



WEBINAR

TOP TAKEAWAYS

HEALTH ANTITRUST ENFORCEMENT: MUST-KNOW CHANGES FROM THE BIDEN ADMINISTRATION

Recent government actions indicate that antitrust is a top enforcement priority. In this webinar, McDermott partners Ashley Fischer and Stephen Wu took an in-depth look at these recent actions, including the Biden administration's Executive Order (EO) on Promoting Competition in the American Economy, and their potential effect on the healthcare industry. Our thought leaders discussed a wide range of timely issues, including changes in Federal Trade Commission (FTC) and US Department of Justice (DOJ) transaction reviews, recent and current enforcement actions, and what constitutes alleged criminal antitrust conduct.

1

Past EOs on competition issues have generally been quite broad. In contrast, the Biden administration's EO on Promoting Competition in the American Economy, issued on July 9, 2021, set out a detailed roadmap of specific antitrust enforcement initiatives and established a White House Competition Counsel to monitor progress. The EO encouraged FTC and DOJ to consider revising the Horizontal (2010) and Vertical (2020) Merger Guidelines and the Antitrust Guidance for Human Resource Professionals, and to curtail the "unfair use of employee noncompete clauses." The EO identified the healthcare sector as one of four key focus areas, with particular emphasis on prescription drugs, hearing aids, health insurance and hospitals.

2

In response to the EO, the heads of the FTC and the DOJ Antitrust Division announced a joint review of the current merger guidelines, noting that they "deserve a hard look to determine whether they are overly permissive." Subsequently, the FTC withdrew the 2020 Vertical Merger Guidelines, stating that they "include unsound economic theories that are unsupported by the law or market realities."

3

While merger filings under the Hart-Scott-Rodino Act have been steadily increasing over the last decade, the number of transactions has skyrocketed since the onset of the COVID-19 pandemic. This surge in filings has led to a backlog of reviews at the FTC and DOJ. As a result, the agencies have suspended grants of early termination of waiting periods, and there is no indication that such grants will resume.

4

In 2020, almost half of all FTC enforcement actions focused on the healthcare industry: 25% of enforcement actions involved pharmaceuticals and medical devices, and 21% involved healthcare providers. This aggressive enforcement focus is likely to continue, and hospital mergers in particular will continue to be scrutinized. In 2020, the FTC challenged three hospital transactions, resulting in one successful challenge, one abandoned transaction and one (somewhat surprising) loss for the FTC.

5

The past year has also seen a ramp-up in DOJ criminal enforcement of antitrust laws. Recent criminal actions in the healthcare sector have involved conduct issues such as market allocation, wage fixing and no-poaching agreements. Industry stakeholders should keep an eye out for potential changes to the rules on sharing wage data: the July 2021 Biden EO directed FTC and DOJ to review Antitrust Guidance for Human Resource Professionals, which includes an antitrust safety zone for exchanges of price and cost data, including wage data.

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