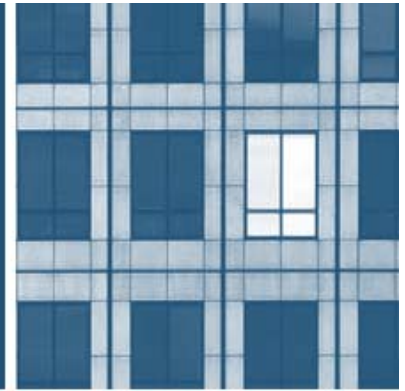


# On the Subject



## Health Industry Advisory

August 26, 2010

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New Horizontal Merger Guidelines recently released by the Federal Trade Commission and U.S. Department of Justice emphasize the competitive effects of potential alignment transactions and place a premium on internal planning materials.

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### New Merger Guidelines Underscore Importance of Internal Planning Documents

When conducting internal analyses of strategic alignment options, hospitals and health systems should focus on establishing the pro-competitive benefits, viewed through the lens of the health care consumer, of particular proposed transactions. This reflects the new Horizontal Merger Guidelines released by the Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) that place greater emphasis on evidence of a transaction's competitive effects. The new guidelines place a premium on the careful, prudent discussion and documentation of competition and pricing considerations in internal planning materials, including those created by third-party consultants.

In the wake of seismic health reform legislation, forward-thinking hospitals and health systems are aggressively pursuing a variety of business opportunities to better position themselves financially and programmatically. Among the many available opportunities are mergers, acquisitions, affiliations, joint ventures and other forms of business alignment with other providers, including medical groups. Given the fluid nature of many health care markets, it is likely that some of these alignment opportunities will include organizations which the antitrust authorities would consider to be competitors. *As active alignment planning is currently underway in many organizations, the new guidelines' shift in emphasis—from market definition to competitive impact—becomes a vital part of the process.*

The new guidelines make clear that documents from the parties to any transaction are a prime source of evidence for analysis by the

FTC and DOJ. More importantly for hospitals and health systems contemplating proposed transactions, the new guidelines reiterate the agencies' position that "documents created in the normal course are more probative than documents created as advocacy materials" during a merger investigation. Hospitals and health systems, therefore, should give particular care to the documents they or their outside consultants create when analyzing potential transactions or the competitive landscape in the relevant market generally. This is especially true when coupled with revisions to the Hart-Scott-Rodino (HSR) Act premerger notification form recently proposed by the FTC Premerger Notification Office, which would require the submission of additional "ordinary course" documents with the parties' initial HSR act filings.

The FTC and DOJ will consider as "highly informative of the likely effects of the transaction" any evidence that the parties "intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development" after the transaction. *Thus, parties will find it difficult to explain away poorly articulated or carelessly prepared documents the parties or their outside consultants may have drafted when initially considering a potential transaction.* On the other hand, the agencies will also look to the parties' documents for "reliable evidence that the transaction is likely to result in efficiencies" and other pro-competitive benefits that may facilitate a transaction's clearance through the agencies.

Business alignment planning processes should take into account the new emphasis of the antitrust regulators. The general counsel should regularly be involved in the document-creation process to assure appropriate documentation of pro-competitive goals. Hospitals and health systems should also consider involving outside antitrust counsel, and perhaps even an economist or similar market analyst, to provide specific antitrust and economic advice and data concerning particular alignment options. While more expensive, it may be warranted in those markets where there is rapid consolidation activity and the most obvious alignment opportunities involve competitor organizations.

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