

**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS
TO AID PUBLIC COMMENT
*In the Matter of Carilion Clinic, Docket No. 9338***

I. INTRODUCTION

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Carilion Clinic (“Carilion”). The purpose of the proposed Consent Agreement is to remedy the competitive harm resulting from Carilion’s acquisition of two independent outpatient centers, Odyssey IV, L.L.C. d/b/a The Center for Advanced Imaging (“CAI”), and The Center for Surgical Excellence, L.L.C. (“CSE”). Under the terms of the proposed Consent Agreement, Carilion is required to divest both acquired centers, together with related assets sufficient to ensure that the buyer(s) of the divested centers will replace fully the competition eliminated by the acquisition.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement or make it final.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement; it is not intended to constitute an official interpretation of the Consent Agreement or modify its terms in any way.

II. BACKGROUND

Carilion is the largest provider of healthcare services in the Roanoke, Virginia area, controlling nearly 80 percent of the hospital beds in the Roanoke area. On August 28, 2008, Carilion acquired CAI and CSE, the only two independent (non-hospital-owned) providers of advanced outpatient imaging and outpatient surgical services in the Roanoke area. Advanced outpatient imaging services are a cluster of imaging services, including Magnetic Resonance Imaging (“MRI”) and Computerized Tomographic Imaging (“CT”) scanning, used to obtain images of the internal anatomy. Outpatient surgical services are surgical procedures, such as interventional spine surgeries or vascular access surgeries, that do not require an overnight stay at a hospital.

Prior to the acquisition, CAI and CSE were direct competitors to Carilion for these services in the Roanoke area, competing on price as well as non-price terms. Notably, the freestanding centers’ charges were significantly lower than Carilion’s charges for the same services. In many cases, CAI’s procedures were also more convenient and accessible than those performed at a hospital. In response to this competition, Carilion took steps to compete and

maintain market share, including improving the accessibility of its services and reducing wait times for scheduling services. This competition provided real benefits, financial and otherwise, for patients in the Roanoke area.

Carilion's acquisition of CAI and CSE eliminated this price and non-price competition, and threatened substantial competitive harm in the markets for advanced outpatient imaging and outpatient surgical services in the Roanoke area. First, the acquisition reduced from three to two the number of competitors for both outpatient services, and reduced the incentives to compete for the remaining firms, Carilion and HCA Lewis-Gale ("HCA"), a similarly-situated hospital provider. Second, the acquisition eliminated health plans' and patients' only independent alternative to Carilion and HCA, and thus substantially reduced competition and enhanced Carilion's power to impose a unilateral price increase. Staff's investigation confirmed that repositioning by existing healthcare providers or new entry would be insufficient to deter or counteract this harm to competition.

Having reason to believe the proposed transaction would result in competitive harm, the Commission authorized staff to commence an administrative trial under Part 3 of the Commission's Rules of Practice. The administrative complaint alleged that the combined entity would increase prices and decrease non-price competition in the markets for advanced outpatient imaging and outpatient surgical services in the Roanoke area.

III. LITIGATION HISTORY

On July 23, 2009, the Commission issued an administrative complaint pursuant to Part 3 of the Commission's Rules of Practice challenging Carilion's acquisition of CAI and CSE. On August 7, 2009, the parties filed an amended joint motion to withdraw the matter from administrative litigation, together with a proposed settlement agreement that the parties asserted would "completely restore the competition that was alleged to have been eliminated by the acquisition." The Commission granted the amended joint motion on August 11, 2009, and temporarily withdrew the matter from adjudication for 30 days. The withdrawal was subsequently extended until October 14, 2009, as Carilion and Commission staff continued to negotiate a remedy in settlement of the ongoing litigation.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the anticompetitive effects of the acquisition by requiring the divestiture of all of the acquired assets to a Commission-approved buyer (or buyers) within three months. The assets to be divested include not only the two acquired centers, but also the associated assets – such as patient and physician records, government permits, medical equipment, and payor and supplier contracts – necessary for a Commission-approved buyer to independently and effectively operate each center. The Commission may appoint a divestiture trustee if Carilion has not completed the required divestitures within three months.

In addition to requiring the divestiture of both centers and all related assets, the Consent Agreement includes several provisions designed to accelerate the Commission-approved buyer(s)' ability to replicate the competition that was eliminated by the acquisition. For example, the Consent Agreement prohibits Carilion from soliciting for employment any physician or physician practice that has referred patients to CAI since the acquisition. The prohibition is effective for six months as of the date Carilion signs the Agreement Containing Consent Orders, and will allow the Commission-approved buyer sufficient time to develop CAI's referral base by preventing Carilion from seeking out and acquiring referring physicians and physician practices. The Consent Agreement also prohibits Carilion from restricting its employed physicians who have referred patients to CAI since the acquisition from continuing to refer patients to CAI. The prohibition is in effect for one year, and is designed to ensure that any Carilion-employed physician who previously referred patients to CAI will continue to be able to do so.

Finally, incorporated into the Consent Agreement is an Order to Maintain Assets ("OMA"). The OMA preserves the viability, marketability, and competitiveness of the assets to be divested, and prohibits Carilion from using or disclosing competitively sensitive information. The OMA also allows the Commission to appoint a Monitor to ensure Carilion's compliance with the Consent Agreement. In addition, the OMA requires Carilion to offer financial incentives to CAI and CSE personnel to remain with each business before the sale, during the transition period, and at the option of the buyer(s), after the transition. Under the Consent Agreement, Carilion also must remove any contractual impediments that may deter CAI or CSE staff from accepting a Commission-approved buyer's offer of employment.

The proposed Consent Agreement will resolve fully the competitive issues raised by the acquisition by reestablishing price, quality, and service competition in the markets for advanced outpatient imaging and outpatient surgical services in the Roanoke area. Moreover, acceptance of the proposed Consent Agreement will bring immediate and certain relief to Roanoke-area consumers by avoiding the expense and uncertainty inherent in continuing litigation.