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Biden Administration to Overhaul Vertical Merger Guidelines

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), especially among physician groups integrating with health systems or insurers, as providers seek to fill gaps in their continuum of care. In 2010, only 28% of physicians were employed by hospitals or health systems, compared to nearly 40% in 2020;[1] by 2021, nearly 70% of physicians were employed by hospitals or corporations.[2] Further, approximately 90% of acute care markets in metropolitan areas are considered highly concentrated.[3] In response to these trends and resulting market imbalances, the Biden Administration is aggressively pursuing antitrust enforcement by updating and revising U.S. antitrust law guidance.[4] This Health Capital Topics article will discuss the vertical integration movement and the proposed changes to antitrust laws that may affect the future of healthcare.

Unlike *horizontal consolidation*, which is the acquisition or merger of two companies at the same level in the supply chain, *vertical integration* is the merger or acquisition of two or more companies that are in the same line of production, but not at the same level.[5] 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.[6] 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.[7] 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.[8]

Federal antitrust laws, such as the Clayton Act, Sherman Act, and Fair Trade Act, govern mergers and acquisitions that may restrain trade or result in unfair compensation. 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 acts 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 U.S. healthcare industry's recent uptick in vertical integration (particularly 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.[13] As such, the Biden Administration has begun investigating possible changes to antitrust law enforcement pertaining to vertical integration.[14] In September 2021, the *Federal Trade Commission* (FTC) voted to withdraw its approval of changes it had made to its vertical merger guidelines, jointly with the *Department of Justice* (DOJ), in 2020.[15] The merger guidelines "outline the principal analytical techniques, practices, and enforcement policies" of the DOJ and the FTC.[16] The 2020 changes improved on the previous 1984 guidelines, but were rescinded in order to "prevent further reliance of flawed provisions."[17] Specifically, the 2020 guidelines inadvertently suggested pro-competitive effects or efficiencies are justifications for an otherwise unlawful merger.[18]

In addition to remedying inaccurate language in the 2020 guidelines, these recent steps by the FTC and DOJ are in line with the Biden Administration's July 2021 executive order to promote competition, which specifically directed the FTC and DOJ to work together to review and consider revising both the horizontal and vertical merger guidelines.[19] Toward that end, the FTC and DOJ commenced a joint review process in January 2022 and issued a request for information (RFI) seeking comment from industry stakeholders on "how the agencies can modernize enforcement of the antitrust laws regarding mergers."[20] The nature of the questions contained in the RFI suggest that the agencies may be looking to substantially change their current enforcement framework.[21]

The proposed guidelines are anticipated to address, among other things, "how markets are defined in merger analyses to factor in non-price related consequences, the breadth of the oversight, the separation of the vertical and horizontal guidelines, the presumption that vertical mergers are beneficial and worker-specific impacts of mergers."[22] Stakeholders and policy experts anticipate that any new changes to antitrust laws and vertical merger guidelines are likely to impact the competitive landscape of the healthcare industry by requiring greater

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government oversight, particularly when companies need to inform the government of a potential merger and whether or not the government will approve certain mergers.[23] Changes will also likely require pro-competitive benefits as a result of any deals and may reduce the internal benefits of such deals.[24] This could mean requiring merging companies to remain separate in at least one area, such as management. The overall goal of revised guidelines is to ensure fair and increased competition; however, it will likely do so by creating more bureaucratic hoops and limiting the scope of acquisitions. Additional consequences of changes to antitrust law enforcement could result in recent mergers being deemed unlawful, requiring the "break-up" of some companies.[25]

Both supporters and critics of the forthcoming changes are arguing many of the same points in defense of their positions, but for different reasons. Most stakeholders argue that increased competition is good, but some state that the problem the Biden Administration is attempting to fix does not exist. An attorney at Dickinson Wright and the CEO of Crux Strategies has said the commercial health insurance plan market is not concentrated, citing UnitedHealthcare, for example, only having 15% market share in 2020. Because "[a]ntitrust law is a blunt instrument for fixing [concentrated markets]…I am not convinced the government is going to do a good job. They are trying to fix a problem that, to a great extent, doesn't exist."[26]

Other stakeholders assert that vertical integration in healthcare is necessary for organizations to survive, with some adding that organizations need to come together to solve the complex problems facing the healthcare industry. A senior managing director at FTI Consulting noted that they "have certainly seen providers struggle mightily with setting up their own plans, taking on value-based arrangements and risk," when talking about the importance of vertical consolidation.[27] The president and CEO of Presbyterian Hospital added that, "[e]ach individual entity alone isn't going to solve it 100% correctly, but if we come together we could have better and more seamless care."[28] As highlighted by these statements, industry stakeholders view vertical integration and complex mergers as critical steps for hospitals and the healthcare industry to solve its most challenging problems, such as providing a full continuum of care to receive the benefits from value-based reimbursement (VBR) models.

Despite the opposition from industry leaders, the FTC and DOJ are determined to follow through with revamping the merger guidelines to help protect the American public from anticompetitive behavior, as Americans "historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation" as a result of industry consolidation and a lack of competition.[29]

The issue of rewriting the vertical merger guidelines is hotly contested between the healthcare industry and the Biden Administration. Oddly, both sides are arguing for more competition, but are hoping to achieve it by different means. Further, because the guidelines are only used for a prosecutor's discretion, it is unclear how changes will affect courts' decisions in antitrust cases.[30] The FTC and DOJ's changes are expected soon, as they are currently operating in a grey area, having revoked the 2020 changes and admitting that the 1984 original guidelines are outdated.[31] The public comment period for the RFI ended on March 21, 2022,[32] and the agencies have stated their intention to publish the proposed guidelines by the end of 2022.[33]

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