

## ANTITRUST IN HEALTH CARE M&A: FIVE KEY CONSIDERATIONS TO GUIDE COMPETITIVE BEHAVIOR

*Mergers and acquisitions in the health care industry present unique challenges that are not often present when undertaking similar transactions in other industries. Because of health care's highly regulated nature, parties may falter if a health care transaction is not reviewed and negotiated carefully with respect to the distinct concerns that health care presents.*

Health care providers are increasingly turning to strategic collaborations and alignments with competitors as a means of securing and improving their competitive position. These transactions are often fraught with competitive concerns that must be vetted throughout all phases of a health care transaction, regardless of the size of the deal or the competitive power of the parties involved. There are certain substantive antitrust issues that could bring the deal to a halt or have costly consequences. Accordingly, each party to a health care transaction should be aware of the following:

- 1. Hart-Scott-Rodino ("HSR") Filing Requirements.** The Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("HSR Act") requires all parties contemplating certain mergers or acquisitions that meet or exceed the jurisdictional thresholds to file an HSR Form (also called a "Notification and Report Form for Certain Mergers and Acquisitions") with the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"). More information on which parties are subject to the HSR filing requirement is available [here](#), but as a general matter, transactions valued at more than \$94 million are HSR-reportable. These filing requirements are not to be taken lightly. Both parties must submit certain documentation about the company's business to the DOJ and the FTC and pay a filing fee ranging from \$45,000 to \$280,000 depending on the size of the transaction. A party found in violation of the HSR Act could be fined up to \$43,280 per day they are in noncompliance. Additionally, the HSR Act prohibits parties from closing a transaction until a mandatory 30-day waiting period has passed or the government grants early termination of the waiting period. Consequently, the HSR filing requirements may pose a significant financial and administrative roadblock to a potential transaction if the parties do not strategically and cooperatively approach the filing.
- 2. Non-Reportable HSR Deals.** While parties to transactions under the HSR thresholds are not required to notify the FTC or DOJ, this does not mean the deal is immune from antitrust scrutiny. The FTC and DOJ may still conduct a pre-transaction review and ultimately challenge a transaction if they find it to be anticompetitive, regardless of the size of the transaction. Transactions may even be challenged post-closing if competitors, payors or the government believe the transaction to be anticompetitive. Moreover, non-reportable transactions still must abide by the restrictions on what pre-transaction information may be shared during due diligence (see Item 3 below). As such, even smaller deals require attention to potential antitrust issues, and parties should consult with antitrust counsel to analyze the competitive impact of a transaction in the relevant geographic and product markets.
- 3. Due Diligence.** The due diligence process can pose significant antitrust enforcement risks. An organization needs effective protocols in place to prevent the release of anticompetitive information before such disclosure is appropriate, including during pre-transaction negotiations, due diligence and transition activities prior to closing. In the event that competitively sensitive information ("CSI") must be disclosed, the parties should establish an independent clean team or hire a third-party to screen the information. Generally, CSI is information related to prices, costs, customers, compensation, marketing, strategic planning or any other proprietary information that could be used to harm competition should a proposed transaction not close. The FTC recommends keeping information exchanges reasonable or in a way that will not harm competition. Accordingly, it is crucial to ensure adequate safeguards are in place to avoid disclosing information that may have antitrust consequences.
- 4. Gun-Jumping.** The term "gun-jumping" refers to parties engaging in impermissible conduct prior to the closing of a transaction. This may include the buyer taking control before the expiration of the HSR waiting period, not filing required documentation or inappropriately sharing pre-transaction information. Buyers must avoid these types of "beneficial ownership" of the assets of the seller prior to close. In the event of beneficial ownership, parties may be subject to civil penalties. Moreover, an FTC investigation could cost additional time and resources. To alleviate these concerns, parties should continue to operate as independent, competing entities until

the transaction is closed.

5. **Execution Risks.** Because the FTC continues to investigate and challenge problematic transactions, antitrust continues to pose a significant execution risk to many strategic transactions. As such, it is an important step to analyze and assess any potential antitrust concerns early in the transaction process. Without a sound antitrust strategy in place, the transaction may face significant execution risk and ultimately fizzle. This not only costs time, money and resources but may also cause harm to the asset for sale—a prolonged antitrust investigation followed by a government challenge often leads to uncertainty and instability for the seller. Consequently, a well-planned strategy is imperative to avoid antitrust risks and successfully close the deal.

Understanding the complexities of antitrust laws and restrictions and the potential impacts on mergers and acquisitions is critical to successfully consummating health care transactions of any size and avoiding delays and undue risk. Hall Render's Antitrust Service Line has experience handling the antitrust component of various transaction types throughout the country. For more information on Hall Render's Antitrust services, click [here](#).

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Special thanks to Diana White, law clerk, for her assistance with the publication of this article.

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Throughout 2020, Hall Render's Mergers & Acquisitions Service Line will be publishing a series of articles identifying important, and often unique, aspects of health care transactions that should not be overlooked. Ranging from Real Estate to Reimbursement, this series is designed to highlight key issues and considerations relating to niche components of health care transactions.

- Part 1: **Real Estate Issues in Health Care M&A**
- Part 2: **Information Technology in Health Care M&A**
- Part 3: **COVID-19 in Health Care M&A**
- Part 4: **Post-Acute and Long Term Care Issues in Health Care M&A**
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- Part 6: **Graduate Medical Education in Health Care M&A**
- Part 7: **Antitrust in Health Care M&A**