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The Updated Merger Guidelines' Impact on the Health Care Sector

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In a significant development for corporate governance and strategic planning, the Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly released proposed updated Merger Guidelines (Proposed Guidelines) on July 19.

If finalized in similar form, the Proposed Guidelines are expected to increase the degree of difficulty associated with merger and acquisition planning and implementation. This is especially the case when combined with proposed new changes to the Hart-Scott-Rodino (HSR) Act premerger notification filing process, released by the FTC on June 27.

The health care industry, while not targeted by specific changes like the technology and private equity sectors, is still expected to be significantly impacted by the Proposed Guidelines. In particular, they are expected to intensify the diligence and decision-making

responsibilities of executive leadership and corporate governance when considering mergers and acquisitions.

The Biden Administration's Focus

It may be helpful to evaluate the Proposed Guidelines within the larger context of the Biden administration's aggressive approach to competition. Beginning with its 2021 "Executive Order on Promoting Competition in the American Economy," the administration has focused on enforcing the antitrust laws using a "whole of government" approach against what it has perceived as the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.

The administration has, with varying degrees of success, pursued those issues as they have been perceived to arise in labor markets, agricultural markets, Internet platform industries, health care markets (including insurance, hospital, and prescription drug markets), repair markets, and U.S. markets directly affected by foreign cartel activity.

The Role of Merger Guidelines

The antitrust enforcement agencies have, since 1968, relied on versions of merger guidelines to enhance transparency and promote awareness on how the agencies review mergers and acquisitions for compliance with federal antitrust laws. The DOJ and FTC have stated that this latest update is intended to better "reflect the realities of how firms do business in the modern economy" and protect the economy, workers, and consumers from the damage caused by anticompetitive mergers.

The Individual Merger Guidelines

The Proposed Guidelines contain both 13 core "guidelines" that reflect the most common issues that arise in merger review, and a more detailed discussion of the framework used when analyzing a transaction with respect to each guideline. The core guidelines are:

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.

Guideline 3: Mergers Should Not Increase the Risk of Coordination.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.

Legal and Strategic Implications

The Proposed Guidelines suggest the following legal and strategic planning implications for health care companies:

1. The draft revised merger guidelines lower the market concentration thresholds at which the FTC and DOJ will consider a market to be highly concentrated and, thus, when they will presume a merger or acquisition to be unlawful back to the levels in the "Clinton-era guidelines." This means a merger of two firms within an industry with six equally sized firms will once again be presumed unlawful. Currently, a presumption of illegality would only apply to a merger of two firms within an industry of five equally sized firms.

2. Beside lowering the thresholds at which deals will result in markets that are considered highly concentrated and, thus, presumed unlawful, the revised guidelines also create a new presumption of illegality for any acquisition that creates a "dominant" firm, defined as one with greater than 30% share. Notably, this is lower than the levels at which courts will deem a firm to have monopoly power for purposes of the Sherman Act.

3. Other changes to the Proposed Guidelines memorialize different theories the FTC and DOJ have pursued in recent, mostly unsuccessful merger challenges, especially those not involving direct competitors such as Microsoft/Activision (withholding key products or services from a competitor), Meta/Within (potential competition), and United/Change (access to competitively sensitive information), and for the first time put in place presumptions of illegality based on market shares in the vertical context where firms at different levels of the same supply chain combine and the acquiring firm will hold a "foreclosure share" of 50% or more in the input it is acquiring.

4. The Proposed Guidelines also explicitly recognize harm to labor markets as a basis for blocking a merger, including specialized occupations like in the health care industry.

5. Unsurprisingly, the Proposed Guidelines also tighten the requirements for different traditional defenses to mergers such as entry, efficiencies, and failing firms.

6. From a corporate governance perspective, the Proposed Guidelines "up the ante" for the board of directors' review and decision-making regarding a proposed transaction. For proposed transactions that implicate one or more of the 13 guidelines, the board (or a key committee) will likely need to be much more involved with executive leadership in the evaluation of the antitrust feasibility and risk for going forward.

7. Individual guidelines raise specific health industry considerations. For example:

- Guideline 1 may be implicated by many health plan or health system M&A transactions because many metropolitan areas, while not necessarily proper antitrust markets, may be considered highly concentrated under the current guidelines, let alone under the lower thresholds of the Proposed Guidelines.
- Guideline 3 could affect transactions between industry incumbents and start-ups or other would-be disruptors.
- Guidelines 5 and 6 could affect vertical physician and outpatient facility acquisition strategies by health systems and health plans, as well as roll-up practice acquisitions, especially if they are perceived to be making it harder for competitors to compete.
- Guideline 7 might have implications for cross-regional merger strategies if undertaken by health plans or health systems considered "dominant" in their home markets even if they do not compete with their targets.
- Guideline 9 could potentially affect roll-up physician practice acquisitions by health plans, health systems, and private equity firms. Additionally, there is a risk of a "straw that broke the camel's back" response from the DOJ or FTC, where a new transaction opens up scrutiny of earlier, already closed transactions.
- Guideline 10 could affect transactions involving health plans, pharmacy benefit managers, or health IT firms that bring together multiple industry participants simultaneously during transactions and demonstrate network effects.
- Guideline 11 could impact transactions of health systems and other providers who may compete to recruit and retain specialized workers, such as physicians or nurses.

- Guideline 12 could potentially impact joint venture strategies between health systems or with other provider organizations (e.g., a joint venture with a behavioral health provider).

Comment Period

The Proposed Guidelines are subject to a 60-day comment period. There is often merit in responding to a public comment invitation on proposed regulations. However, given the nature of the positions set forth in the Proposed Guidelines, it is unlikely that anything short of a tidal wave of negative reaction will result in fundamental change to their focus.

Our "Bottom Line":

The Proposed Guidelines demonstrate the agencies hostility to M&A (see note 34 ("[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition"), but it is not certain whether the courts will accept their most aggressive changes which are not based in any recent precedent and instead rely on old cases from the 1960s and 1970s, before the Chicago School's focus on economic evidence and protecting consumer welfare.

All this said, the Proposed Guidelines make it clear that this administration prefers parties to build, rather than buy. For firms that do pursue M&A, these new guidelines and the recent proposed HSR changes mean they will have to prepare their antitrust defense sooner in the deal process and prepare for a more onerous antitrust clearance process regardless of whether the deal has a real risk of creating competitive issues.

For those deals that do raise competitive issues, parties will need to have evidence showing why buying and not building is the only feasible choice, that the parties compete in broad markets with all realistic competitors, and be prepared to present any remedies to a court, even if the agencies have rejected them like recent successful defendants have.

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Their views do not necessarily represent the views of McDermott Will & Emery and/or Kaufman Hall, and/or their respective clients.