protecting consumers.”⁷ Part of its work involves (along with the Department of Justice) challenging mergers and acquisitions, across all industries, that are “likely to substantially lessen competition and harm consumers.”⁸

FTC began a “COPA Assessment Project” in 2017 to “assess the impact of COPAs on prices, quality, access, and innovation for health care services.”⁹ As part of that project, the agency held a public workshop wherein staff sought public comment on a number of issues, including:

- (1) The effects of COPAs in terms of price, cost, and quality of healthcare services; access to healthcare services; and innovations in healthcare delivery models, as well the measurement of these effects;

- (2) The amount of time, as well as the commitment of resources and expertise, required to implement and monitor the effectiveness of COPAs;
- (3) The long-term viability of COPAs and likelihood that states will oversee COPAs in perpetuity;
- (4) The impact to healthcare markets following the expiration or repeal of COPAs, when the state is no longer monitoring the behavior of the healthcare providers;
- (5) The public reaction to COPAs, and whether that is incorporated into state oversight; and
- (6) Whether healthcare services competition is more or less effective than regulation in lowering prices, costs, and expenditures; improving quality and access; promoting efficient resource allocation; and fostering innovation in delivery models.¹⁰

Further, as part of the Assessment Project, the FTC conducted a number of case studies on both recently-approved COPAs and the effect of rescinded COPAs. Summaries of some of these studies were included in the policy paper that the FTC published on August 15th, which paper appears to be the culmination of the agency’s 5-year assessment project. In general, the agency found that COPAs “are often unsuccessful in mitigating merger-related price and quality harms” and when COPAs are rescinded, “the risk of price and quality harms increases significantly because of the absence either of the preexisting competition or regulation.”¹¹ More specifically, the FTC listed five “reasons to be skeptical” of COPAs:

- (1) “COPAs exacerbate the widespread problem of hospital consolidation,” as studies have identified several harms that can arise from hospital consolidation;
- (2) “COPAs can reduce hospital employee wage growth,” when fewer hospitals compete for workers;
- (3) “COPA monitoring and compliance are difficult,” as effective oversight requires the state to have significant expertise and resources;
- (4) “COPAs are susceptible to regulatory evasion,” as COPA regulation is not sufficiently comprehensive to address all ways in which hospitals exercise market power; and

- (5) “COPAs are only temporary,” because they are eventually repealed, revoked, or terminated.¹²

The policy paper also addressed the “flawed” arguments that hospitals typically make in favor of COPAs. First, the FTC cited research findings that hospital mergers often do not result in cost savings and efficiencies, in contrast to hospital claims.¹³ Second, the agency dismissed assertions that hospitals must merge to ensure financial sustainability and achieve healthcare reform objectives, stating that:

“[i]n each of the last four hospital mergers the FTC investigated that received a COPA, and in our experience more broadly, hospitals seeking COPAs have had adequate financial resources to continue operating independently and to maintain quality and access to healthcare services...Indeed, if a hospital is truly failing financially and the proposed merger is the only way for it to remain viable, the FTC is unlikely to challenge such a merger and the hospital does not need COPA protection against antitrust enforcement.”¹⁴

Third, hospitals argue that proposed mergers would “create jobs and ensure local access to healthcare facilities and services”; in contrast, the FTC’s experience has been that hospitals tend to consolidate facilities and jobs, and eliminate services, in order to achieve post-transaction cost savings.¹⁵ Fourth, although hospitals assert that a merger would result in a larger combined patient base, enabling them to improve population health efforts and facilitate value-based payment models, the FTC cites empirical research finding the opposite, and

adds that value-based payment models are already occurring and, in some cases, are being mandated by the Centers for Medicare & Medicaid Services (CMS).¹⁶ Fifth, in response to hospital claims that mergers eliminate unnecessary and duplicative costs, the FTC points to research findings that “[m]any hospital mergers do not result in significant cost savings,” and in fact, other studies have found that hospital competition leads to improved health outcomes.¹⁷

In sum, the FTC recommends that states repeal existing COPA laws, so long as an active COPA is not in place.¹⁸ The FTC cites extensive evidence indicating that “[i]n the long run, hospital mergers shielded with COPAs often lead to higher prices and reduced quality from unconstrained provider market power,”¹⁹ in its appeal to state lawmakers to “avoid using COPAs to shield otherwise anticompetitive hospital mergers.”²⁰

Part of Bigger FTC Strategy?

The FTC has made a number of different 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;²¹ the FTC is currently reworking its merger guidelines, which are anticipated to result in stricter oversight;²² and emboldened FTC scrutiny of hospital mergers has resulted in a number of scrapped hospital deals over the past year.²³ It seems that the FTC’s COPA policy paper is yet another indication of the administration’s focus on enhancing competition in the healthcare industry.

1 “FTC Policy Perspectives on Certificates of Public Advantage” Staff Policy Paper, Federal Trade Commission, August 15, 2022, available at: https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf (Accessed 8/24/22).

2 “A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets” Federal Trade Commission, <https://www.ftc.gov/news-events/events/2019/06/health-check-copas-assessing-impact-certificates-public-advantage-healthcare-markets> (Accessed 8/24/22).

3 *Ibid.*

4 Those states are Maine, Minnesota, Montana, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

5 Staff Policy Paper, Federal Trade Commission, August 15, 2022, p. 7.

6 *Ibid.*

7 *Ibid.*, p. 6.

8 *Ibid.*

9 *Ibid.*, p. 3; “FTC Staff Seeks Empirical Research and Public Comments Regarding Impact of Certificates of Public Advantage” Federal Trade Commission, November 1, 2017, <https://www.ftc.gov/news-events/news/press-releases/2017/11/ftc-staff-seeks-empirical-research-public-comments-regarding-impact-certificates-public-advantage> (Accessed 8/24/22).

10 Federal Trade Commission, June 18, 2019.

11 Staff Policy Paper, Federal Trade Commission, August 15, 2022, p. 7.

12 “Key COPA Facts” Federal Trade Commission, https://www.ftc.gov/system/files/ftc_gov/pdf/Key_COPA_Facts.pdf (Accessed 8/24/22).

13 Staff Policy Paper, Federal Trade Commission, August 15, 2022, p. 4.

14 *Ibid.*, p. 5.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, p. 7.

19 *Ibid.*, p. 12.

20 *Ibid.*

21 “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 8/24/22).

22 *Ibid.*

23 “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 8/24/22).



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