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FTC's Proposed New HSR Regulations: "Need to Know" Keys for Health System Leadership and In-House Counsel

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The Federal Trade Commission's (FTC's) proposed pre-merger notification regulations[1] pursuant to the Hart-Scott-Rodino (HSR) Act[2] (Proposed Rule) may have particular significance for the health care industry, given its historical use of mergers, acquisitions (M&A), and similar forms of non-organic growth. As a result, the Proposed Rule is worthy of attention by organizational leadership for its impact on planned and possible transactions.

General Observations

1. HSR filings will require more deal-related documents to be submitted from more employees (and the consultants and bankers they might retain) than presently, so deal teams need to be more sensitive to document creation than ever before.

2. For the first time, parties will have to submit ordinary course strategic plans, so they must take more care in their ordinary course planning documents when describing the competitive landscape.
3. Parties will have to disclose competitive overlaps with detailed narrative descriptions of (a) the rationale for the deal, (b) transaction timelines, and (c) existing business relationships between the parties. The parties will also have to provide detailed analyses of competition. These will all take significant time and access to key executives to prepare.
4. Parties will have to disclose officers, board directors, and board observers of all entities within the parties as well as identify other entities (i.e., non-parties) for which these individuals served as officers, board directors, or board observers within the two years prior to the filing.
5. Parties will have to disclose their pre-existing relationships, such as supply arrangements or management agreements.
6. Parties will have to disclose information about their labor forces, including employee locations, if the parties overlap in the types of employees they have, and they will need to report violations of labor and employment laws. The Proposed Rule will memorialize within the HSR process the FTC's and Department of Justice's (DOJ's) recent focus on labor and employment issues.
7. Parties will have to disclose any prior acquisitions of any size within the prior ten years if the parties have a competitive overlap.
8. Parties will have to implement document holds across any controlled entity when they submit their HSR filings, even if the transaction is not public or even widely known internally.

These and other proposed changes are subject to a 60-day public comment period, after which the FTC likely will adopt a final rule which could go into effect later this year or early next year. The Proposed Rule is also generally consistent with the Biden Administration's aggressive enforcement of the antitrust laws and may foreshadow the FTC's and DOJ's forthcoming revisions to their Merger Guidelines.

Special Governance Observations

The Proposed Rule, if finalized, will impact board governance in several ways, e.g., (1) the obligation to disclose in the filing all officers, directors, and board observers of every entity within the corporate structure; (2) the emphasis on disclosure of transaction rationale, with which the board is traditionally closely involved; (3) the pressure on the transaction timetable, caused by the proposed requirement that a draft definitive agreement or detailed term sheet-and not a simple letter of intent-is required to commence the filing process; (4) the extensive documents and information that must now be included in the HSR filing; and (5) the extent to which labor considerations will now play a part in the merger planning process.

Special Tactical Observations

The Proposed Rule particularly impacts hospitals and health systems that tend to rely on non-officers and outside consultants/bankers to assist with deals (and who all generate voluminous documents during any M&A transaction). That process will now need to be monitored earlier and more closely for content and document control because the Proposed Rule seeks not only documents from more people involved in the deal, but (for the first time) drafts as well.

The proposed ten-year prior M&A disclosure requirement is likely to require hospitals, health systems, and Private Equity (PE) funds to disclose numerous prior small physician practice and outpatient facility deals that were not reportable at the time—which could enable the FTC or DOJ to revisit them.

Preparing the narrative responses about competitive overlaps effectively means that clients will be submitting white papers at the time of filing, accelerating work that previously would have been done during the first 30 days after filing (or often not until well into an investigation) (and likely requiring retention of an economist or other experts). All of this will be time consuming and expensive.

Finally, compiling the newly required documents and information will be burdensome, something even the FTC acknowledges, although likely underestimates, in its Proposed Rule. Practically, this means parties to an M&A transaction will have to allocate meaningful time to preparing their HSR filings, especially if they have a competitive overlap. Parties to a transaction will no longer be able to sign a transaction agreement and start and finish their HSR filing processes within a few days, as is often the case today.

Special Strategic Observations

The bottom line is that if these proposed changes take effect, HSR filings will take significantly longer and cost more to prepare, slowing down transactions, and will reveal much more information about parties' past M&A and current and future strategies. These changes will impact both PE funds and traditional hospital and health care provider and payer organizations, albeit in different ways.

Depending upon the transaction and the parties, the proposed required disclosures of officers, directors, and board observers' similar roles in other firms not involved in the transaction could reveal interlocks that may violate the letter or spirit of Clayton Act Section 8's ban on interlocking directors and officers among competitors.

Additionally, the proposed required disclosure of all prior acquisitions going back a decade will unveil any prior "roll-up" strategies that may not have required any HSR filings in the

past. For traditional hospital, health care provider, and payer organizations, the proposed changes will also spotlight labor market antitrust issues and any pre-existing relationships among the parties, such as supply and management agreements.

In preparation for these potentially sweeping changes, it is recommended that growth-oriented health industry companies conduct document creation training for employees, executives, and board members (and observers) involved in M&A and strategic planning, among others. Outside M&A consultants with which the organization typically works might be included in limited forms of this training. The chief legal officer/general counsel is likely the most appropriate corporate officer to lead the entire training exercise in conjunction with other key officers, such as the corporate compliance and risk officers.

A Reminder of What's Still to Come

Health care entity leadership should remember that apart from these proposed changes to the HSR filing process, the DOJ and the FTC are expected to release revised Merger Guidelines this month, which is likely to further roil the M&A process.

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[1] 88 Fed. Reg. 42178 (Jun. 29, 2023).

[2] 15 U.S.C. § 18a et seq.