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New Merger Guidelines – Potential Complications in Healthcare Transactions

Overview

On December 18, following recent litigation wins,[1] the Department of Justice and the Federal Trade Commission (FTC) (collectively referred to herein as the agencies) jointly issued the 2023 Merger Guidelines (the guidelines), which essentially state the agencies will presume, unless facts are sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition. In an evolving and volatile industry like healthcare, this is likely to complicate transactions between competitors or the consolidation of integrated health systems.

The guidelines delineate the criteria employed by the agencies in their review of proposed mergers and acquisitions. The culmination of a two-year process, the guidelines were subject to public feedback, gaining more than 30,000 comments following the release of a draft in July. Criticisms from the public primarily centered on the perceived aggressiveness of the proposed guidelines and their purported lack of grounding in established case law. While the guidelines are nonbinding, they are important because (1) they provide insight into the agencies' playbook for evaluating transactions for potential violations of the Clayton Act and (2) federal courts have historically treated the guidelines as persuasive authority in pertinent antitrust litigation.

The Guidelines – Themes and Takeaways

Presumption of Illegality

One of the most significant changes from the preceding set of merger guidelines pertains to the threshold at which a transaction is presumed to raise competition concerns. The government can establish a presumption of harm by demonstrating that a transaction will result in undue concentration in the market. The guidelines take a giant step backward (aligning with the standards stipulated in the 1992 guidelines) and reduce the Herfindahl-Hirschman Index (HHI)-based threshold to allow the agencies to presume a deal is anticompetitive. The agencies now contend that a transaction should be presumed to be detrimental if the post-merger, marketwide HHI exceeds 1,800 and the change in HHI from the transaction surpasses 100 points. Alternatively, the presumption arises if the merged company's market share exceeds 30 percent and is coupled with a change in HHI exceeding 100. This adjustment means that a greater number of transactions will fall in the classification of "presumptively harmful" and consequently undergo evaluation by the agencies and will require the merging parties to rebut this presumption by presenting evidence substantiating why the merger is unlikely to negatively impact competition. This will result in additional transaction costs.

Consolidation and Series of Transactions Are Concerning Factors

The guidelines articulate that a trend toward consolidation is deemed a "highly relevant factor" capable of amplifying the competition concerns, and that the agencies will scrutinize transactions with a focus on their potential impact on future consolidation activities. Companies that have undertaken a sequence of transactions will also be scrutinized, and the agencies "… may examine the whole series." This could present a particular challenge for healthcare companies and larger physician group practices with a business strategy that involves the acquisition of additional providers in a series of transactions. According to the guidelines, the agencies may examine a pattern or strategy of growth through acquisition by examining both the companies' history and their current or future strategic initiatives. Additionally, the agencies will consider transactions (consummated or not), both in the markets at issue and in other markets, to reveal the overall strategic

approach. The FTC has expressed concern about the trend toward consolidation in the healthcare industry, and therefore, the agencies will closely monitor a company's strategic investments to evaluate a transaction's impact on competition.

What Does This Mean for Healthcare Providers?

The guidelines appear intended to support and legitimize the agencies' historical scrutiny of healthcare mergers and acquisitions. The FTC asserts that consolidation in the healthcare industry leads to increased healthcare costs. The guidelines appear to target areas where the agencies have faced challenges in enforcing nontraditional mergers and have experienced setbacks in legal proceedings.[2]

Through the guidelines, the agencies are demonstrating a renewed resolve to challenge mergers, including vertical and cross-market transactions that in the past they may have had less authority to pursue. Vertical deals, particularly prevalent among midsize and large insurers and hospitals, may involve the acquisition of physician group practices to retain a greater share of revenue internally and to promote value-based payments. The general sense is that vertical transactions of this variety increase consolidation even among unrelated services. For example, following a purchase of an independent physician practice, a large hospital system may now be a patient's only practical choice for primary care.

The guidelines underscore the current "anti-merger" position of the agencies, and while they are not legally binding, they telegraph the enforcement attitude of the agencies. Therefore, parties considering mergers or acquisitions in the healthcare industry should be proactive in developing the data that may be necessary to rebut the presumption of anti-competitive impact. Further, the parties to any large healthcare transaction need to understand the reality that litigation could become a strategic option to navigate the regulatory landscape and move forward with their proposed transactions and business objectives.

Day Pitney's experienced healthcare attorneys are well versed in healthcare transactions and in assessing associated risks and opportunities, including the potential for antitrust scrutiny. Our team, in collaboration with our litigation attorneys, is ready to defend legal transactions against regulatory challenges. Whether it involves evaluating potential risks or providing robust legal defense, our professionals are committed to advising clients on successful completion of healthcare transactions in the evolving regulatory landscape.

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[1] *Illumina v. FTC, No. 23-60167* (5th Cir. 2023) (holding that a proposed merger between Illumina and Grail is likely to substantially lessen competition in the multi-cancer early detection market; *John Muir Health/Tenet Healthcare Co., In the Matter of* (parties stepped away from the proposed transaction as a result of FTC litigation).

[2] See *Louisiana Children's Med. Center v. Attorney General of the United States, et al.,* No. 23-1890 (E.D. La. 2023); *United States v. UnitedHealth Group, Inc*. (D.D.C. September 21, 2022).

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