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I. INTRODUCTION

Recently, the Obama Administration has reshaped the healthcare industry and encouraged collaborations among competitors as a way to drive skyrocketing costs down and improve the efficiency of the delivery of healthcare to Americans. But are the Administration's own competition watchdogs standing in the way of these efficiencies?

Tensions between reducing costs and protecting competition are increasingly ramping up for companies seeking to adjust to a constantly shifting competitive landscape created under new federal healthcare reform legislation—the Patient Protection and Affordable Care Act ("ACA")[2]—increasing deal uncertainty for parties attempting new collaborations. Going forward, parties will continue to face uncertainty about how the industry will respond to collaborations, including how competition will be affected, and a lack of clarity about how the agencies will weigh the potentially substantial benefits of proposed collaborations against the potential effect such collaborations will have on a constantly shifting competitive landscape.

This is occurring as the healthcare industry remains one of the largest and fastest-growing sectors in the U.S. economy. It makes up approximately one-fifth of the U.S. GDP, which makes it almost the size of the entire economy of the United Kingdom. According to economists in the Office of the Actuary at the Centers for Medicare and Medicaid Services ("CMS"), healthcare spending is projected to grow at an annual average rate of 5.8 percent through 2020, which is just over 1.0 percent higher than the projected growth rate of U.S. GDP. By 2020, healthcare spending is projected to exceed $4.5 trillion.

II. THE ACA, COLLABORATION, AND ANTITRUST

On March 23, 2010, President Obama signed the ACA into law. The purpose of the ACA was to: (i) increase the quality and affordability of health insurance, (ii) lower the uninsured rate by expanding public and private insurance coverage, and (iii) reduce the costs of healthcare for individuals and the government by shifting the system towards quality over quantity through increased competition, regulation, and incentives to streamline the delivery of healthcare. The ACA introduced a number of provisions and tools to achieve these purposes. The Act's primary tool to reduce costs and improve healthcare outcomes, however, is the promotion of collaboration among hospitals, doctors, and other healthcare professionals.

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[2] Pub. L. No. 11-48, 124 Stat. 119 (2010).

Accordingly, at an unprecedented pace, healthcare organizations—both hospitals and physicians—are consolidating to create larger hospital systems with broader service reach and greater efficiencies. This consolidation is manifesting itself on two fronts: Individual hospitals are merging with other local hospitals or larger regional or national hospital systems, and physician groups are joining the payroll of hospitals. From 2009 to 2012, there were 314 hospital mergers in the United States.

In general, the purpose of the federal antitrust laws is "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down and keep quality up."[3]

At first blush, the stated purpose of the ACA and the federal antitrust laws appear consistent and at least are directionally pointed the same way. Yet there is a tension between the two. On one hand, the clear directive of the ACA is to reduce costs and collaborate more. On the other hand, the Federal Trade Commission ("FTC") is charged with ensuring that such collaborations do not substantially lessen competition among hospitals and physician groups. So, reducing costs should reduce price and increase access to health care. However, reducing competition could encourage hospitals or physicians to pocket the cost savings and not pass them on. As a result, while collaborations have increased, so has FTC enforcement in healthcare. Indeed, the greatest area of competition enforcement from 2009 to 2012 for the FTC was in healthcare (32 percent), and healthcare and pharmaceuticals combined (46 percent) amounted to almost half of all FTC enforcement activity.[4]

Multiple senior leaders at the FTC have tried to assuage this tension. Commissioner Julie Brill recently stated, "the FTC's work and the ACA share the common goals of promoting high-quality and cost-effective health care."[5] FTC Bureau of Competition Director, Deborah Feinstein, stated that it is "critical to recognize that the integration of care provided to patients is fully compatible with core antitrust principles. . . . [and] there is no tension between rigorous antitrust enforcement and bona fide efforts to coordinate care, so long as those efforts do not result in the accumulation of market power."[6] Chairwoman Edith Ramirez explained that "[a]ntitrust enforcers recognized that provider collaboration represents an innovative way to seek to lower healthcare costs and improve the quality of care. We, of course, do not want to stand in the way of those goals. At the same time, we want to ensure that the financial savings and improved

[3] Fed. Trade Comm'n, The Antitrust Laws, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

[4] Fed. Trade Comm'n, Annual Highlights: Stats & Data, http://www.ftc.gov/reports/annual-highlights-2013 (2013).

[5] Julie Brill, Commissioner, Fed. Trade Comm'n, Keynote Address at the Hal White Antitrust Conference, *Competition in Health Care Markets*, at 6 (June 9, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/314861/140609halwhite.pdf.

[6] Deborah L. Feinstein, Director Bureau of Competition, Fed. Trade Comm'n, Fifth National Accountable Care Organization Summit, *Antitrust Enforcement in Health Care: Proscription, not Prescription*, at 2 (June 19, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

patient outcomes that could result from these collaborative efforts are not lost because of increased provider concentration and coordination."[7]

Unfortunately, many antitrust practitioners believe that the antitrust laws and antitrust enforcers continue to "stand in the way" of innovative collaborations that likely will lower healthcare costs and improve the quality of care. But why?

III. THE IMPORTANCE OF CONSIDERING EFFICIENCES IN MERGER REVIEWS

Perhaps the largest reason for this skepticism is the current way efficiencies are considered in the merger review process. Not unique to healthcare merger analysis, but for merger analysis generally, the FTC and the Department of Justice Antitrust Division (the "Agencies") typically consider efficiencies in a silo, placing whatever weight the efficiencies are given on a scale towards the end of the overall review to see which way the balance tips. The Agencies pay close attention to cost savings and, where parties are able to demonstrate substantial merger-specific cost savings, it may help address concerns over concentration levels or a potential lessening of competition.

However, for the most part, the Agencies are skeptical of efficiency claims in a merger. Indeed, the *2010 Horizontal Merger Guidelines* ("*HMG*") clearly acknowledge this cynicism: "Projections of efficiencies may be viewed with skepticism, particularly when generated outside the usual business planning process."[8] Furthermore, parties have a high burden when presenting cost saving and efficiency claims:

> [I]t is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.[9]

Additionally, the Agencies currently only consider efficiencies specific to the narrowly defined relevant antitrust markets. Part of the tension that manifests itself in the healthcare context, but in other contexts as well (such as airlines), is that consumers in these industries are part of much larger markets than the narrowly defined antitrust markets.

At least two senior leaders at the FTC have recently provided support for increased attention regarding the scope of efficiencies in merger analysis.

Commissioner Joshua Wright believes that the FTC "should advocate that courts adopt an approach to efficiencies analysis that considers the competitive benefits from a merger that are outside the relevant product market."[10] Interestingly, this notion is not necessarily novel. Buried

[7] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address at 11th Annual Loyola Antitrust Colloquium, *Antitrust, Accountable Care Organizations, and the Promise of Health Care Reform*, at 2 (April 29, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-accountable-care-organizations-and-promise-health-care-reform/110429loyolaspeech.pdf.

[8] U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug. 19, 2010) § 10 [hereinafter 2010 Horizontal Merger Guidelines].

[9] *Id.*

[10] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, 2013 Georgetown Global Antitrust Symposium Dinner: *The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets*, at 18 (Sept. 24, 2013),

in a footnote in the *HMG*, for the first time Agencies appear to recognize that there are instances where a transaction could cause anticompetitive effects in one market that would be offset by substantial efficiencies in another:

> The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small, so the merger is likely to benefit customers overall.[11]

Commissioner Wright supports this direction and points out that "doing so would take the important step of updating current merger doctrine with respect to efficiencies analysis so that it is consistent with the modern trend in favor of analyzing actual competitive effects rather than adopting simplified and potentially misleading proxies for harm."[12]

Including out-of-market efficiencies in the merger review analysis makes sense, particularly since included in the 2010 *HMG* was an endorsement to an approach that generally will result in narrowly defined relevant product markets. Unfortunately, as Commissioner Wright points out, narrowly defined product markets "inevitably lead to the atomization of classes of consumers whereby a market may be defined by picking a harmed consumer and defining a relevant market around that individual."[13] Merging companies seeking government antitrust clearance have consistently included out-of-network efficiencies in their arguments.

In the St. Luke's Health System/Saltzer Medical Group merger (which the FTC, the Idaho Attorney General, and a handful of private party participants successfully challenged in the Federal District Court for the District of Idaho), St. Luke's argued out-of-market efficiencies:

- "St. Luke's is in the process of transforming the delivery of healthcare by offering the population of southern Idaho clinically integrated, risk-based care."[14]
- St. Luke's "transaction with Saltzer will permit the affiliated entities to achieve integrated care—particularly in Canyon County—faster and more effectively than could happen if the transaction had not happened or were unwound."[15]

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available at http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf.

[11] 2010 *Horizontal Merger Guidelines* § 10, n.14.

[12] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, 2013 Georgetown Global Antitrust Symposium Dinner: *The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets*, at 18 (Sept. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf.

[13] *Id.* at 19-20.

[14] Pretrial Memorandum, Federal Trade Commission v. St. Luke's Health System, Ltd., Case No. 1:12-CV-00560-BLW-REB, at 12 (D. Idaho Sept. 10, 2013).

In the American Airlines/US Airways merger challenged by the U.S. Department of Justice in the Federal District Court for the District of Columbia, the airlines also claimed out-of-market efficiencies:

- The merged airlines "would generate enormous direct consumer benefit, most significantly by creating a unified network affording a vastly expanded array of flight options for travelers—taking more passengers where they want to go when they want to go there."[16]
- The models "routinely used by the airlines in their businesses demonstrate that these positive network effects" of "a unified network" would "attract millions of additional passengers to the merged airline" and that methods used by the government "conservatively demonstrate that the value of these consumer benefits would exceed $500,000,000 every year, net of any fare effects."[17]

Unfortunately, neither the St. Luke's/Saltzer merger (appeal pending) nor the American/US Airways merger (deal settled) provided any movement in terms of out-of-market efficiency analysis. Nevertheless, there is still hope for efficiency reform.

On top of the support from Commissioner Wright for updating current merger doctrine with respect to efficiencies analysis, FTC Bureau of Economics Director, Martin Gaynor, recently encouraged economists to "devote more attention to the modeling of efficiencies." As part of this encouragement, Mr. Gaynor asked economists to "step back . . . and consider what the goal of economic analysis of an antitrust matter is. The question that we're really asking is whether a merger or some type of conduct makes consumers better off."[18]

IV. CONCLUSION

Due to the large number of merger transactions that have occurred, the healthcare industry is teed up to provide enough data points to really move the needle in terms of analyzing out-of-market efficiencies. Any developments in this arena, however, will have implications outside the healthcare context.

Uniquely, the healthcare industry is in a period of tremendous and constant flux. Under the ACA, we see a period of unprecedented innovation and reform—providers are repositioning themselves in the marketplace, and healthcare providers and plans are consolidating, all in an effort to walk a fine line between improving access to high-quality care and containing costs. As pioneers in navigating this new landscape, both companies and the Agencies are attempting to adjust.

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[15] *Id.* at 17.

[16] Answer to Amended Complaint, *United States v. US Airways Group*, Case No. 1:13-CV-01236-CKK, at 2 (D.D.C. Sept. 10, 2013).

[17] *Id.*

[18] Martin Gaynor, Director Bureau of Economics, Fed. Trade Comm'n, 2014 Annual Conference of the American Antitrust Institute, *Efficiencies Analysis: False Dichotomies, Modeling, and Applications to Health Care*, at 1 (Aug. 3, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/574751/140619efficienciesanalysis.pdf.

For the Agencies, it will mean closely examining their traditional view of efficiencies and likely broadening both the scope of efficiencies considered and the ability of claimed efficiencies to overcome perceived threats to competition. For companies, these shifts mean unfortunate deal uncertainty and the need for both careful analysis of strategic options and understanding of the competitive responses likely to occur going forward.