Proskauer

Public Portal to Promote Healthy Competition

Health Care Law Brief on **April 25, 2024**

On Thursday, April 18, the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and the Department of Health and Human Services ("HHS") announced the launch of an online portal that allows the public to report potential health care antitrust violations.

The portal, HealthyCompetition.gov, aims to advance government efforts to boost competition in health care markets, and aligns with the Biden-Harris Administration's recent announcement about cracking down on anticompetitive practices in health care.

Assistant Attorney General Jonathan Kanter, of the DOJ's Antitrust Division, stated in a press release that the portal would "allow the [DOJ and FTC] to collaborate early and often, helping to promote economic opportunity and fairness for all." FTC Chair Lina M. Khan agreed, stating that "[t]his joint initiative between FTC, DOJ and HHS will provide a crucial channel for the agencies to hear from the public, bolstering our work to check illegal business practices that harm consumers and workers alike." HHS Secretary Xavier Becerra explained that the agencies understand it is their "responsibility to stop monopolistic, anti-competitive practices that undermine the delivery of health care to Americans. The information provided by the public will help to root out these behaviors."

Complaints submitted through the portal will be reviewed by the DOJ Antitrust Division and FTC. Those complaints rising to the level of "sufficient concern" under federal antitrust laws will be escalated for further investigation by the appropriate agency.

The portal homepage provides several examples of health care business practices that can hinder competition:

- Roll-ups or serial acquisitions – a practice of making a sequence of relatively minor acquisitions that, in their totality, result in a consolidation or acquisition.
- Collusion or price-fixing among competitors.

- Consolidations that significantly lessen competition.
- Anti-tiering and anti-steering clauses that prevent health insurers from providing discounts.
- Joint ventures that inappropriately inhibit innovation, quality, or access.
- All-or-nothing clauses that require health insurers to contract with all the provider's facilities.
- Use of competitor data to monitor rivals or their customers.
- Tactics that delay generic medicines from being marketed, including making minor modifications to a drug with an expiring patent, paying manufacturers to delay producing generics, or improperly listing patents in the Orange Book, the Food and Drug Administration's annual publication of approved drug products with therapeutic equivalence evaluations.
- Exclusive contracting that prevents buyers from purchasing from other sellers or price parity contract provisions that prevent sellers of health care services from offering lower prices to other competing buyers.
- Imposing unnecessary provider accreditation or recertification requirements that reduce the number of providers or make it more expensive to practice medicine.
- Written or verbal policies that limit consumer choice or employee wages. For example, non-compete agreements prevent health care providers from working for a competitor for a specific time in a set geographic location.[1] No-poach and no-solicitation agreements made between competitors to not pursue each other's employees also suppress wages and benefits.

The portal homepage also lists federal antitrust laws and discusses how each promotes healthy competition in the health care sector, including:

- **The Sherman Act** makes it a criminal offense to monopolize or enter into certain agreements, like those to fix prices or wages, rig bids, or allocate customers. The Sherman Act also bans predatory pricing that aims to set prices so low as to drive competitors out of business, and then raise prices when competition is lessened.
- **The FTC Act** forbids unfair or deceptive practices from companies.
- **The Clayton Act** prohibits mergers that substantially lessen competition, or to enter into tying agreements – those that force a customer to purchase one product before they can purchase another.
- **The Robinson-Patman Act** bans charging competing buyers' different prices for the same commodity strictly to give favored customers an edge, and not for increased efficiency or to meet competitors offerings.

As a result of the new initiative, we can expect to see more complaints regarding possible antitrust violations. As many unlawful anticompetitive actions are not overt, the portal could raise awareness to discreet offenses. For example, restrictive covenants on employment, like no-poach and non-compete agreements, are often made verbally and may be difficult for the government to learn of, and identifying these limitations on employment may become of greater import given recent FTC action banning non-competes. Additionally, the portal, in working with the public in a user-friendly format, can be expected to lead to more health care antitrust investigations and potential challenges, especially for those transactions that do not trigger notification under the Hart-Scott-Rodino Act ("HSR") and Clayton Act.

This joint action, along with the FTC and DOJ withdrawal of prior guidance policy statements, will likely cause uncertainty and confusion within the health care industry. The DOJ, in February 2023, withdrew three statements discussing the best way to promote competition and transparency in health care. The FTC also announced the withdrawal of two statements with similar guidance on health care antitrust best practices in July. Most recently, the FTC withdrew prior statements professing the benefits of pharmacy benefit managers in reducing costs to consumers by negotiating rebates with drug manufactures on their behalf. Both agencies state that transactions need a case-by-case analysis and that outdated guidance no longer reflects the current marketplace. However, even in the wake of changes and uncertainty in antitrust policy statements, the major federal antitrust laws, including the Sherman Act, the Clayton Act, and the FTC Act, remain unchanged in their statutory language or application.

Proskauer has the knowledge, experience, and expertise to help health care stakeholders understand the implications and strategize and navigate the potential interpretations of these laws in the current environment.

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[1] On April 23, 2024, the FTC issued a final rule banning noncompete clauses. Existing noncompete clauses for all but the 0.7% of employees who are senior executives will no longer be enforceable after the final rule's effective date, 120 days after its publication in the Federal Register.

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