

Changes Ahead for Healthcare Mergers? It's a Winks Game for Now, But Get Ready to Comment

by Lisa Jaffe Hubbell

Look at the press release from the Federal Trade Commission (FTC) and the Department of Justice (DOJ) on the questions they have regarding changes to horizontal merger rules and you'd be forgiven if half of them required second or third readings. They are largely written by and for lawyers, says Jerome Hoffman, a partner at Holland & Knight specializing in mergers, antitrust, and healthcare issues.

Still, the organizations are holding workshops in December of this year and January 2010, and are actively seeking comment on proposed changes – the first of any major magnitude since 1992. Any changes could alter the way the FTC and DOJ enforce rules, as well as differentiating between some industries such as healthcare and others.

Among the topics the DOJ and FTC are looking at are:

- Current guidelines require a five-step process to decide whether to challenge a merger. Are those steps enough, too many, or appropriate?
- Should they expand discussion on the “hypothetical-monopolist test”?
- Should they simplify that test?
- Should the guidelines stop referring to where something is produced and instead concentrate on a geographic market based on where customers are?
- Should the guidelines explain more fully how market shares and market concentration are measured and interpreted in dynamic markets, including markets experiencing significant technological change?
- Should the guidelines be updated to address more explicitly the non-price effects of mergers, especially the effects of mergers on innovation?
- Should the guidelines be revised to reflect learning based on merger retrospective studies?

The changes are not directed at healthcare specifically, and are coming in part not just because of the 17-year lapse in change, but because of the change of administration, says Hoffman. “It was felt that under the last regime, trust enforcement was rather moribund,” he says. Still, it comes at a time when law and economic analysis have both changed and there are more tools and tests available to determine whether a merger would harm competition.

As it pertains to healthcare, Hoffman says merger guidelines and enforcement is difficult. “Healthcare is not a typical industry,” he notes. “Consumers, even employers, don't buy healthcare services like they buy other things. And insurance companies are the largest consumers of healthcare, so the whole market structure is a lot different than other industries.”

Overlaying those differences are the state and national regulatory requirements that impose some restrictions on building new hospitals – like Certificate of Need laws – and licensing that make entry to and exit from the market more difficult than in other industries.

Hoffman gives an example of how the current rules don't work for hospitals. For years, the FTC was applying the Elzinga-Hogarty test to establish market boundaries for all industries. This test was named for two men who wrote an article in the 1980s about geographical boundaries. In the last challenge to a healthcare merger – related to Northwestern University and happening four years after the merger was completed when detrimental impacts to the community from the merger became evident – Ken Elzinga was called as a witness. He spent a lot of time, Hoffman says, excoriating the use of Elzinga-Hogarty for healthcare mergers.

So there is a reason to hope that new regulations will at least address the special needs and requirements of some industries, says Hoffman. The 20 questions are a great starting point. “I think, though, they absolutely must have some separate guidelines or commentary on healthcare or that not all industries will be treated the same.”

What does it mean for healthcare organizations now? They should be encouraging their professional organizations – the American Medical Association or the American Hospital Association, for example – to get involved in the discussion process. If they have inside counsel that has expertise in this area, or outside counsel they've worked with on mergers, encourage them to go to the website and provide input. And Hoffman says that the Internet isn't only for answering those questions. He says that the FTC and DOJ do consider other comments from individuals and organizations when formulating new rules. “They expect input from the big players, but the smaller organizations that don't have a big voice can still provide feedback. The FTC and DOJ need to know how they can help preserve competition, make it more robust, and preserve quality at a reasonable price.”