DOJ, FTC ISSUE VERTICAL MERGER GUIDELINES

On June 30, 2020, the Antitrust Division of the Department of Justice (“DOJ”), along with the Federal Trade Commission (“FTC”) issued a finalized version of their new Vertical Merger Guidelines (the “Guidelines”). The Guidelines do not institute many significant changes to the enforcer’s approach to analyzing vertical mergers but rather attempt to memorialize the agencies’ current practices. Assistant Attorney General Makan Delrahim said the Guidelines “explain our investigative practices as we apply them today and have applied them in recent years.”

The Guidelines reinforce the notion that vertical tie-ups aren’t automatically illegal, or conversely, presumptively lawful and should be analyzed like their horizontal counterparts. Enforcers look at the ability to raise prices and the incentives to do so when tasked with examining a company that is vertically integrated and is preventing a competitor from gaining access to a key input. The Guidelines include detailed examples and discussions of “raising rivals’ costs” and “foreclosure” theories of harm.

The Guidelines adhere closely to an earlier proposed version released in January (more information on the earlier version of the Guidelines is available here); however, there are several concepts of which providers should be aware.

- **Potential Safe Harbor and Increased Transparency** - The initial proposed guidance originally included a 20% market share threshold as a “safe harbor.” This threshold was criticized by experts; some thought it to be too high and permissive of anti-competitive mergers while others felt 20% was too low and this threshold would likely put unnecessary attention on tie-ups that were not a risk to competition. The “safe harbor” was dropped entirely from the final Guidelines.

- **Diagonal Mergers** - The concept of a “diagonal mergers” is also discussed in the Guidelines. This is described to be when a company acquires a component of a rival’s supply chain that “neither expands nor improves the functionality that the acquiring firm can provide.” Again, the enforcers would look to the ability and incentive to reduce competition in the market when analyzing a proposed merger for anticompetitive qualities.

- **Double Marginalization** - The Guidelines describe the proper analysis of the elimination of double marginalization. This usually involves examining whether it would be less costly for a newly merged firm to supply inputs than for the downstream firm to purchase them from one or more independent firms absent the merger. Certain aspects of the analysis have been clarified from the proposed version as well.

**PRACTICAL TAKEAWAYS**

The Guidelines offer a number of considerations health care providers should keep in mind when contemplating a vertical merger or transaction:

- Despite federal antitrust enforcer’s contention that the Guidelines do not represent a shift in policy, but rather a memorialization of the DOJ and FTC’s current practices, what is clear is a continued, increased scrutiny of vertical transactions by the FTC and DOJ. This shift in scrutiny could become even more pronounced pending the results of November’s presidential and congressional elections as Democrats increasingly focus on vertical mergers.

- The Guidelines hope to improve the transparency of the government’s approach to analyzing vertical mergers for anticompetitive qualities, as well as help companies and attorneys navigate potential mergers with vertical elements.

- If you are considering a vertical merger or transaction involving parties at different points in the supply chain, you should contact your antitrust counsel to determine if these new Guidelines will impact how the FTC or DOJ will view your transaction.

Accordingly, if you have questions about how the Agencies would view an arrangement or would like additional information about this topic, please contact a member of Hall Render’s Antitrust Practice Group.

If you have any questions or would like additional information, please contact:
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A copy of the Vertical Merger Guidelines is available [here](#).