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SESSION 4

Antitrust Issues in Provider Mergers & Acquisitions

January 24, 2025

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Speaker Introductions

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Benjamin Dryden is an antitrust lawyer and serves as the vice chair of the Firm's Antitrust & Competition Practice Group. His practice focuses on the antitrust issues that arise in mergers and acquisitions. His experience includes advising clients on the antitrust risk profiles of potential transactions, counseling clients through the due diligence and integration planning processes, negotiating antitrust risk provisions in purchase agreements, and representing clients in investigations before the Department of Justice, Federal Trade Commission, and state attorneys general. He has particular experience with transactions in the hospital, health insurance, and manufacturing sectors. Benjamin also provides a broad range of antitrust counseling and compliance services, with particular focuses on healthcare and antitrust issues relating to labor and employment.

In his M&A practice, Benjamin regularly represents clients in merger investigations before federal and state antitrust enforcers, including "Second Request" merger investigations. Because Second Requests can require sorting through massive volumes of documents in a short amount of time, Benjamin is an expert at leveraging artificial intelligence to achieve the best results in the quickest, most cost-effective way. In 2023, the legal technology company Relativity named Benjamin an "AI Visionary" for his innovative work deploying artificial intelligence in Second Requests. In addition, Benjamin helps clients navigate the complex requirements of the Hart-Scott-Rodino (HSR) Act. He has prepared well over 100 HSR filings and routinely advises clients on the intricate HSR reportability rules. He also negotiates and oversees "clean team" agreements to ensure compliant information sharing throughout the due diligence and integration planning processes.

Benjamin provides a broad range of antitrust counseling services, ranging from one-off counseling questions to employee compliance trainings and full-scale antitrust audits. Benjamin complements his legal and industry knowledge with a down-to-earth, plain-spoken style, allowing him to effectively communicate complex concepts with a broad range of audiences. Benjamin is a sought-after speaker on antitrust topics, with quotes in publications such as the Wall Street Journal, CNBC.com, Reuters, and Bloomberg Law, as well as dozens of articles to his name..

Speaker Introductions

Michael Ramey
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Michael uses decades of experience in transaction advisory services, including transaction facilitation, due diligence, and integration planning, to advise hospitals, healthcare systems, physician practices, ambulatory care centers, medical equipment companies, healthcare information technology companies, and other healthcare service providers pursuing mergers and acquisitions.

His expertise lies in performing due diligence including quality of earnings, facilitating transactions, performing strategic assessments, valuing entities, supporting governmental regulatory reviews, devising integration plans, and advising on transaction structures and financial feasibility for entities contemplating or pursuing transactions.

Overview

- General antitrust principles in mergers and acquisitions (M&A)
- 2023 revisions to federal *Merger Guidelines*
- 2024 reforms to Hart-Scott-Rodino reporting requirements
- State regulatory requirements for provider M&A
- Scanning the horizon for second Trump Administration
- Reference materials

Overview

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The Three Key Federal Antitrust Laws

- "*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal*."

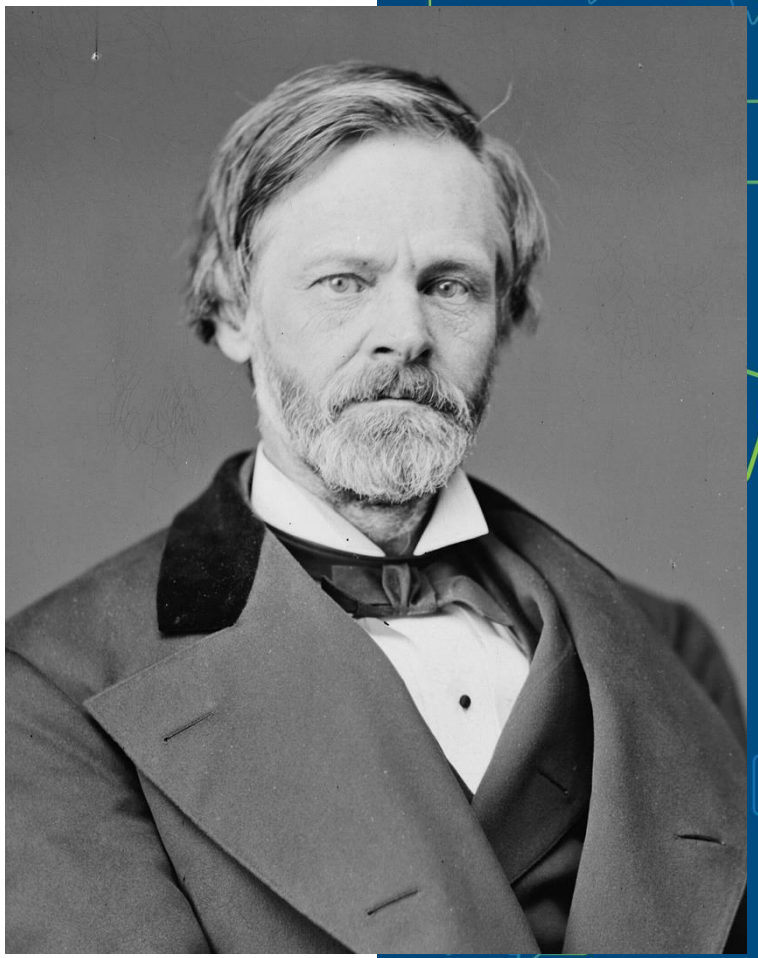
  - Section 1 of Sherman Antitrust Act (15 U.S.C. § 1)

- "*Every person who shall monopolize, or attempt to monopolize, ... shall be deemed guilty of a felony*...."

  - Section 2 of Sherman Antitrust Act (15 U.S.C. § 2)

- "*No person…shall acquire…the whole or any part of the stock or …assets of another person…where in any line of commerce or ...in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly*."

  - Section 7 of Clayton Antitrust Act (15 U.S.C. § 18)



“Probabilities, Not Certainties”

- “Congress used the words ‘may be substantially to lessen competition’ to indicate that its concern was with ***probabilities, not certainties***.” *FTC v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016).
  - “All that is necessary is that the merger create ***an appreciable danger*** of such consequences in the future. ***Doubts are to be resolved against the transaction***.” *Id.*
- Courts follow a three-step “burden-shifting” process to decide cases under Section 7:
  1. The government/plaintiff must show (i) a proper “market” (defined by product and geography) and (ii) a reasonable probability that the merger will harm competition in that market.
     a. The “reasonable probability” element is usually shown with evidence of market concentration.
  2. The defendants can rebut the plaintiff’s showing with evidence that the merger will be competitively harmless (e.g., because of competition from others) or even pro-competitive (e.g., by enabling synergies).
  3. The government/plaintiff gets the chance to rebut the defendants’ rebuttal.

Issues in an Antitrust Review

- In an antitrust investigation/litigation over a provider M&A transaction, the key issues are likely to be:
  - Will the transaction result in ***price increases*** (i.e., prices negotiated by commercial payors)?
  - Will the transaction reduce head-to-head competition for ***quality***?
  - Will the transaction reduce head-to-head competition for ***amenities, service, locations, etc.***?
  - Will the transaction create other benefits (e.g., cost savings/economies of scale) that might ***promote*** competition? If so, are these benefits "merger-specific"?

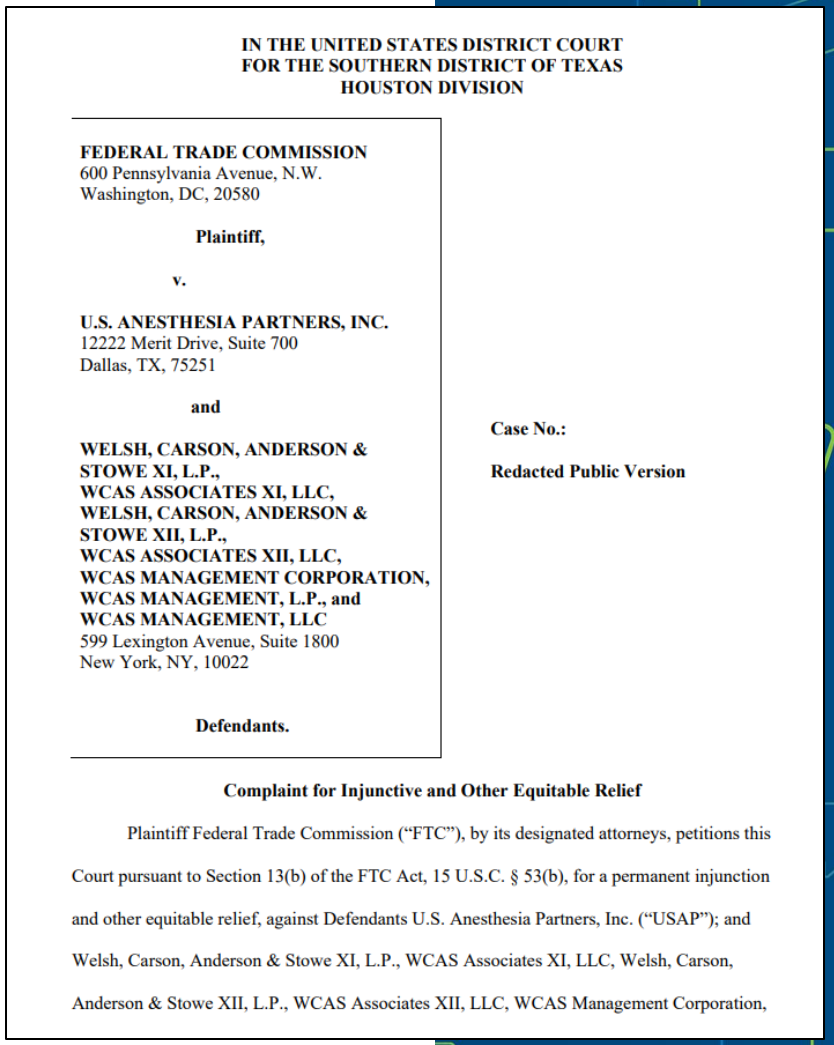
- Factors that will shape the investigation/litigation include:
  - What do payors say about the merger?
  - What do local enforcers/employers/competitors say about the merger?
  - What do the parties' documents and business teams say about the motives for the merger?
  - What do the parties' documents and business teams say about competition generally?
  - What happened with past M&A transactions involving the same parties or geographies?

Provider M&A is a Top Enforcement Focus

- Healthcare provider mergers, and hospital mergers in particular, are consistently among the top areas for antitrust enforcement. Since 2020 alone, the Federal Trade Commission (FTC) has challenged the following hospital mergers — usually either winning in court or forcing the parties to abandon the transactions:
  - Novant Health's acquisition of two hospitals from Community Health Systems (NC)
  - John Muir Health's acquisition of remaining 51% interest in San Ramon Regional Medical Center (CA)
  - RWJ Barnabas's acquisition of St. Peter's Healthcare System (NJ)
  - Hackensack Meridian Health's acquisition of Englewood Healthcare (NJ)
  - HCA's acquisition of five hospitals from Steward Health Care (UT)
  - Lifespan's acquisition of Care New England (RI)
  - Thomas Jefferson Health's acquisition of Albert Einstein Healthcare Network (PA)
  - Methodist Le Bonheur's acquisition of two Memphis-area hospitals from Tenet (TN)

Recent Focus on Private Equity – "Rollups"

- In September 2023, the FTC sued U.S. Anesthesia Partners ***and*** its private equity owners (Welsh Carson) for an alleged "roll-up scheme" to acquire over a dozen hospital-based anesthesiology practices (>1,000 doctors) across the state of Texas.
  - Acquisitions spanned multiple cities (e.g., Dallas, Houston, San Antonio, others) and resulted in immediate price increases.
- More broadly, the FTC and DOJ have increasingly scrutinized the incentives/impacts of private equity on healthcare.
  - On March 4, 2024, the FTC held a half-day workshop on the subject. The FTC Chair opened the workshop by noting "*concern about the ways that private equity buyouts in healthcare have worsened outcome[s] for workers and patients alike… firms of all types should be on notice*."



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC, 20580

Plaintiff,

v.

U.S. ANESTHESIA PARTNERS, INC.
12222 Merit Drive, Suite 700
Dallas, TX, 75251

and

WELSH, CARSON, ANDERSON & STOWE XI, L.P.,
WCAS ASSOCIATES XI, LLC,
WELSH, CARSON, ANDERSON & STOWE XII, L.P.,
WCAS ASSOCIATES XII, LLC,
WCAS MANAGEMENT CORPORATION,
WCAS MANAGEMENT, L.P., and
WCAS MANAGEMENT, LLC
599 Lexington Avenue, Suite 1800
New York, NY, 10022

Defendants.

Case No.:

Redacted Public Version

Complaint for Injunctive and Other Equitable Relief

Plaintiff Federal Trade Commission ("FTC"), by its designated attorneys, petitions this Court pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for a permanent injunction and other equitable relief, against Defendants U.S. Anesthesia Partners, Inc. ("USAP"); and Welsh, Carson, Anderson & Stowe XI, L.P., WCAS Associates XI, LLC, Welsh, Carson, Anderson & Stowe XII, L.P., WCAS Associates XII, LLC, WCAS Management Corporation,

Antitrust Compliance in Due Diligence – Integration Planning

- The antitrust laws apply not only to the M&A transaction itself, but to ***the entire transaction process,*** as the process involves actual/potential competitors exchanging information and strategies.
  - Section 1 of the Sherman Act applies to agreements between market participants to share competitively sensitive information (CSI). This means there are restrictions around what CSI can be shared in connection with due diligence or pre-closing integration planning.
- ***Until closing, the companies are separate and must treat each other as arms-length competitors***.
- As a rule, only exchange CSI that is ***reasonably necessary*** for the stage of the deal you are in
  - The CSI needed for a Letter of Intent (LOI) is usually less than the CSI needed for a Definitive Agreement.
- CSI obtained from diligence/integration planning should ***only*** be used for deal-related purposes.
- Usually (but with exceptions, e.g., for affiliations or rollover interests), diligence should be one-directional – with CSI flowing from target to buyer.
  - Any CSI shared must be reasonably necessary for the recipient's consideration of the deal.

Clean Teams/Black Boxes

- Often, some degree of due diligence is needed into core competitive secrets, like payor rates/terms or employee wages.
- In these situations, parties will often set up a ***"clean team"*** or ***"black box"*** process.
  - Allows detailed diligence of CSI by a limited group of "clean" individuals, with only aggregated/bottom-line results reported to the business principals
- A clean team typically includes external consultants/lawyers, especially to perform detailed analyses like comparing the effects of moving from one party's contracts to the other party's contracts.
- Summaries/reports will be reviewed and approved by antitrust counsel before being shared with the business principals.

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Competition Matters

Avoiding antitrust pitfalls during pre-merger negotiations and due diligence

By: Holly Vedova, Keitha Clopper, and Clarke Edwards, Bureau of Competition | March 20, 2018

Most antitrust practitioners are attuned to advising clients about the antitrust risk that a proposed acquisition may violate Section 7 of the Clayton Act. But counsel and clients must also be conscious of the risks of sharing information with a competitor before and during merger negotiations—a concern that remains until the merger closes.

Companies considering acquisitions, mergers, or joint ventures typically have a legitimate need to access detailed information about the other party's business in order to negotiate the deal and implement the merger. But some information of interest may be competitively sensitive, such as current and future price information, strategic plans, and costs. This is especially true if the companies compete with one another. For prospective transactions involving a competitor or potential competitor, special care must be taken to minimize antitrust risks throughout premerger negotiation and due diligence process, as well as during the integration planning process.

Selected Industries

- Automobiles (1)
- Drug Stores and Pharmacies (1)
- Energy (1)
- Gasoline (1)
- Government (1)
- Health Care (10)
- Hospitals and Clinics (1)
- Industrial Goods (1)
- Manufacturing (1)
- Non-Profits (1)
- Optometry (1)
- Pharmaceuticals (1)
- Prescription Drugs (2)
- Real Estate and Mortgages

Polling Question #1

Overview

- General antitrust principles in mergers and acquisitions
- 2023 revisions to federal *Merger Guidelines*
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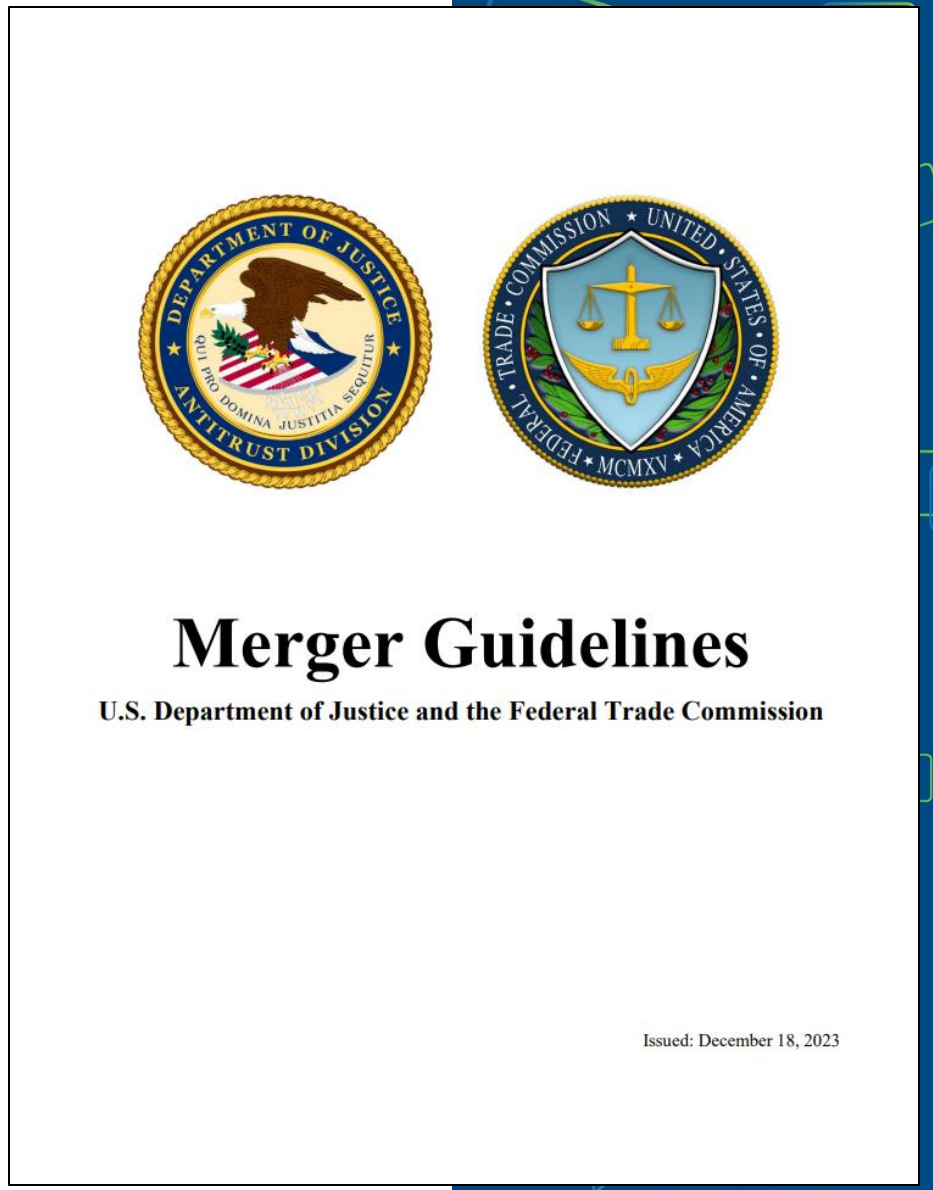
Background on *Merger Guidelines*

- Since the 1960s, the Department of Justice (DOJ) has published standards for reviewing M&A under the antitrust laws. Federal Trade Commission (FTC) began doing the same in 1982.
- These "*Merger Guidelines*" were updated in the 1980s, 1990s, 2010 (under Obama), 2020 (Trump), and 2023 (Biden).
- The 2020 update saw the adoption of special *Guidelines* for "vertical" mergers (i.e., between a buyer and a seller). In 2021-22, however, Biden's DOJ and FTC withdrew the Trump-era *Vertical Merger Guidelines*.
- In December 2023, the DOJ and FTC issued a completely rewritten set of *Merger Guidelines,* to govern "horizontal" (competitor + competitor), "vertical" (buyer + seller), and all other transactions.



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Overview of 2023 *Merger Guidelines*

1. Mergers are **presumptively illegal** when they "***significantly increase concentration in a highly concentrated market***."
2. Mergers can violate the law when they eliminate ***substantial head-to-head competition***.
3. Mergers can violate the law when they increase the risk of "coordination."
4. Mergers can violate the law when they eliminate a potential entrant in a concentrated market.
5. Mergers can violate the law when they ***create a firm that may limit access to products or services that its rivals use to compete***.
6. Mergers can violate the law when they "entrench or extend a dominant position."
7. The Agencies consider an industry-wide "trend toward consolidation."
8. ***The Agencies may consider a larger "series" of acquisitions*** (e.g., U.S. Anesthesia).
9. The Agencies consider all angles of "platform" mergers.
10. ***The Agencies consider competition between buyers (e.g., for workers or supplies)***.
11. The Agencies consider acquisitions of partial/minority interests.

Structural Presumptions

- The 2023 *Merger Guidelines* adopted two "structural presumptions" for determining whether a merger "significantly increase[s] concentration in a highly concentrated market" under Guideline 1.
- These presumptions use the Herfindahl-Hirschman Index (HHI), a measure of market concentration.
- HHIs are calculated by "summing the squares" of the market shares of the firms in a market.
  - E.g., in a market with four competitors with respective market shares of 40%, 30%, 20%, and 10%, the HHI would be ($40^2 + 30^2 + 20^2 + 10^2$), or 3,000.
  - HHIs can range from zero (e.g., hundreds of firms, each with <1% share) to 10,000 (i.e., a true monopolist with a 100% share).
- The Agencies consider both (i) how concentrated the market will be post-merger and (ii) how much the HHI will increase as a result of the merger (the "change" or "delta").
- These presumptions can be ***rebutted*** with evidence showing that the structural conditions are not representative of how competition really works. But rebutting a presumption is an uphill battle.

Structural Presumptions (*continued*)

- The 2023 *Merger Guidelines* ***presume*** that a merger is unlawful when either:
  A. The combined firm has a market share >30% and the change in HHI is >100; ***or***
  B. The overall market's post-merger HHI is >1,800 and the change in HHI is >100.

- An HHI delta of 100 is very small. A delta of 100 occurs when:
  - A firm with a 25% share merges with a firm with a 2% share, or
  - A firm with a 50% share merges with a firm with a 1% share.
    - As a rule, the delta equals ([Firm A's share] x [Firm B's share] x 2).

- By comparison, the 2010 *Guidelines* had only presumed a harm to competition for mergers where the post-merger HHI is >2,500 and the delta is >200.
  - For deals in the middle (e.g., an HHI between 1,500-2,500 and/or a delta between 100-200), the 2010 *Guidelines* had adopted a middle level of scrutiny, noting the possibility of competitive harm but without an outright presumption.

Applying Presumptions to Provider M&A

- Applying the structural presumptions requires knowing the parties' ***market shares***. This, in turn, requires knowing not only the ***service market*** (e.g., "primary care" or "general acute-care inpatient services") but also a ***geographic market***. Unfortunately, enforcers have been wildly inconsistent in defining geographic markets in provider M&A cases:
  - A single, four-county area in PA
  - A single, four-county area in WV and OH
  - A one-county area in OH
  - Three ***separate*** markets in UT, spanning four counties
  - The Memphis Metropolitan Statistical Area
  - The entire state of Rhode Island
  - An area defined by an interstate, a lake, and two county lines
  - Hospitals used by residents of Bergen County, NJ (defined by where patients live)
  - Region comprising 11 hospitals around North Philadelphia (defined by where hospitals are)
  - Region comprising 10 hospitals around Montgomery County, PA (including 3 in the alleged North Philadelphia market)

Guidance from Case Law

- "The relevant geographic market is that area in which a potential buyer may rationally look for the goods or services he seeks. The relevant market's geographic scope must be determined within ***the specific context of each case***, correspond to the ***commercial realities of the industry***, and be ***economically significant***."

  - *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160 (3d Cir. 2022)

- "The geographic market question asks, in essence, ***how many hospitals can insurers convince most customers to drive past*** to save a few percent on their health insurance premiums? We should not be surprised if that number is very small."

  - *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016).

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Overview of Hart-Scott-Rodino Act

- For mergers of a certain size, the Hart-Scott-Rodino (HSR) Act requires the parties to notify the DOJ and FTC and observe a 30-day "waiting period" before closing, to allow a pre-merger antitrust review.
  - The size threshold is currently $119.5 million, adjusted every year for changes in Gross National Product (GNP).
  - Applying the size threshold can be highly complex (e.g., what consideration gets counted? how is debt handled? what about cashless nonprofit transactions?)

- Historically, ~97% of HSR-reportable transactions are cleared within the 30-day waiting period. The remaining ~3% garner a more in-depth investigation.
  - An in-depth review is called a "Second Request." An HSR-reportable transaction cannot close until at least 30 days after the parties substantially comply with the Second Request.
  - Compliance often requires submitting millions of documents and terabytes of transactional data.
  - Historically, most Second Requests lead either to a lawsuit challenging the deal, a divestiture/other relief to settle concerns, or abandonment of the deal.

2024 HSR Reforms

- In November 2024, the FTC finalized rules to significantly expand the information and detail required in HSR filings.
- The changes apply not only to the ~3% of transactions that have historically garnered Second Requests, but also to the ~97% of transactions that merely require reporting to the Agencies without triggering a more in-depth review.
- The rule changes are scheduled to take effect for transactions that are reported on or after February 10, 2025.
  - However, these reforms may well be delayed by a month or two by the incoming Trump Administration, with the possibility for further reforms before the rules finally take effect.

Key HSR Reforms for Healthcare Providers

- ***Information about Overlap / Supply Relationships***
  - Historically, HSR filings required the parties to submit general information about their own operations.
  - The new HSR form, by contrast, will require identifying:
    - Any current/planned business lines that compete with the other side;
    - Any products/services they supply $10 million or more of to competitors of the other side; ***or***
    - Any products/services they purchase $10 million or more of from competitors of the other side.
  - For any overlaps/supply relationships, need to list top-10 customers/suppliers. For overlaps, top-10 customers need to be reported for separate categories (e.g., commercial, government, national accounts).

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Competition Matters

Planning for the new HSR Form

By: Bureau of Competition | November 12, 2024

As antitrust practitioners know, parties to certain mergers and acquisitions are required to submit premerger notification forms that disclose information about their proposed deal and business operations to the FTC and DOJ's Antitrust Division. By now, everyone has heard the news that the Commission voted unanimously to issue rules that update the information parties must provide to the agencies on their HSR Forms. That rulemaking was published in the Federal Register on November 12, making the effective date for the new HSR Form February 10, 2025.

The changes to the HSR Form and Instructions will involve adjustments for practitioners both inside and outside the Agencies and we have already started planning for what comes next. Over the next few months, the FTC's Premerger Notification Office (PNO) will help navigate the transition from the current form to the new form to minimize disruption or delay in processing the new forms. Until February 10, 2025, filers should continue to use the current Form and Instructions. But if a deal in the works will be notified on or after that date, it's never too early to plan for submitting a filing using the new HSR form.

Selected Industries

Automobiles (1)
Drug Stores and Pharmacies (1)
Energy (1)
Gasoline (1)
Government (1)
Health Care (10)
Hospitals and Clinics (1)
Industrial Goods (1)
Manufacturing (1)
Non-Profits (1)
Optometry (1)
Pharmaceuticals (1)
Prescription Drugs (2)
Real Estate and Mortgages (1)
Retail (1)

Key HSR Reforms for Healthcare Providers (*continued*)

- ***Information about officers, directors, and minority shareholders***
  - For any overlaps/supply relationships identified, ***the buyer*** needs to identify:
    - Any officers or directors (including officers/directors of certain ***subsidiaries***) that ***also*** serve as an officer or director of ***any other company*** that competes with the target.
      - This information will be used, among other reasons, to evaluate whether the transaction will create officer/director “interlocks” between competitors.
  - Regardless of whether there is any overlap or supply relationship, buyer must also identify:
    - All 5%-or-greater minority investors of the buyer, the buyer’s subsidiaries, the buyer’s ultimate parent entity, or any entity created for purposes of the transaction.

Key HSR Reforms for Healthcare Providers (*continued*)

- **Document search and production requirements:**
  - Historically, HSR filings required the parties to submit certain competition-related documents ("4(c) documents") that were prepared by or for officers/directors for the M&A process.
  - But the new HSR form would require:
    - Expanding the search list from officers/directors to the "supervisory deal team lead" (the non-officer, non-director who leads the deal).
    - Treating any "draft" shared with a director as a "final" document.
    - For deals with overlap/supply relationship, providing certain competition-related documents prepared in the past 12 months that are ***unrelated*** to the M&A transaction:
      - "Regularly prepared plans and reports" provided to CEO in past 12 months that analyze relevant market
      - "All plans and reports" provided to Board in past 12 months that analyze relevant market

Other Notable HSR Reforms

- **More broadly, the HSR reforms would also impose:**
  - A requirement to describe "*each strategic rationale for the transaction*"
  - A requirement for the buyer to disclose any preexisting agreements between the parties (e.g., supply agreements, licenses, leases, or non-competes)
  - Expanded requirements for identifying prior acquisitions in areas of overlap
  - A requirement to submit full transaction agreements, including exhibits, schedules, etc.
  - A requirement to prepare translations of foreign-language documents
  - A requirement to disclose any subsidies received from China, Iran, North Korea, and Russia
  - A requirement to disclose certain pending or awarded defense/intelligence contracts
  - Stricter requirements for when transactions can be reported on the basis on a letter of intent or non-definitive agreement

Polling Question #2

The Bottom Line:
What the HSR Reforms Mean in Practice

- HSR filings will take more time, effort, and cost to complete.
- HSR filings will include more information and details about the parties' operations and the potential competitive effects of the transaction.
- For the first time, HSR filings will include certain ***ordinary-course*** business plans and reports.
- HSR filings will identify certain customers, suppliers, and other stakeholders that may be contacted about the transaction.
- Parties will not be able to make HSR filings until a reasonably well-developed LOI is ready.

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State Healthcare Filings/"Mini-HSR Acts"

- Over the past decade, several states have enacted laws requiring certain provider M&A transactions to be notified to ***state*** authorities.

- These laws include "mini-HSR Acts," intended to screen transactions specifically for potential antitrust concerns, as well as general laws intended to provide a more broad, holistic review.

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Illustrative State Laws

- California Health & Safety Code 127500 – "material transactions" involving healthcare entities must be reported to Cal. Office of Health Care Affordability at least 90 days before closing.
  - Applies to transactions where one party has California assets/revenues of $25 million or more, and other party has California assets/revenues of $10 million or more.
- Illinois Comp. Stat. 10/7.2a – "covered transactions" involving healthcare facilities or provider organizations must be reported to Illinois AG at least 30 days before closing.
  - Applies to healthcare facilities recognized under state law as well as provider organizations that represent 20 or more providers in contracting.
  - "Covered transactions" include M&A transactions as well as joint contracting affiliations.
- Massachusetts Gen. Laws ch. 6D, § 13 – transactions involving certain healthcare facilities or provider organizations must be reported to Mass. AG, Health Policy Commission, and Center for Health Information and Analysis at least 60 days before closing.
  - Applies to provider organizations with $25 million or more in net patient service revenue.

Other State Laws Requiring Notice

- Connecticut Gen. Stat. §§ 19a-486i, 19a-494
- Georgia Code § 31-7-401 et seq.
- Indiana Code § 25-1-8.5
- Minnesota Stat. § 145D.02
- Nevada Rev. Stat. §§ 598A.290 et seq., 439A.126
- New York Pub. Health Law Art. 45-A
- Oregon Rev. Stat. § 415.501 et seq.
- Rhode Island Gen. Laws § 23-17.14 et seq.
- Washington Rev. Code. §§ 19.390.010 et seq.

Certificates of Public Advantage

- On the other end of the spectrum, some states have adopted “Certificate of Public Advantage” (COPA) laws
  - “COPA” laws allow a state to immunize provider M&A transactions from federal antitrust review by clearly articulating and actively supervising an alternative form of state regulatory oversight. When granted, COPAs provide a complete bar to federal antitrust enforcement.
  - 19 states have some form of COPA law: FL, ID, IN, KS, LA, ME, MS, NE, NY, OH, OR, SC, TN, TX, VA, WA, WV, WI, WY
- FTC routinely opposes COPA applications, and in 2022, FTC published a report arguing that COPA laws are an inadequate alternative to competition among hospitals.

Overview

- General antitrust principles in mergers and acquisitions
- 2023 revisions to federal *Merger Guidelines*
- 2024 reforms to Hart-Scott-Rodino reporting requirements
- State regulatory requirements for provider M&A
- Scanning the horizon for second Trump Administration
- Reference materials

Trump’s Nominees for DOJ, FTC

- Trump has nominated Gail Slater, a former economic advisor to then-Senator Vance (and before that, an FTC staffer) to lead the DOJ’s Antitrust Division.

- At the FTC:
  - Trump has named Commissioner Andrew Ferguson to serve as FTC Chair
  - Trump has nominated Mark Meador – a former FTC, DOJ, and Republican Hill staffer – to serve as the fifth FTC Commissioner
    - Slater and Meador both require Senate confirmation
    - Chair Ferguson was previously appointed to FTC by Biden and confirmed by Senate; his Chairmanship does not require confirmation and therefore is already effective.
  - All are experienced antitrust enforcers, with a focus on Big Tech.

Evolution, Not Revolution

- By and large, expect Trump's nominees to enforce the antitrust laws aggressively—including in the healthcare sector.
- On the margins, however, we anticipate a few differences in the Trump Administration's approach to enforcement decisions compared to the Biden Administration:
  - More focus on harms to patients or payors, less focus on harms to workers or suppliers
  - More openness to divestiture/remedy proposals to resolve problematic mergers
  - More openness to crediting "efficiencies"/ "synergies" as a pro-competitive benefit of M&A
  - Less suspicion/hostility toward private equity buyers
  - Marginal differences (perhaps) about HHI thresholds / structural presumptions
  - Less openness to novel enforcement theories, especially in "vertical"/non-horizontal mergers
  - (Perhaps) less burdensome processes/requests for Second Requests or other investigations

Potential for More Significant Changes

- Over time, areas where the Trump Administration might depart more significantly from the Biden Administration's approach include:
  - Delaying and/or revising the 2024 amendments to the HSR rules
  - Revising the 2023 *Merger Guidelines*, including potentially reverting to the 2010/2020 *Guidelines*
  - Reducing the budgets/staffing of the DOJ or FTC (e.g., eliminating or redeploying newly created "Counsel for Health Care" positions at DOJ and FTC)
  - Consolidating federal antitrust enforcement under a single agency (presumably, DOJ)
  - Potentially using antitrust M&A as a tool for economic protection (e.g., to block Chinese influence or restrict foreign ownership of U.S./allied businesses)

Polling Question #3

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Reference Materials

- Department of Justice & Federal Trade Commission *Merger Guidelines* (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf
- Federal Trade Commission blog post: *Avoiding antitrust pitfalls during pre-merger negotiations and due diligence* (Mar. 20, 2018), https://www.ftc.gov/enforcement/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger-negotiations-and-due-diligence
- Federal Trade Commission: *HSR Notification Form Changes Effective February 10, 2025,* https://www.ftc.gov/enforcement/premerger-notification-program/hsr-notification-form-changes-effective-february-10-2025
- *FTC Policy Perspectives on Certificates of Public Advantage* (Aug. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf
- Benjamin R. Dryden, *Quickly Calculate HHI Deltas Using this 1 Weird Trick* (Mar. 4, 2016), https://www.foley.com/insights/publications/2016/03/quickly-calculate-hhi-deltas-using-this-1-weird-tr/

Questions?

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