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Year-End Reviews Highlight Antitrust Enforcement in, And Guidance Relevant to, Health Care Industry; Aggressive Enforcement is Likely to Continue in 2017

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The *Federal Trade Commission* (“FTC”) and the *Antitrust Division of the Department of Justice* (“Antitrust Division”) released their respective year-end reviews highlighted by aggressive enforcement in the health care industry. The FTC, in particular, indicated that 47% of its enforcement actions during calendar year 2016 took place in the health care industry (including pharmaceuticals and medical devices). Of note were successful challenges to hospital mergers in Pennsylvania (Penn State Hershey Medical Center and Pinnacle Health System), and Illinois (Advocate Health Care Network and North Shore University Health System). In both actions, the FTC was able to convince the court that the merger would likely substantially lessen competition for the provision of general acute-care hospital services in relevant areas in violation of section 7 of the Clayton Act. See *FTC v. Penn State Hershey Med. Center*, 838 F. 3d 327 (3d Cir. 2016); and *FTC v. Advocate Health Care Network et al No. 1:15-cv-11473*, 2017 U. S. Dist. LEXIS 37707 (N.D. Ill.Mar. 16, 2017)

The Antitrust Division, in similar fashion, touted its actions to block the mergers of Aetna and Humana, and Anthem and Cigna. Complaints against both mergers were filed simultaneously in July of 2016, and tried before different judges in the Federal District Court for the District of Columbia. After extensive trials, Judge Bates blocked the Aetna/Humana deal, and Judge Amy Berman Jackson blocked the Anthem/Cigna transaction. *United States v. Aetna Inc., No. 1:16-cv-1494*, 2017 U.S. Dist. LEXIS 8490 (D.D.C. Jan 23, 2017) and *United States v. Anthem Inc., No. 1:16-cv-01493*, 2017 U.S. Dist. LEXIS 23614 (D.D.C. Feb8, 2017).

In addition to their enforcement activities, the agencies promoted jointly issued policy guidelines, including their “Antitrust Guidance for Human Resources Professionals.” Although not specific to any industry, this guidance has particular relevance to the health care industry. Among other things, this guidance makes clear that naked wage-fixing (such as the wave of wage fixing claims relating to nurses) and no-poaching agreements (that would include agreements not to hire competing physicians) are not only per se illegal, but also subject to criminal prosecution.

While a marginal enforcement shift may be in store as a result of the change in administration, most signs point to a continued focus on the health care industry. Maureen K. Ohlhausen, appointed by President Trump as acting Chair of the FTC, reiterated in a speech recently delivered at the spring meeting of the American Bar Association’s antitrust section, that “[i]t’s extremely important we continue our enforcement in the health care space.” Likewise the Acting Director of the FTC’s Bureau of Competition – Abbott (Tad) Lipsky, appointed by Chairman Ohlhausen, applauded the FTC’s success in challenging the Advocate/Northshore Hospital merger noting, in a related FTC press release, that the “merger would likely have reduced the quality, and increased the



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cost, of health care for residents of the North Shore area of Chicago.”

Makan Delrahim, President Trump’s selection (awaiting confirmation) to head the Antitrust Division, recently lobbied on behalf of Anthem and its efforts to acquire Cigna, and has openly stated with respect to certain announced mergers, that size alone does not create an antitrust problem. Nevertheless, given the political climate and overall impact the health care industry has on the U.S. economy, the Antitrust Division’s efforts to open markets in the health care sector, particularly to generics and new medical technologies by challenging pay for delay deals and scrutinizing unnecessarily restrictive agreements among medical device manufacturers is likely to continue.

A wild card affecting future antitrust enforcement is increasing possibility of passage of the **Standard Merger and Acquisitions Review Through Equal Rights Act of 2017 (H.R. 659 a/k/a the “SMARTER ACT”)**. This bill, recently approved by the House Judiciary Committee, would eliminate the FTC’s administrative adjudication process as it relates to merger enforcement, forcing the FTC to bring all such actions in court. In addition, it would align current preliminary injunction standards such that both the FTC and DOJ would face the same thresholds required of the Clayton Act rather than the more lenient standard under the FTC Act. A similar bill passed the House in 2016, but was not taken up by the Senate.

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