

The Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act

THE ISSUE

Hospitals are reshaping the health care landscape by striving to become even more integrated, aligned, efficient and accessible to the community. Both public and private forces are fueling the drive toward greater integration and alignment. The need to become more efficient and obtain access to capital to meet these challenges is leading to more integration among hospitals, physicians and other providers.

It is important to standardize the merger review process between the two federal antitrust agencies: The Department of Justice's Antitrust Division (DOJ) and the

Federal Trade Commission (FTC). FTC has frequently used its own internal administrative process to challenge a hospital transaction, an option not available to DOJ, which increases the time and expense of defending a transaction and the likelihood of an outcome that favors the agency.

The Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2015 (H.R. 2745) seeks to eliminate the FTC's ability to challenge a transaction without going to court and to require the FTC to meet the same preliminary injunction standards as the DOJ.

AHA VIEW

Congress should act to remove a regulatory roadblock to hospital realignment. Hospital integration and realignment is essential if the field is to be successful in its drive to build an efficient and effective continuum of care that delivers care to communities in innovative ways and in new, more convenient settings. Both antitrust agencies should be required to prove their case before a neutral judge in the federal courts and not just internal proceedings in which the agency has a decided advantage. The SMARTER Act (H.R. 2745), sponsored by Rep. Blake Farenthold (R-TX), would help rebalance the process to assure fairness—the bill passed the House on March 23, 2016, and has been introduced by Sen. Mike Lee (R-UT) as S. 2102 in the Senate.

WHY?

- **Both public and private forces are fueling the drive toward greater integration and alignment.** For example, there are significant financial penalties levied on hospitals that are unable to coordinate care and uncertain rewards for hospitals that accept financial risk to keep their communities healthy. And, there are new competitors and technologies to which hospitals must adapt if they are to remain viable.
- **The SMARTER Act's provisions are the product of recommendations by the Antitrust Modernization Commission, a 12-member group appointed by the president and Congress to study ways to modernize antitrust laws and policies. The Commission recommended:**
 1. The FTC should be prohibited from pursuing administrative litigation for transactions reported to the agency.
 2. The same legal standard should apply to both federal antitrust agencies when they seek a preliminary injunction in federal court to challenge a merger. The Antitrust Division typically must show a reasonable probability that it will win the case. The FTC has to only make a showing that blocking the merger would be in the "public interest" with some consideration of its likelihood of success.
- **FTC has frequently used its own internal administrative process to challenge a hospital transaction.** Specifically, while the DOJ litigates its merger cases entirely in federal court before an impartial judge, the FTC has used the difference in authority between the two federal antitrust agencies to force hospitals to defend a transaction before the agency, and, in at least one case, simultaneously before the agency and the federal courts. This unfair advantage should not be permitted.