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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.

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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 ...

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