The American Antitrust Institute

June 26, 2014

BY HAND

Honorable Christine Roach
Justice of the Superior Court
Suffolk Superior Court, Room 1017
Three Pemberton Square
Boston, MA 02108

Re: Commonwealth of Massachusetts v. Partners Healthcare System, Inc., South Shore Health and Educational Corp., and Hallmark Health Corp., Superior Court Civil Action No. 14-2033 BLS (June 24, 2014)

Dear Judge Roach:

The American Antitrust Institute (AAI) urges the Court to adopt a procedure for meaningful public comment on the proposed settlement in the above-referenced matter. As a national public interest group that seeks to promote competition and protect consumers,[1] AAI is concerned that the settlement does not adequately resolve the competitive problems resulting from the hospital acquisitions at issue.

On Tuesday, June 24, 2014, Attorney General Coakley filed a complaint and proposed settlement that purports to remedy the anticompetitive acquisitions of South Shore Health and Educational Corp. and Hallmark Health Corporation by Partners Healthcare System, Inc. We understand that the Court will hold a hearing on Monday, June 30, 2014, on the Joint Motion for Entry of Final Judgment By Consent. We request that the hearing *not* address the merits of the Joint Motion, but rather establish a procedure for resolving it that allows consumers, third-party payers, competitors, and other stakeholders to have input in the process.

Attorney General Coakley's complaint and other filings make clear that the acquisitions are anticompetitive and illegal and would raise prices. Implicit in the loss of competition between Partners and the acquired hospitals is also a likelihood of reduced quality and accessibility of healthcare services for consumers in the Commonwealth. We are concerned that the settlement does nothing to address non-price anticompetitive effects of the acquisitions, and that its attempt to remedy the likely anticompetitive price effects through a complex regulatory approach will be harmful to the public interest.

[1] The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org.

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It is well settled under antitrust law that the remedy for an unlawful merger should fully restore competition. *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and to 'restore competition.'") (citation omitted); U.S. Dep't of Justice, Antitrust Div. Policy Guide to Merger Remedies at 1 (June 2011) ("[A] successful merger remedy must effectively preserve competition in the relevant market."), http://www.justice.gov/atr/public/guidelines/272350.pdf. The typical and favored resolution of an anticompetitive merger is to block the merger or require divestitures of other business units to replace the lost competition.[2] The courts and antitrust enforcement officials have been clear that "conduct," or behavioral, remedies are disfavored because they present often-insuperable monitoring and oversight challenges, among other reasons.[3]

Given the opportunity, AAI will seek to elaborate on our concerns by filing comments—as is the right of any stakeholder in a settlement of a *federal* merger case—but we plainly cannot do so within the super-expedited framework proposed by the Attorney General. Indeed, in light of the length and complexity of the proposed settlement, and the fact that the details only became public on Tuesday, it would be virtually impossible for any stakeholder to comment intelligently by Monday. And there is no apparent reason for undue haste.

We believe that a full public process, with the opportunity for meaningful public comment, is important in determining whether or not the proposed settlement is in the public interest. Accordingly, we recommend that the Court adopt a process akin to that used under the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b) (h) ("Tunney Act"), to which the Attorney General referred in her filing and which Atrius Health Inc., et al. are proposing.

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[2] For recent examples of such remedies in hospital merger challenges, see *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (enjoining merger of two hospitals whose combination would lessen competition for general acute-care inpatient services and primary care services); *FTC v. St. Luke's Health System, Ltd.*, No. 13-cv-00116, Findings of Fact and Conclusions of Law at 49 (D. Idaho, Jan. 24, 2014), http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf (ordering divestiture as remedy for merger of hospital with physician practice and rejecting separate-contracting remedy); *ProMedica Health System, Inc. v. FTC*, No. 12-3583, 2014 U.S. App. LEXIS 7500, *36 (6th Cir. Apr. 22, 2014) (rejecting conduct remedy for unlawful merger "because there are usually greater long term costs associated with monitoring the efficacy of a conduct remedy than with imposing a structural solution" (internal quotation marks omitted)).

[3] *See* John Kwoka & Diana Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement* (Nov. 2011) (explaining why behavioral remedies are typically unsuccessful), http://www.antitrustinstitute.org/content/aai-releases-white-paper-behavioral-merger-remedies-evaluation-and-implications-antitrust-en; Deborah L. Feinstein, Director, Federal Trade Commission Bureau of Competition, Antitrust Enforcement in Health Care: Proscription, not Prescription, Remarks at Fifth National Accountable Care Organization Summit (June 19, 2014) (criticizing use of conduct remedies in health care mergers), http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

Specifically we request that the Court:

1) Provide for a comment period for the public to file comments with the Attorney General;

2) Provide the opportunity for the Attorney General to respond to any filed public comments and thereafter to file the comments and response with the Court;

3) Establish a process to permit third parties to intervene or file amicus briefs; and

4) Set a date for a hearing in which interveners or amici can present their views on whether the proposed settlement is in the public interest.

Thank you for your consideration.

Respectfully submitted,

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