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SPECIAL FOCUS: ANTITRUST

Overview: Provider Mergers in Response to Health Care Reform and Changing Market Dynamics

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In this edition of Health Law Alert, Ober|Kaler's [Antitrust Group](#) presents several [articles](#) addressing the recent wave of hospital and physician mergers, and the evaluation and treatment of those mergers by the Federal Trade Commission (FTC), U.S. Department of Justice, Antitrust Division (DOJ), and state attorneys general (collectively, the Agencies) in several recent investigations and litigated challenges resulting in published decisions or consent decrees.

Merger activity between hospitals, health systems, and physician groups has been on the rise in the last few years. In 2011, there were 92 transactions involving 212 hospitals, and in 2009 and 2010 there were 85 and 89 mergers, respectively. In addition to hospital-merger activity, physician groups have been increasingly affiliating with hospitals, whether by full merger resulting in hospital employment or less than full integration, such as joint ventures. For example, in the cardiology specialty, a consulting firm, MedAxiom, recently surveyed 144 cardiologist practice groups, and of those, 38.2 percent were fully integrated with hospitals by the fall of 2011, up from just 14.3 percent in the spring of 2010. What is driving the recent increase in hospital and physician-group merger and affiliation activity? This consolidation trend is caused by three interrelated factors: (1) increased access to capital for some large health systems following the recession and the corresponding weak financial condition of smaller hospitals; (2) across-the-board reductions in Medicare reimbursement rates (primarily to physicians); and, most significantly, (3) systemic changes in the country's health care structure, primarily (but not entirely) resulting from the Affordable Care Act. Patient Protection and

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Affordable Care Act, Pub. Law 111-148, 124 Stat. 119 (2010), and Health Care and Education Reconciliation Act of 2010, Pub. Law. 111-152, 124 Stat. 1029 (2010).

Contemporaneously, the Agencies have been vigilantly policing hospital mergers, hospital acquisitions of physician groups, and physician practice group mergers. It does not appear from the Agencies' recent enforcement record that they are persuaded by arguments asserted by merging providers that meeting the demands of health care reform or these other merger drivers should be considered as a defense in the Agencies' challenges to hospital or physician group mergers. Instead, the Agencies have adhered to established merger analysis, as discussed in "[Recent Enforcement Actions: Hospital Mergers](#)" and "[Recent Enforcement Actions: Physician Group Mergers](#)." Merging providers, however, can reduce the risk of an Agency challenge to their transaction by taking proactive steps early in the merger planning process and certainly before any Agency investigation is commenced, rather than simply reacting to the Agency investigate on after the fact. The Agency enforcement actions described in the following articles provide some insight for merging hospitals and physicians to navigate the current enforcement environment.