

FTC and DOJ Take Key Actions with Antitrust Guidance Affecting Healthcare

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This year, the Federal Trade Commission (the “FTC”) and the Department of Justice (the “DOJ”) have been modifying antitrust guidance related to healthcare, and recently enacted three notable changes. First, the FTC and DOJ jointly issued updated [Draft Merger Guidelines](#) (the “Draft Guidelines”) to address the way the agencies evaluate a merger to determine its effect on competition. The Draft Guidelines outline 13 principles the DOJ and FTC may use when determining whether a merger, including a healthcare merger, is unlawfully anticompetitive under antitrust laws. The elements are not mutually exclusive, and the FTC or DOJ may use any one, or any combination when analyzing a merger. The principles are as follows:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.

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10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform or to displace a platform.
 11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
 12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
 13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

The public has until September 18, 2023 to provide comment before the FTC and the DOJ finalize the Draft Guidelines.

The second significant action came on July 14, 2023 when the FTC withdrew two antitrust policy statements^[1] (collectively, the “Policy Statements”) related to enforcement in healthcare markets. This FTC action was not unexpected, as it follows the DOJ’s February 3, 2023 withdrawal of support of the Policy Statements.

The FTC’s rationale for withdrawing support of the Policy Statements is similar to the DOJ’s rationale, claiming the Policy Statements were outdated and no longer served their intended purpose. The agencies say withdrawing the statements promotes transparency and fair competition in healthcare markets. The withdrawal of the guidance creates uncertainty with how the FTC will approach enforcement in the future. To address this issue, the FTC simply offered that “the Commission will rely on general principles of antitrust enforcement and competition policy for all markets, including markets related to the provision of healthcare products and services.”^[2]

The third significant action was on June 27, 2023, when the FTC issued proposed pre-merger notification regulations (the “Proposed Rule”) pursuant to the Hart-Scott-Rodino (HSR) Act (the “Act”).^[3] The Act requires companies to file pre-merger notification with the FTC and the Antitrust Division of the DOJ for certain acquisitions. If adopted, the Proposed Rule will require companies to spend considerably more time, effort and money when preparing their HSR filings. The FTC estimates the new rules would extend the time required to prepare an HSR filing from 37 hours to 144 hours.

Some of the most significant developments in the proposed rule are that filers must:

- Submit more comprehensive details of the transaction, including a transaction diagram, project closing timeline and the strategic rationale for the transaction.
- Submit draft documents that deal with competition-related issues not only in the planning of the transaction by board members, officers and consultants, but also documents created in the ordinary course of business.
- File responses describing the competitive landscape of the transaction as it relates to labor markets and employees.
- Disclose prior acquisitions from the past ten years involving any line of business where there is the potential for competitive overlap.

- Provide the organizational structure of the company to identify individuals and entities that may have influence over the business.

While the above list is not comprehensive of the new requirements, it demonstrates the increased obligations for companies, including healthcare, when contemplating a merger. Comments on the Proposed Rule must be filed on or before August 28, 2023.

[1] [hlth3s.pdf \(ftc.gov\)](#) & [Federal Trade Commission, Department of Justice Issue Final Statement of Antitrust Policy Enforcement Regarding Accountable Care Organizations | Federal Trade Commission \(ftc.gov\)](#)

[2] <https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements>

[3] <https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf>

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