Avoiding Antitrust Traps in Merger Negotiations

Key Recommendations for Health Care Executives

1. Think about what you put in writing (even before you start negotiations). Not all competitor consolidations present antitrust problems. But a consolidation that is likely to increase prices or diminish competition may be challenged by state or federal enforcement agencies. To determine whether a particular deal raises antitrust concerns, government lawyers pay close attention to what the parties themselves have said about the transaction in their planning documents, board presentations, and similar materials. Predictions that a consolidation will “increase leverage in dealing with payors” or “enable us to stabilize reimbursement rates” can scuttle a deal that might otherwise go unchallenged.

2. Think about who might complain. Both the federal government and individual states may open an investigation in response to complaints from private parties. The government tends to give the most credibility to complaints from customers (third party payors or consumers), but competitor complaints can also result in agency review. If an investigation commences, the investigating agency will require you to produce all documents you have created that analyze the transaction, which is why you should be cautious of what you put in writing.

3. Be careful about sharing too much information or coordinating operations prior to closing. If the parties to a proposed consolidation are competitors, they must continue to behave that way until the deal closes. This means no agreements on pricing, bids, dealings with customers and the like, even if a merger agreement has been signed. It also means competitively sensitive information should be shared only as reasonably necessary to evaluate and consummate the transaction.

4. If an investigation may be coming, plan early for how to respond. The antitrust rules governing mergers and other consolidations are anything but black and white. The federal government has published guidelines designed to help parties understand how antitrust rules apply to consolidations, but there is ample room within the guidelines to craft arguments both for and against many transactions. The earlier the parties begin planning how to respond to an antitrust investigation, the more likely it is they will be able to show why their deal should be allowed to proceed.

5. Consider what happens if a transaction is delayed or blocked. In spite of good planning and documentation, the government may move to impose conditions on your transaction (or to block it altogether) if the investigating agency believes competitive harm is likely. If that’s a potential risk, the parties should consider whether to include provisions in their merger agreement that address how long they must continue to pursue the transaction and under what circumstances a party can withdraw. Such provisions may be especially important for the party being acquired, since its business can potentially deteriorate during a lengthy investigation.

These suggestions aren’t intended to tell you whether your deal will or will not pass antitrust muster. That’s a subject for another article (or more likely for a conversation with your antitrust lawyer). But if you follow our recommendations for how to approach competitively sensitive combinations, we believe that you’ll significantly reduce the likelihood of an unpleasant antitrust surprise along the way.