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HEALTH CARE TRANSACTIONS

RESOURCE GUIDE

Antitrust Enforcers Walking the Talk: Healthcare Remains Under the Microscope

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As part of the Biden Administration's whole-of-government approach to address perceived consolidation in a variety of industries, including in the healthcare industry, the Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ) (collectively, the Agencies) are continuing to make good on their promise to increase scrutiny of mergers and acquisitions, along with other conduct they contend is anticompetitive such as labor market restrictions.[1] State attorneys general (AGs) are also taking action, including under newly enacted state healthcare notification laws. The bottom line is that antitrust enforcers are using all of the tools at their disposal to carry out the Biden Administration's mandate and the result is an evolving legal landscape for the healthcare industry.

Navigating Uncertainty Under New Antitrust Rules

The revised Merger Guidelines in December 2023 (Merger Guidelines) were announced by the Agencies just weeks after the FTC issued newly proposed rules under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Proposed HSR Rules).[2] The Merger Guidelines represent a significant departure from the 2010 Horizontal and Vertical Merger Guidelines, and the Proposed HSR Rules represent the first time the HSR process has been substantively updated in over 40 years. If implemented in their current form, both will have the effect of making the merger review process lengthier, more complicated, and more burdensome.

In particular, the Merger Guidelines and Proposed HSR Rules will impact healthcare providers in the following ways:

- **Market concentration thresholds for M&A are lower.**
  - An entity or organization with over 30% market share in a relevant service line may be presumed to be in violation of Section 7 of the Clayton Act under certain circumstances.
- **M&A may violate the law when it entrenches or extends a dominant position.**
  - The Agencies will examine whether one party already has a dominant position that the merger may reinforce and will review whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in a different market.
- **When a merger is part of a series of acquisitions, the Agencies may examine all of them.**
  - If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy.
- **Labor market effects will be scrutinized.**
  - The Agencies and AGs have been requesting labor market information as part of their merger investigations.
  - The Proposed HSR Rules will require submission of labor market data as part of any HSR filing, and Guideline 10 in the Merger Guidelines outlines the Agencies' analysis of potential labor market effects.
- **Increased focus on vertical and cross-market theories of harm.**
  - In particular, Guidelines 5 and 6 (and others) could impact healthcare providers that are looking to partner with or acquire a payor, medical device, pharmaceutical company, or other company that provides non-clinical healthcare-related services not offered by the healthcare provider.
  - Vertical mergers or acquisitions will not be allowed to substantially lessen competition by giving a company control over a product, service, or customers that its competitors use to compete or by raising a rival's costs of, excluding or limiting a rival's access to, a related product/service.
  - Cross-market theories of harm will likely be evaluated under a combination of the Guidelines, including Guidelines 5 and 6.

- **Proposed HSR Rules expand the filing parties' disclosure requirements, including:**
  - Areas of actual or potential competition, vertical supply relationships, and strategic rationale for the transaction.
  - Detailed information about the post-transaction structure, the parties' organization, including more information about minority interest holders.
  - Disclosure of both parties' acquisitions going back 10 years where there is horizontal overlap.
  - More expansive disclosure of HSR Item 4(c) and 4(d) documents, including those of supervising deal team leaders and drafts.
  - Disclosure of foreign entity or government subsidies.
  - Disclosure of labor market data.

FTC Reviews Hospital System, Provider Deals Under New Merger Guidelines

Even before the Merger Guidelines were finalized in December 2023, the FTC has been applying them to proposed mergers and acquisitions involving health systems and provider groups, including the following:

- ***FTC and Rhode Island v. LifeSpan and Care New England* – Labor Market Concerns.** The Rhode Island AG, in denying approval of the proposed merger of Lifespan and Care New England in 2022, stated that the combined system would employ 67 percent of the full-time registered nurses employed by the state's hospitals.3 Two of FTC's Commissioners stated that they would have supported a complaint on this basis.4

- ***FTC v. Amgen and Horizon Therapeutics* – Entrenchment of Dominance.** The FTC applied the Merger Guideline regarding dominance in its investigation and challenge to Amgen Inc.'s (Amgen's) acquisition of Horizon Therapeutics plc (Horizon). In May 2023, the FTC filed an injunction seeking to block Amgen's acquisition of Horizon.[5] The FTC alleged that the acquisition would allow Amgen to use its best-selling pharmaceuticals as leverage to pressure insurance companies and pharmaceutical benefit managers into favoring Horizon's two monopoly products or disadvantaging rivals. At the time the suit was filed, the FTC stated that it won't hesitate to challenge mergers that "enable pharmaceutical conglomerates to entrench their monopolies . . ." In September, the FTC and several state AGs announced that Amgen and Horizon entered into a settlement with various conditions that would allow the acquisition to move forward, including that it must receive prior approval from the FTC prior to an acquisition of products that treat thyroid eye disease and chronic refractory gout.[6]

While the FTC (along with DOJ and AGs) are using the more expansive Merger Guidelines to review transactions under new theories of harm such as labor market effects, dominance, and serial acquisitions, it also continues to investigate and challenge transactions under the more traditional theory of horizontal overlap. These include:

- ***FTC v. Novant Health, et al.*** In January 2024, the FTC sued to block Novant Health's acquisition of two North Carolina hospitals. The FTC alleged that the proposed transaction would give Novant control of close to 65 percent of the market for inpatient general acute care services in the Eastern Lake Norman Area of North Carolina.[7]

- ***FTC and California v. John Muir Health, et al.*** In November 2023, the FTC sued to block John Muir Health's proposed acquisition of San Ramon Regional Medical Center in California.[8] The complaint alleged that the transaction would eliminate head-to-head competition between the parties for inpatient general acute care services in the I-680 corridor. The parties subsequently abandoned the transaction.

State AG Investigations Increase Under New Notification Laws

In the last few years, a number of states have enacted comprehensive pre-closing state health care transaction notification laws. This number has grown substantially in the last few years, along with states' concerns about consolidation in local and regional health care markets. Illinois, Minnesota, New York, and California have joined other states (such as Massachusetts and Rhode Island) to require some form of healthcare transaction pre-closing notice and/or approval. Other states such as Pennsylvania and Indiana have proposed notification legislation. Organizations or companies contemplating transactions with health systems, physician practice groups, or other health care entities in these states should take note of the new laws given that the consequences of noncompliance may be substantial, including the potential for fines and the need to delay closing.

Unlike the Agencies, some states can unilaterally block or impose conditions on a transaction without going to court. The California AG used its authority to approve nonprofit hospital transactions, including by imposing conditions on several hospital mergers in recent years.[9] These conditions can be quite significant, including limitations on hospitals' contracts with payors, capping commercial rates, and capping increases—these conditions can be imposed without judicial review. By contrast, the FTC needs to go to court unless the parties will agree to a remedy.

State notification laws are increasing in number and will likely result in AGs reviewing healthcare transactions that have a negligible impact on competition since the laws have a broader scope. In states that have implemented notification laws, healthcare entities should factor additional time and the potential for an AG investigation into their growth strategy.

DOJ Continues to Prosecute Labor Market Restrictions

Since the issuance of the Agencies' 2016 HR Antitrust Guidance,[10] DOJ has repeatedly stated that it views naked wage-fixing and no-poach agreements between competitors as criminal violations of the Sherman Act. While DOJ has not yet persuaded a jury to find any defendants guilty of an alleged criminal no-poach agreement, the fact that the executives from these companies were criminally indicted signals that companies considering entering into any type of labor market restriction, including a mutual non-solicitation or no-poach agreement, should continue to exercise caution. In order to reduce their risk of a potential criminal prosecution, organizations should document the business rationale for such an agreement, assess whether it is "reasonably necessary" to achieve the goals of a larger business collaboration or arrangement between the parties, and ensure its scope is reasonable in terms of covered employees and length of time.

At the end of 2020, DOJ's first criminal prosecution was announced and others closely followed—all but one of them have involved organizations in the healthcare industry. The indictments and outcomes are summarized below.

- ***U.S. v. Jindal.*** In December 2020, a criminal indictment against Neeraj Jindal was returned by a federal grand jury alleging a per se illegal conspiracy for wage-fixing involving a Texas-based physical therapist staffing company.[11] The criminal indictment alleged that the defendant (Jindal) agreed with a competing staffing agency to reduce the rates paid by each company for physical therapists during a five-month period in 2017. Jindal was also alleged to have separately reached out to four other competing agencies about collectively decreasing rates and was accused of obstructing the FTC investigation.
  - **Outcome:** In April 2022, the jury acquitted both defendants of anticompetitive conduct, but convicted one defendant of obstructing the DOJ's investigation, resulting in a sentence of probation.
- ***U.S. v. DaVita.*** In January 2021, DOJ brought criminal charges against Colorado-based DaVita Inc. (DaVita) and its former CEO, alleging that DaVita and its competitors entered into and engaged in a conspiracy not to poach and hire one another's senior-level employees.[12] The alleged agreement included phone and email conversations between HR professionals, instructions not to solicit certain senior-level employees, and monitoring employees to ensure their adherence to the agreement. The senior-level employees were also required to notify their respective employers that they were seeking new employment in order for their application to be considered by the other companies participating in the arrangement.
  - **Outcome:** In April 2022, after a nearly two-week trial, the jury acquitted all defendants on all charges. A follow-on class action suit against SCA, DaVita and others (*In re Outpatient Med. Ctr. Emp. Antitrust Litigation*) is proceeding before an Illinois federal district court.
- ***United States v. Surgical Care Affiliates LLC.*** In January 2021, DOJ indicted SCA, an operator of outpatient surgical facilities around the country, for an alleged seven-year conspiracy among competitors not to solicit each other's senior-level employees.
  - **Outcome:** In November 2023, DOJ voluntarily dismissed the indictment, a companion case to *DaVita*, without further explanation.[13]
- ***U.S. v. VDA OC LLC and Hee.*** In March 2021, another grand jury returned an indictment against a Nevada-based healthcare staffing company, VDA OC LLC (VDA) and a former manager of the company, alleging they had entered into and engaged in an agreement with a competitor to allocate employee nurses and fix their wages in violation of the Sherman Act.[14]
  - **Outcome:** VDA plead guilty and was sentenced to pay a criminal fine and restitution.[15] In January 2023, Mr. Hee entered into a pretrial diversion agreement with DOJ, committing to performing 180 hours of community service while holding a job, surrendering his passport, and avoiding additional legal troubles in order to avoid jail time.
- ***U.S. v. Manahe.*** In January 2022, four individuals in the home healthcare industry were indicted for alleged agreement to fix wages of personal support workers and not hire each other's employees during the pandemic.[16]
  - **Outcome:** In March 2023, after a two-week trial, the jury acquitted all defendants on all charges.
- ***U.S. v. Lopez.*** In March 2023, DOJ indicted a health care staffing executive alleging he conspired with others to fix the wages of Las Vegas nurses at home health agencies.[17]
  - **Outcome:** Case is pending.

What This Means for You

The Agencies' continued scrutiny of healthcare deals, along with their implementation of the new Merger Guidelines and the revised HSR rules necessitates additional evaluation, planning, and resources when it comes to your organization's growth strategy. The revised HSR Rules and more complex Merger Guidelines, in addition to the burgeoning number of state healthcare notification laws, will increase deal timelines, the merging parties' burden (expense and manpower), and overall uncertainty and potential risk as to the outcome. Deal teams should carefully consider issues like risk shifting, clearance strategy, the appetite for merger challenge litigation, possible remedies, and settlement options at the beginning of a proposed transaction.

Despite its losses, DOJ continues to focus on investigating and prosecuting allegedly illegal restrictions on the labor market. We expect that 2024 will bring more enforcement actions by DOJ for alleged antitrust violations relating to the labor market. Because this area of the law is evolving, we recommend that companies review current HR practices (including participation in salary benchmarking and wage surveys), provide antitrust training for relevant management and employees, and commit to a robust compliance program that accounts for the evolving legal and regulatory landscape.

Endnotes

1 The White House Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/; *see also* Husch Blackwell LLP, Biden Antitrust Enforcers Take Aim and Mergers and Acquisitions (Feb. 23, 2022), https://www.huschblackwell.com/newsandinsights/biden-antitrust-enforcers-take-aim-at-mergers-and-acquisitions.

2 FTC and DOJ Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

3 Rhode Island Attorney General Press Release, Rhode Island Attorney General Denies Application for Merger of Lifespan and Care New England Health Systems (Feb.17, 2022), https://riag.ri.gov/press-releases/attorney-general-denies-application-merger-lifespan-and-care-new-england-health#:~:text=PROVIDENCE%2C%20R.I.%20%E2%80%93%20Attorney%20General%20Peter,lawsuit%20to%20block%20the%20transaction.

4 FTC Concurring Statement of Commissioner Slaughter and Chair Khan Regarding FTC and State of Rhode Island v. Lifespan and Care New England Health System (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

5 FTC v. Amgen, et al., No. 23-cv-3053 (Complaint Filed May 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2310037amgenhorizoncomplainttropi.pdf.

6 FTC Press Release, Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

7 Complaint, Novant Health, et al., FTC Docket No. 9425 (Jan. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/novant-chs_part_3_complaint_public_redacted.pdf.

8 Complaint, John Muir Health, et al., FTC Docket No. 9241 (Nov. 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09421jmhtenetpart3administrativecomplaintpublic.pdf.

9 Cedars-Sinai Press Release, *Huntington Hospital and Cedars-Sinai Affiliation Update* (Mar. 30, 2021), https://www.cedars-sinai.org/newsroom/huntington-hospital-and-cedars-sinai-affiliation-update/.

10 FTC and DOJ Antitrust Guidance for Human Resources Professionals (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

11 DOJ Press Release, *Former Owner of Health Care Staffing Company Indicted for Wage Fixing* (Dec. 10, 2020), https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

12 DOJ Press Release, *DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care* (July 15, 2021), https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care.

13 Reuters, *US Drops Antitrust Case Over Healthcare Hiring Agreements* (Nov. 14, 2023), https://www.reuters.com/legal/us-drops-antitrust-case-over-healthcare-hiring-agreements-2023-11-14/.

14 DOJ Press Release, *Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses* (Mar. 30, 2021), https://www.justice.gov/usao-nv/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school.

15 DOJ Press Release, *Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses* (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

16 DOJ Press Release, *Four Individuals Indicted on Wage Fixing and Market Allocation Charges* (Jan. 28, 2022), https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges.

17 U.S. v. Lopez, No. 2:23-cr-00055 (Superseding Criminal Indictment Sept. 6, 2023), https://www.justice.gov/d9/2023-09/416469.pdf.

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