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HEALTH ANTITRUST IN THE BIDEN ADMINISTRATION: HOT TOPICS

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AGENDA

- Antitrust updates
 - Biden administration policy
 - Recent enforcement actions

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS



Executive Order 13813 of October 12, 2017

Promoting Healthcare Choice and Competition Across the United States



Executive Order -- Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy

April 15, 2016



Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

- Affirms policy of administration to enforce the antitrust laws to combat:
 - “The excessive consolidation of industry
 - The abuses of market power,
 - And the harmful effects of monopoly and monopsony”
- Sets forth specific initiatives
- Establishes White House Competition Council to monitor progress

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

- Encourages FTC/DOJ to:
 - Enforce the antitrust laws “fairly and vigorously”
 - Consider revising Horizontal (2010) and Vertical (2020) Merger Guidelines & Antitrust Guidance for HR Professionals
 - Exercise authority to curtail the “unfair use” of employee non-compete clauses
- Affirms legal authority to challenge consummated mergers retrospectively

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

- Antitrust enforcement should focus on healthcare, labor and agricultural markets, and the tech sector
- Four areas of focus in health care:
 - Prescription Drugs
 - Hearing Aids
 - Health insurance
 - Hospitals

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

- “[U]nchecked mergers” have led to the “ten largest healthcare systems now control[ling] a quarter of the market”
- “[H]ospitals in consolidated markets charge far higher prices than hospitals in markets with several competitors”
- “Hospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options”

HEALTH ANTITRUST ENFORCEMENT UPDATE

- FTC Chair/DOJ Antitrust Division AAAG Statement
 - Current Merger Guidelines “deserve a hard look to determine whether they are overly permissive”
 - Jointly launching a review “with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law”
- FTC Withdraws 2020 Vertical Merger Guidelines
 - “Include unsound economic theories that are unsupported by the law or market realities” – FTC press release
 - Clayton Act does not “contain exceptions for mergers that lessen competition but also create some form of efficiency.” – Majority statement

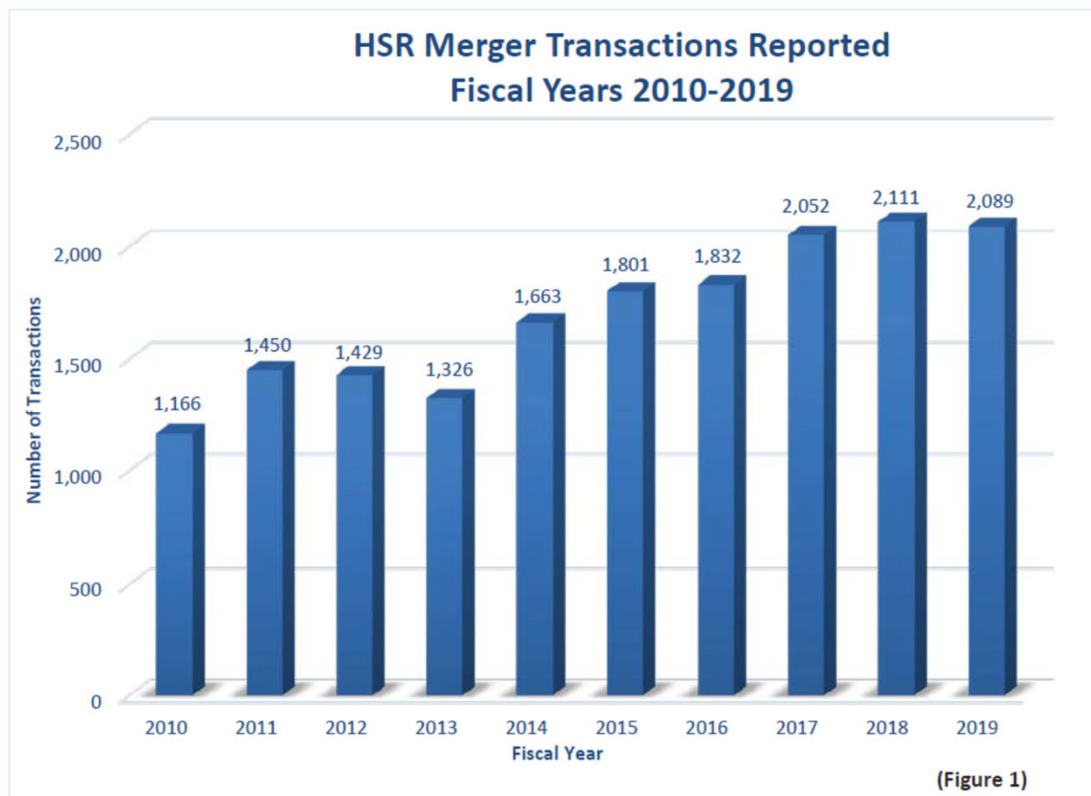
HEALTH ANTITRUST ENFORCEMENT UPDATE

- FTC policy
 - Compulsory process
 - One Commissioner to authorize
 - Settlement agreements
 - Approval of subsequent transactions
 - Pre-consummation warning letters
 - HSR waiting period expiring and FTC investigation not complete

HEALTH ANTITRUST ENFORCEMENT UPDATE

- FTC policy
 - Physician practice acquisition retrospective
 - Orders issued in January 2021 to 6 payors for 5 years of patient-level commercial claims data for inpatient, outpatient and physician services in 15 states
 - Retrospective review of whether acquisition of certain physician practices led to post-closing price increases

MERGER REVIEW



HSR Transactions by Month	
July 2021	343
June 2021	295
May 2021	326
April 2021	266
March 2021	323
February 2021	304
January 2021	210
December 2020	192
November 2020	424
October 2020	233
September 2020	177
August 2020	182
July 2020	112
June 2020	111
May 2020	73
April 2020	79
March 2020	138
February 2020	140
January 2020	162
December 2019	172
November 2019	209
October 2019	146

COMPETITION

ANTITRUST ENFORCEMENT

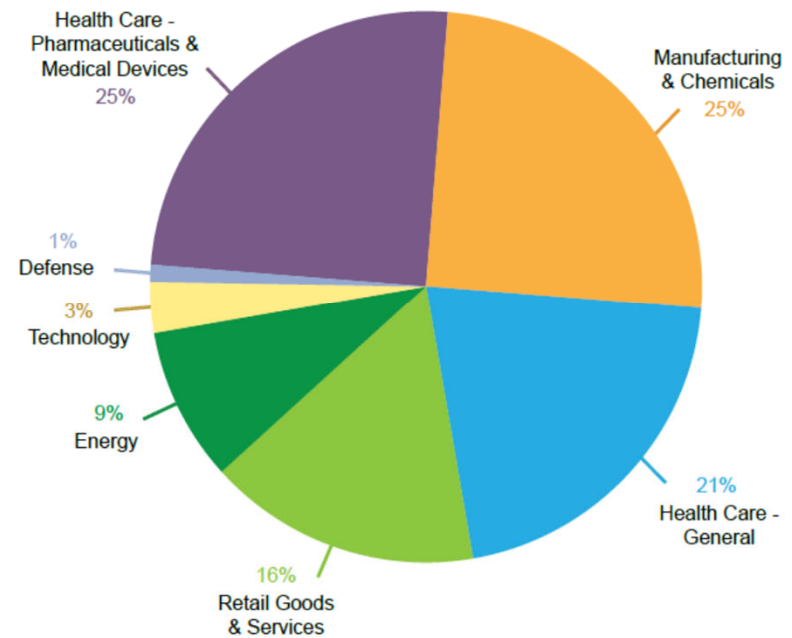
Merger Consent Orders	12
Filed Merger Cases	9
Abandoned Transactions	11
Non-Merger Actions	3
Civil Penalty Actions	1

POLICY INITIATIVES

Hearings & Workshops	4
Reports	6
Advocacy & Amicus Briefs (7 advocacy letters & 2 briefs)	9

ENFORCEMENT ACTIONS BY SECTOR

FISCAL YEARS 2016-2020



RECENT HOSPITAL MERGER CHALLENGES

Hospital Merger (State & Year)	FTC-Alleged Post-Merger Combined Share of Parties	Alleged Reduction in Competitors	Alleged Post-Merger HHI & Classification (Increase)	Outcome
Hackensack/Meridien (NJ 2020)	50% of GACH services	4-3	Highly Concentrated: ~3,000 (~900)	Court granted FTC's PI motion.
Methodist Le Bonheur/ St. Francis (TN 2020)	>50% of GACH IP commercial admissions	4-3	Highly Concentrated: >4,500 (>1,000)	Parties abandoned transaction after complaint filed.
Jefferson (J)/ Einstein(E) (PA 2020)	60% of GACH IP commercial admissions (N. Philadelphia) 45-60% of GACH IP commercial admissions (Montgomery) 70% of IP rehab commercial admissions	5-4	Highly Concentrated: 4,500 (1,200) (GACH – N. Philadelphia) 3,500 (700) (GACH- Montgomery) 5,900 (2,500) (IP rehab)	FTC challenged but lost PI and dropped appeal. Parties closed transaction.



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Statement of FTC Office of Public Affairs Director Lindsay Kryzak on District Court's Decision to Grant Preliminary Injunction Halting New Jersey Hospital Merger

August 4, 2021

Following the U.S. District Court for the District of New Jersey's decision to grant a preliminary injunction against Hackensack Meridian Health, Inc.'s proposed acquisition of Englewood Healthcare Foundation, FTC Office of Public Affairs Director Lindsay Kryzak made this statement:

“Too many hospital mergers lead to jacked up prices and diminished care for patients most in need. It remains a mystery why these two hospital systems decided to pursue a highly suspicious merger in the middle of a global pandemic. The Court has hit pause on this merger, which the FTC alleges is unlawful. Hospital executives hatching merger plans should take note.”

MARKET ALLOCATION

- ***U.S. v. Florida Cancer Specialists (FCS)***
 - DOJ filed a Deferred Prosecution Agreement in April 2020
 - Alleges FCS and a competing oncology practice illegally allocated chemotherapy services to FCS & radiation therapy to other practice in SW Florida from 1999 – 2016
 - Requires FCS to pay \$100 million fine, waive all non-compete, non-solicitation and similar terms & implement effective compliance program
 - Separate civil consent decree with the Florida AG resulted in \$20 million payment
 - FCS founder and former President indicted in September 2020

EMPLOYMENT ISSUES

- “Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws”
- “DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies”
- “[F]irms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services”



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR

NO-POACH AGREEMENT

- *U.S. v. Surgical Care Affiliates (SCA)*
 - January 5, 2020 indictment alleges:
 - SCA and Company B had “no poach” agreement from 2012 - 2017
 - SCA’s CEO agreed with Company A’s CEO “not to solicit each other’s senior-level employees” from 2010 - 2017
 - On May 14, 2010, Company A CEO sent email, “I had a conversation with [SCA CEO] re people and we reached agreement that we would not approach each other’s proactively”
 - On Nov. 11, 2013, Company A’s HR senior employee emailed recruiter: “[D]o not schedule a call w/[candidate] ... Take any SCA folks off list”
 - On July 17, 2017, Company A HR employee emailed recruiter saying candidate “look[s] great” but we “can’t poach her” from SCA.
- DaVita & its former CEO indicted July 2021

WAGE FIXING

- *U.S. v. Neeraj Jindal* (December 2020)
 - First criminal wage-fixing indictment against an individual
 - Former owner of a therapist-staffing company indicted for conspiring over a 5-month period to fix physical therapist and therapist assistants' wages in the Dallas-Fort Worth area
 - Jindal and his co-conspirators allegedly shared nonpublic information on wage rates, and as a result paid lower rates to PTs and assistants
 - Jindal also was charged with obstructing a separate FTC investigation into the alleged wage-fixing

NO-HIRE/NO POACH AGREEMENT

- *Seaman v. Duke University*
 - Class action lawsuit filed in June 2015 alleged Duke and UNC agreed not to hire each other's medical faculty
 - UNC settled for injunctive relief – prohibiting no-hire agreements
 - Class of medical faculty certified
 - DOJ intervened
 - Duke settlement for \$54 million plus injunction
 - Compliance officer
 - Antitrust training
 - DOJ role in enforcing injunctive relief
 - New no-poach class action complaint filed May 2020 on behalf of non-medical faculty

EXCHANGES OF PRICE AND COST DATA

- **FTC/DOJ Antitrust Safety Zone**
 - Managed by a third party (e.g., trade association, consultant)
 - Historical information, at least 3 months old
 - Five or more participants and no single participant's data represents more than 25% of the survey data
 - Information disseminated in aggregate and blinded form

Statements of Antitrust Enforcement Policy in Health Care



Issued by the
U.S. Department of Justice
and the
Federal Trade Commission



August 1996