CAPITOL STREET

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FTC-DOJ Merger Rules Would Chill Dealmaking

Guidelines Lower HHIs, Target Vertical Integration

Relevant Industries

Health Plans, Hospitals, Physicians, Home Health, Post-Acute Care, PBM, MedTech

On July 19, 2023, the FTC and DOJ released their draft merger guidelines (here). Comments are being accepted during a 60-day comment period. The comment period closes on September 18, 2023.

Our Take & Next Up

These are onerous rules, meant to chill merger activity in all industries, including healthcare. They will likely be finalized largely as is. Herfindahl-Hirschman Index (HHI), a measure of market concentration, thresholds are lowered (2,500 to 1,800), and there is a new 50% test that is detrimental to vertical integration (e.g., health plans/post-acute care/providers). There is a crack-down on serial acquisitions. We do not view the agencies as making major revisions in the final rule. Hospitals/Plans may use these new rules as a way to shift away from vertical integration to prevent monopolization in certain geographies. Courts/Congress may attempt to loosen these rules, but that will take months to years.

Key Points

HHI merger thresholds are lowered, leading to more deals likely being considered anti-competitive. Markets with HHI between 1,000 and 1,800 are referred to as “concentrated markets” and markets with a post-merger HHI greater than 1,800 are highly concentrated (from 2,500 before). Previously, if a post-merger entity increases the HHI by more than 200 points, antitrust concerns would be raised. The new guidelines lower that threshold to 100 points.

Vertical integration is vilified, likely impacting health systems and other stakeholders, with a new “foreclosure share.” The agency believes that vertical integration forecloses competitors of either party from a segment of that market that would have otherwise been open to them. The “foreclosure share” is the share of the related market that is controlled by the merged firm. If the foreclosure share is above 50%, that factor alone is sufficient evidence to conclude that the merger will substantially lessen competition. This is critical for plans, hospitals, providers, physicians, home health, and other post-acute care.

All healthcare sectors are impacted by the new guidelines, and we view the proposal as anti-merger overall. The FTC/DOJ will likely continue to challenge mergers, and in response, we view deal activity as likely to be deterred. FTC/DOJ will continue analysis of M&A trends.

- **The new guidance cracks down on serial acquisitions (PE/roll-ups).** In some cases, serial acquisitions hold the potential to improve quality and access to care and can help a growing industry evolve. The FTC/DOJ worry that serial acquisitions do the opposite and lead to higher prices. The agencies may examine trends/patterns of acquisitions throughout the history of the firm and their incentives, as well as future impacts of serial acquisitions.
- **The guidelines will check the monopoly powers of vertically integrated PBMs, pharmaceutical companies, and health insurance plans.** With high drug prices in the US and rebating/formulary practices, the guidelines hope to examine how vertical integration impacts supply chains and limits fair competition. Pharmacists are hopeful that guidelines help to soften the power that vertically integrated PBM-insurers have and help to improve quality, choice, price, and wages.
- **FTC/DOJ wants to protect the healthcare workforce.** The FTC/DOJ is concerned that, through consolidation, there will be less competition for workers or other sellers. Hospitals currently acquire physician groups and therefore better control referrals and prices, which augment and internalize revenue streams. Agencies are also concerned about protecting low-wage aids and non-clinicians working in healthcare settings.
- **The guidelines seek to prevent substantial hospital/clinic/outpatient consolidation that eliminates competition in geographic areas**. Recent hospital consolidation has led to less competition in geographic areas due to the increased control that health systems may have over a community.

Amgen and Horizon merger is currently being challenged with a novel antitrust argument, so this will play out in court. In May 2023, the FTC filed a lawsuit seeking to block Amgen's planned buyout of rare disease company, Horizon Therapeutics. The FTC argues that Amgen could leverage its portfolio to prevent competition for Horizon's medications in thyroid eye disease and chronic refractory gout. Both of Horizon's drugs in these categories do not have any competition and have high prices. The FTC fears that this deal could lead to even higher prices and block the entrance of more affordable generics into the market. Amgen and Horizon claim that these concerns are speculative and aim to close the deal by the end of the year.

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