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FTC and DOJ Release Final Merger Guidelines

On December 18, 2023, the Federal Trade Commission (FTC) and Department of Justice (DOJ) jointly issued their final Merger Guidelines, which guide the agencies in their review of mergers and acquisitions in evaluating compliance with federal antitrust laws.[1] The new Guidelines replace, amend, and consolidate the Horizontal Merger Guidelines and Vertical Merger Guidelines, which were published in 2010 and 2020, respectively.[2] While the final version reflects some notable changes from the proposed Guidelines that were made in response to public comments, the main takeaways from the draft version released in July 2023 remain the same.[3] This Health Capital Topics article discusses the finalized Guidelines and how they may affect healthcare transactions going forward.

Horizontal consolidation is the acquisition or merger of two companies at the same level in the supply chain, while vertical integration is the merger or acquisition of two or more companies in the same line of production, but not at the same level.[4] Each type of merger has its own purpose, such as increased revenue, market share, or diversified product offerings accomplished through horizontal consolidation or increased efficiency and lower costs achieved through vertical integration.[5] Vertical integration in the healthcare industry translates to hospitals, health systems, or insurers offering, indirectly or directly, a broad range of patient care and support services.[6] This is seen most commonly when hospitals, health systems, and insurers buy-out or absorb physician groups. In doing so, health systems and insurers claim to increase their organizational performance and decrease costs.[7] The U.S. healthcare industry has seen a rise in vertical integration transactions since the passage of the Patient Protection and Affordable Care Act (ACA), particularly among physician groups integrating with health systems or insurers, as providers seek to fill gaps in their continuum of care. This uptick (particularly in those deals whose size do not trigger regulatory review) has given rise to concerns over what mergers and acquisitions are allowed under current U.S. antitrust laws.[8]

Federal antitrust laws, such as the Clayton Act, Sherman Act, and Fair Trade Commission Act, govern mergers and acquisitions that may restrain trade or result in unfair competition. Specifically, these laws prohibit any attempt or conspiracy to monopolize or unreasonably harm or restrain industry trade;[9] further, companies and individuals may not engage in deceptive business practices.[10] Violating one or more of these laws can result in fines up to $1 million for individuals and up to $100 million for corporations.[11] The purpose of antitrust laws is to maintain healthy competition and avoid price-fixing, rigged bids, and monopolization.[12]

The finalized Guidelines expand, clarify, and build on existing frameworks. It includes 11 finalized Guidelines meant to aid the agencies in determining if mergers are anticompetitive and unlawful under current antitrust laws.[13] Notably, two additional Guidelines were proposed in the draft version but ultimately removed or consolidated in the final Guidelines. For example, draft Guideline 6, which stated that "vertical mergers should not create market structures that foreclose competition," was removed.[14] The final Guidelines incorporate this deleted information in a footnote, and instead focus on vertical merger issues in Guideline 5.[15] Draft Guideline 13, which stated that the draft merger guidelines were not exhaustive, was also deleted.[16] While Guideline 13 was removed, the overview still states that the Guidelines "dictate or exhaust the range of theories or evidence" that may be used in merger litigation or reviews, and that they "do not limit the [Agencies'] discretion."[17]

The remaining 11 final Guidelines are as follows:

(1) Mergers raise presumptions of illegality when they increase concentration significantly in a market that is highly concentrated.
(2) Mergers can violate the law when eliminating substantial competition between firms.
(3) Mergers can violate the law when they increase risks of coordination.
(4) Mergers can violate the law when they eliminate potential entrants into a market that is concentrated.
(5) Mergers can violate the law when a firm is created that limits access to services or products that its rivals use to compete.
(6) Mergers can violate the law when they extend or entrench a dominant position.
(7) When an industry undergoes a trend towards consolidation, agencies consider whether it increases the risk that mergers may tend to create a monopoly or substantially lessen completion.
(8) When a merger is associated with a series of multiple acquisitions, the agencies may examine the whole series of acquisitions.

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(9) When a merger involves a platform that is multi-sided, the agencies examine competition between the platforms, on the platform, or to displace the platform.

(10) When a merger involves buyers that are competing, the agencies may examine whether it may lessen competition substantially for workers, suppliers, creators, or other providers.

(11) When an acquisition involves minority interests or partial ownership, the agencies may examine its impact on competition.[18]

While these final 11 Guidelines do not significantly deviate from the draft released in July 2023, there are some notable differences.[19] For example, final Guideline 6 contains an expanded discussion of ways in which the acquisition of a competitor can reduce competition by entrenching the acquiring firm's dominant position.[20] If the agencies find that a firm is dominant, they will have latitude to challenge any acquisition that may extend or entrench the dominant firm's position.[21] In final Guideline 7, the agencies clarified how industry consolidation trends can heighten competition concerns for proposed mergers.[22] The clarification is an indication that the agencies will scrutinize not only the mergers that occur in industries experiencing consolidation, but also within industries that trend toward concentration.[23] The final Guidelines also expand on the draft's discussion regarding rebuttal evidence, such as procompetitive efficiencies from a proposed transaction and entry by other firms.[24]

Overall, the final Guidelines "place an emphasis on transactions that tend to create a monopoly," codify new thresholds regarding which transactions will be considered presumptively illegal by the regulatory agencies, and advance new harm theories relating to labor market competition.[25] The Guidelines also suggest that regulatory agencies will focus on transactions within markets that are highly concentrated, and markets where the dealing party may hold a dominant position.[26]

These Guidelines are indicative of the continuing pursuit of aggressive antitrust enforcement, including through the development of novel theories of harm in competition.[27] While the Guidelines may result in enhanced agency scrutiny of proposed deals, they do not have the force of law.[28] However, this enhanced scrutiny can still impact healthcare deals, as the mere threat of litigation can affect the valuation of a company, and/or make an attractive deal stall, be renegotiated, or completely fail.[29] Legal experts suggest that prospective dealmakers should continue to expect that more transactions will receive more scrutiny, increasing the cost and time of transactions, with extended investigations becoming more burdensome and frequent.[30]

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Todd A. Zigrang, MBA, MHA, FACHE, CVA, ASA, ABV, is the President of **HEALTH CAPITAL CONSULTANTS** (HCC), where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 28 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 2,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

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