Updates
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Antitrust Enforcers Unlikely to Lessen Scrutiny of Healthcare Mergers During Pandemic

COVID-19 has financially stressed the U.S. healthcare system in several ways. In many cities, hospitals have needed to add healthcare capacity (especially ICU beds) to serve rapidly increasing numbers of COVID-19 patients. At the same time, many states have mandated suspension of elective procedures, which typically generate most hospital revenue. Moreover, many non-COVID-19 patients are avoiding or delaying healthcare treatments, further depriving providers of income.

Together, these factors may lead healthcare providers to consider mergers with competitors. But neither federal nor state antitrust regulators appear willing to permit such mergers without a thorough review.

Federal Trade Commission: COVID-19 Not a "Free Pass"

At the beginning of the pandemic, some observers suggested the Federal Trade Commission (FTC) would relax its scrutiny of mergers of financially distressed healthcare providers. In late May 2020, however, the director of the FTC's Bureau of Competition issued a statement emphasizing that the agency would continue to vigorously enforce the antitrust laws despite the economic crisis.

That statement addressed the "failing firm" defense, which allows anticompetitive mergers to proceed under certain conditions if the target company is financially distressed. But as the FTC's Merger Guidelines explain, proving that defense requires showing that: (1) the target firm cannot meet its financial obligations in the near future; (2) cannot successfully reorganize under Chapter 11 of the Bankruptcy Code; and (3) has made unsuccessful good-faith efforts to find "reasonable alternative offers" that would pose a less severe danger to competition. These are very high bars and are infrequently met.

The FTC bureau director's recent statement underscored that his staff would continue to apply that same strict test used before the COVID-19 pandemic, noting, "[c]onsumers deserve the protection of the antitrust laws now as much as ever."

State of California: Healthcare Mergers Deserve Even Stricter Review

Meanwhile, some states are going a step further and making healthcare mergers even more difficult despite the COVID-19 crisis. In California, Senate Bill 977 would expand the types of healthcare acquisitions and affiliations that require pre-closing approval by the California attorney general. Relatively small transactions, valued at $500,000 or above, would require such approval, including investments by private equity groups or hedge funds in healthcare facilities or providers. AG consent would not be given unless the merging parties can demonstrate that the transaction will result in substantial clinical integration, a substantial likelihood of increasing access of services to an underserved population, or both, or if the affiliation's likely anticompetitive effects outweigh likely benefits to clinical integration or access for the underserved. If enacted, the bill would represent a stricter approach to healthcare mergers just one year after the California AG announced a settlement of its antitrust case against a large a multi-hospital system in Northern California.

Takeaways

Financially strapped healthcare firms considering mergers and acquisitions should not assume that the COVID-19 crisis will lessen their regulatory burden. Federal and state regulators say that they are still scrutinizing healthcare deals very closely. Those interested in pursuing such deals should retain antitrust and bankruptcy experts to analyze the firm's prospects for meeting the "failing firm" defense and relevant state regulatory requirements.

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