U.S. HEALTHCARE ANTITRUST IN THE TRANSACTIONAL SPACE: SCANNING THE HORIZON FOR CHANGE

BY HOLDEN BROOKS[1]

1 McGuireWoods LLP.

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By Holden Brooks

Major changes are underway with respect to how healthcare deals get done in the U.S., with new merger guidelines and HSR reporting requirements waiting in the wings, new analytical frameworks being explored, and new pre-close notice and clearance laws proliferating at a rapid pace at the state level. More small-scale healthcare deals will be subject to some type of antitrust scrutiny than ever before, with many clients confronting antitrust principles and processes for the first time. In an environment in which skepticism about private equity investment in healthcare and scale-based efficiencies in provider deals has never been higher, providing effective advice in 2023 will involve more complex counseling, starting at the earliest stages of the deal process, working shoulder to shoulder with transactional and regulatory counsel teams. Take a moment to understand where you need to be looking for new developments at the federal and state levels, consider how to best educate and manage expectations for clients regarding timing, risk, and expense, and generally prepare for a once-in-a-generation shift in how our work gets done.

In the remainder of 2023, providing effective representation of U.S. healthcare clients in the transactional space will increasingly depend on scanning the horizon to identify and understand new laws and enforcement priorities at the state and the federal level. This article attempts to describe in brief some of the rapid and unprecedented developments in enforcement in this area and the ways that these developments will fundamentally change the timelines and processes for getting deals through; and make practical suggestions for how to prepare.

I. WHAT TO WATCH FOR ON THE FEDERAL HORIZON

Much was made of President Biden's Executive Order of July 2021 and its exhortation to federal antitrust enforcers to focus on "excessive concentration" in healthcare.[2] Since that time, the Federal Trade Commission ("FTC") has succeeded in its efforts to stop four separate hospital transactions;[3] the Department of Justice Antitrust Division ("DOJ") has withdrawn well-worn healthcare antitrust enforcement guidance in place since the 1990s, in part addressing transactions;[4] and together have otherwise maintained an enforcement focus on healthcare. But even more interesting than this first phase are developments that are likely to come into focus in the near future that will have a significant impact on healthcare transactions.

A. Upcoming Hart Scott Rodino Act Changes Designed to Deter Serial Acquisition Strategies

Changes to the Hart Scott Rodino Act merger notification process may have a particular impact on healthcare transactions. The FTC recently indicated that it will hold merger parties accountable for following all requirements of the HSR Act;[5] implemented a new filing fee scale with significantly increased fees for large deals;[6] and, perhaps most importantly, previewed that it intends to introduce changes to the HSR form that are expected to have a "significant deterrent effect" on transactions by requiring the disclosure of more information by the parties.[7] Specifically, a new HSR form,[8] which is expected to be introduced after a notice and comment process, will require more information regarding prior transactions to shed light on "roll up" strategies that may have been pursued through deals that fell below the relevant HSR thresholds. Because "roll ups" in healthcare that involve smaller transactions have been specifically called out as a concern by both the FTC and DOJ,[9] it is reasonable to expect that the new HSR forms will be calibrated so that they reflect information pertinent to past (or potentially future) serial acquisitions in the same geography and service line.

B. New Merger Guidelines and Focus on Private Equity in Healthcare

Another potentially significant change may be revealed in the updated FTC/DOJ Merger Guidelines, which are expected to be released in the very near term. As part of the revision process, the agencies released a "Request for Information" to solicit public feedback to certain questions that FTC and DOJ posed relating to specific topics.[10] A relatively large number of comments in response to the Request for Information published by the agencies relate to vertical and horizontal healthcare transactions and urge the FTC and DOJ to adopt healthcare-specific analytical frame-

2 Exec. Order No. 14036, 86 FR 36987 (Jul 9, 2021) (Executive Order on Promoting Competition in the American Economy), https://www.whitehouse.gov/briefing-room/presidentialactions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 *In re Care New England, Lifespan,* https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0031-lifespancne-matter; *In re RWJ Barnabas Health, Saint Peter's,* https://www.ftc.gov/legal-library/browse/cases-proceedings/2010145-rwj-barnabas-healthsaint-peters-healthcare-system-matter; *In re HCA, Steward Healthcare*, https://www.ftc.gov/legal-library/browse/cases-proceedings/2210003-hca-healthcaresteward-health-care-system-matter; *In re Hackensack Meridian Health, Inc., Englewood Healthcare Fndtn.*, https://www.ftc.gov/legal-library/browse/cases-proceedings/2010044-hackensack-meridian-health-inc-englewood-healthcare-foundation-matter.

4 Press Release, DOJ, Justice Department Withdraws Outdated Healthcare Guidance (February 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

5 Holly Vedova, Director, FTC Bureau of Competition, Spring Meeting Update Blog Post (March 31, 2023), https://www.ftc.gov/enforcement/competition-matters/2023/03/spring-meeting-updates.

6 Press Release, FTC, FTC Announces 2023 Update of Size of Transaction Thresholds for Premerger Filings and Interlocking Directorates (Jan. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-announces-2023-update-size-transaction-thresholds-premerger-notification-filings-interlocking.

7 Shaoul Sussman, Associate Director for Litigation, FTC Bureau of Competition, Antitrust Effects: US Industries, Loyola University Stigler Center, Beyond the Consumer Welfare Standard Conference (April 20, 2023), 2023 Antitrust and Competition Conference - Beyond the Consumer Welfare Standard? Day One. - YouTube (at approximately 3:14 in video).

8 See Vedova blog post, *supra* note 3.

9 Andrew Forman, Deputy Assistant Attorney General, DOJ, The Importance of Vigorous Antitrust Enforcement in Healthcare, Remarks at the ABA Antitrust in Healthcare Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust ("Forman Remarks").

10 FTC and DOJ Request for Information on Merger Enforcement (January 18, 2022) https://www.regulations.gov/document/FTC-2022-0003-0001.

works or protocols (e.g. lowering reporting thresholds for healthcare transactions; using healthcare-specific concentration indices) to address concentration in payor and provider spaces.[11] Whether or not there will be guidelines specific to particular markets remains to be seen (and the wisdom of a market-specific approach is itself a point of debate in the comments), but if there are market-specific guidelines in the draft that is eventually released, it would not be unexpected to see some that are focused on healthcare transactions.

As part of the merger guidelines revision process, the FTC and DOJ conducted "listening sessions" in 2022, including one on healthcare. [12] Deputy Assistant Attorney General Andrew Forman of DOJ recounted the feedback in stark terms, with a particular spotlight on private equity, which was a specific topic on which the FTC and DOJ sought feedback in the Request for Information:

> [W]e heard from folks throughout the health care industry who described their firsthand experiences about the effect of consolidation and acquisitions by private equity groups. They described fewer caregivers, degradation of care, commoditization of health care services, and increased prices. This group of speakers from across the industry raised important topics that we are considering today. We are also aware of, and are analyzing, recent competition studies that have suggested the negative impact of certain private equity acquisitions and conduct in important health care products and services, including home health care, inpatient services, outpatient services, and pharmaceuticals.

Forman's remarks are consistent with other comments made by FTC and DOJ and enforcement actions taken, including addressing perceived health care roll ups with prior approval orders[13] and taking on other issues that the agencies consider to be closely associated with private equity investment, such as incentives to "focus solely on short-term financial gains;" the perceived tendency of private equity investment in competitive entities to result in interlocking directorates that may violate Section 8 of the Clayton Act;[14] and what is seen as a pattern of less-than-perfect compliance with HSR filing requirements.[15] Once the draft guidelines are released, there is likely to be a public comment period and debate about whether the agencies' negative-leaning approach is justified, in the healthcare context and in other industries, and about potential procompetitive upsides to private equity investment.[16]

C. Cross Market Transactions Among Providers

Another potential development to watch for is an enforcement action targeting a cross market healthcare provider transaction in which the parties do not operate in the same geography and, arguably, are not competing for inclusion in payor networks or for patients as traditional competitors would be. Several theories of competitive harm have been developed in the economic literature that could potentially support an enforcement action under Section 7 of the Clayton Act, including, for example, that a merged health system may raise prices where insurers need providers and facilities across more than one geography.[17] Although the FTC has reviewed multiple cross market transactions involving health care providers, and have in some cases undertaken prolonged investigations, they have yet to challenge one. In light of the fact that some state enforcers now have multiple cross market transaction enforcement actions in the books (including for what might appear to be fairly modest acquisitions

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11 See e.g. Purchaser Business Group on Health, Comment of William Kramer, Executive Director on Health Policy (April 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-0747 (expressing concern regarding concentration resulting from provider transactions); American Medical Association, Comment of Dr. James Madara, (April 21, 2022) https://www.regulations.gov/comment/FTC-2022-0003-1494 (expressing concern regarding concentration resulting from payor transactions); American Hospital Association, Comment of Melinda Hatton, General Counsel (March 31, 2023) https://www.regulations.gov/comment/FTC-2022-0003-0279 (advocating for guidelines that recognize the procompetitive benefits of hospital mergers).

12 FTC/DOJ Healthcare Listening Session Transcript (April 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ-Listening-Forum-%20Health-Care-Transcript.pdf.

13 Press Release, FTC, FTC Imposes Strict Limits on Davita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis; see also FTC Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 11, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission.

14 Press Release, DOJ, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially (describing resignation of director from healthcare analytics firm board).

15 Forman Remarks, *supra* note 7; see also Vedova blog post, supra note 3.

16 A current and comprehensive examination of these issues can be found here: Kenneth Schwartz, Michael Singer, Isabel Tecu, *Private Equity and Competition*, Antitrust Magazine Online (April 2023), https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publications/antitrust/magazine/2023/april/full-issue.pdf. Another interesting consideration of private equity in healthcare can be found here, Laura Alexander, Ola Abdelhadi, Brent Fulton, Richard Scheffler, "Private Equity's Entry Into Healthcare Reveals Gaps In Competition Policy" (October 2022), https://www.competitionpolicyinternational.com/private-equitys-entry-into-healthcare-reveals-gaps-in-competition-policy/#_ftn25.

17 Leemore Dafny, Kate Ho, Robin Lee, *The Price Effects of Cross-Market Hospital Mergers*, 50 RAND J. ECON. 2, 286-325 (2019) https://www.nber.org/papers/w22106.

of single facilities)[18] without meaningful challenges to those efforts, a federal enforcement action based on cross market theories may not be far behind.

D. Heightened Risks from Disclosure of Information in Healthcare Merger Investigations

Another new enforcement risk related to undergoing a healthcare transaction review is the risk that disclosure of information to the FTC or DOJ in the course of a merger review will lead to criminal or other exposure outside the review itself, which can result in steep fines, imprisonment for individuals, and — of particular concern for healthcare providers — debarment from public payor programs such as Medicaid and Medicare. In December 2022, the DOJ and the United States Department of Health and Human Services ("HHS") signed a Memorandum of Understanding ("MOU") that lays out a protocol for HHS sharing information with DOJ that may relate to potential antitrust violations and or DOJ to share with HHS evidence of violations of laws within its enforcement purview, including HIPAA and the Social Security Act:

> Through coordination in information sharing, enforcement activity, and training, the two agencies will strengthen the enforcement of federal laws, including the full force of [Office of Inspector General's] exclusion authorities and the antitrust laws enforced by the Justice Department's Antitrust Division, while ensuring the continuity of health care products and services. In particular, this MOU will allow the two agencies to make referrals of potentially illegal activity to each other, as appropriate, and to coordinate on policy, strategy, and training.[19]

In addition, in March 2023 the FTC Bureau of Competition formally announced the creation of a Criminal Liaison Unit ("CLU"), which is tasked with referring to DOJ or other criminal prosecutors "conduct uncovered during the course of FTC investigations and litigations."[20] Since its creation in 2022, the Unit has referred potential criminal matters involving potential Sherman Act violations, spoliation, influencing witness testimony, fraud, and obstruction — including in the healthcare context. The CLU will make referrals of substantive antitrust violations detected during merger and other civil investigations but also non-antitrust violations, including of healthcare laws or related to conduct that takes place during those investigations. Counseling healthcare clients about these new risks and budgeting time and resources to conduct appropriate interviews and reviews of materials prior to production in merger investigations will be important steps to add to the deal process.

II. WHAT TO WATCH FOR ON THE STATE HORIZON

A. Proliferating State Pre-Close Approval Requirements for Healthcare Transactions

Within the past decade, several state legislatures have passed statutes that require parties to qualifying healthcare transactions to provide notice to state healthcare agencies or offices of the attorney general and to delay closing until after an initial waiting period has elapsed (mostly 30 to 90 days) or the relevant regulator has issued an approval or concluded an investigation (which may take much longer and require payment of a significant fee). In many instances, these laws supplement statutes already on the books that cover transactions involving non-profit hospitals and cover transactions between for-profit and smaller healthcare entities including physician groups, medical and dental services organizations, durable medical equipment providers, payors, and other "healthcare adjacent" companies. They usually include a requirement that parties provide extensive information about themselves and the transaction with the filing (which may be public and posted on the agency's website), but also respond to what can be extensive requests for additional information. They may be triggered by certain annual revenue thresholds being met or by the number of providers affiliated with the parties, and may often look to the relevant parent entities to determine whether these tests are satisfied, including out-of-state entities several levels above the entities involved in the transaction. In a worst-case scenario for parties, there may be a legal challenge to the transaction stemming from the investigation, resulting in a settlement with conditions or the deal being blocked.

Many of these provisions are modeled after the Massachusetts Health Policy Commission Notice of Material Change requirement, which has been in place for nearly a decade.[21] Connecticut passed a law requiring notice for physician transactions soon after Massachusetts,[22]

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18 See e.g. Richard Scheffler, Neal Adams, Daniel Arnold, *The Competitive and Quality Impact of the Proposed Acquisition of Adventist Vallejo by Acadia Healthcare* (Sept. 25, 2021), https://www.oag.ca.gov/system/files/media/ahv-cqi.pdf.

19 Press Release, DOJ, Justice Department's Antitrust Division and the Office of the Inspector General of the Department of Health and Human Services Announce Partnership to Protect Health Care Markets (Dec. 9, 2022), https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-office-inspector-general-department-health-and.

20 Holly Vedova, Director, FTC Bureau of Competition, FTC's Criminal Liaison Unit is Off to the Races Blog Post (March 24, 2023), https://www.ftc.gov/enforcement/competition-matters/2023/03/bcs-criminal-liaison-unit-races.

21 M.G.L. c. 6D § 13, https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter6D/Section13.

22 Public Act 14-168, https://www.cga.ct.gov/2014/act/pa/pdf/2014PA-00168-R00SB-00035-PA.pdf.

followed by Washington in 2019[23] and Oregon[24] and Nevada[25] in 2021. In 2022, California passed a statute covering a very broad range of transactions that goes into effect in 2024,[26] and on May 3, 2023, New York passed its own statute, with an effective date of August 1, 2023.[27] Currently, legislatures in Illinois,[28] Minnesota,[29] and North Carolina[30] are considering similar statutes that, if passed, could go into effect within the next few months, and the Maine legislature will likely pick up consideration of its version of a healthcare transactions review law when it next convenes later this spring in a special session.[31]

With healthcare deal values remaining relatively high and physician practice size increasing, [32] transactions are more likely to meet revenue and other size thresholds. And with four of the ten most populous states potentially being added to the list of jurisdictions requiring pre-close notice in the near future, it will become increasingly necessary to make filings or at the very least "run the traps" on multiple states' varying requirements. Although healthcare markets have long been a stated priority for state attorneys general, recent speeches and comments on the FTC/DOJ "Request for Information" related to the revision of the merger guidelines show that interest in investigating healthcare transactions of all sizes and bringing enforcement actions remains high.[33]

B. Controversy Regarding COPAs

At the same time that more states are passing legislation that would make it easier to detect potentially anticompetitive transactions, several states continue to have certificate of public advantage ("COPA") laws that allow qualifying transactions to enjoy some degree of immunity from federal antitrust laws. In April 2023, the question of whether a state COPA can confer immunity from the HSR Act and its filing requirements came into high relief in a pair of dueling complaints filed in federal court: One by LCMC Health, seeking "a declaratory judgment that the [HSR Act] does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity … to vindicate an important policy choice of the State of Louisiana concerning the health care services available to its citizens;"[34] and another by the FTC, asking for an order that the January 2023 transaction was reportable and that a filing was still required.[35] LCMC argued that:

> [i]f the FTC succeeds in subjecting state authorized mergers to Section 7A of the Clayton Act, it will permanently hamper the ability of States to authorize and approve time-sensitive mergers, even in instances where, as here, the State has concluded that a given transaction serves its critical interest in providing affordable, quality health care to its citizens.

As for the FTC, it alleged that the idea that at COPA could exempt a transaction:

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23 Wash. Rev. Code Ann. § 19.030 (2019), https://app.leg.wa.gov/RCW/default.aspx?cite=19.390.

24 ORS 415, https://www.oregonlegislature.gov/bills_laws/ors/ors415.html.

25 Nevada AB47, https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7300/Text; *see also* Nevada SB239, https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7964/Overview.

26 Cal. Health and Safety Code § 127507, https://legiscan.com/CA/text/SB184/id/2600107.

27 *See* Omnibus Budget Bill S. 4007/A. 3007, extension://elhekieabhbkpmcefcoobjddigjcaadp/https://legislation.nysenate.gov/pdf/bills/2023/S4007 (starting at p. 137) .

28 HB 2222, https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=112&GA=103&DocTypeId=HB&DocNum=2222&GAID=17&LegID=146481&SpecSess=&Session=.

29 Minn. HF 402 4th Engrossment - 93rd Legislature (2023 - 2024), www.revisor.mn.gov/bills/text.php?number=HF402&type=bill&version=4&session=ls93&session_year=2023&session_number=0.

30 House Bill L DRH40194-MGf-112, https://webservices.ncleg.gov/ViewBillDocument/2023/4114/0/DRH40194-MGf-112.

31 HP 894, An Act to Improve State Oversight of Proposed Health Care Entity Transactions, https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0894&item=1&snum=131.

32 See e.g. American Medical Association Policy Research Perspective (2021), Carol K. Kane, PhD ("Since 2012 the share of physicians in small practices has fallen continuously, with 61.4 percent of physicians in practices with 10 or fewer physicians in 2012 and 56.5 percent in 2018. This appears to be driven by movement away from the smallest practices, those with fewer than 5 physicians.").

33 Public Comments of 23 State Attorneys General (April 21, 2022), https://www.naag.org/wp-content/uploads/2022/08/Public-Comments-of-23-State-Attorneys-General-.pdf (describing state efforts to investigate healthcare transactions and urging more vigorous enforcement by FTC and DOJ).

34 Complaint, *LCMC v. Garland, FTC, DOJ*, Dkt. No. 1, Civ. No. 23-1305 (E.D. La. April 19, 2023).

35 Petition, *FTC v. LCMC ad HCA*, Dkt. No. 1, Civ. No. 23-1103 (D.D.C. April 20, 2023).

appears nowhere in the text of the HSR Act and has never been recognized as an exemption from the HSR Act's notification requirements by any court in the HSR Act's forty-seven-year history. Additionally, neither the FTC nor the DOJ has promulgated an interpretation of the HSR Act exempting parties from filing where those parties received a similar certificate.

In its prayer for relief, the FTC asked the court not only to order LCMC to make a filing, but to force LCMC to halt integration to give the FTC time "to determine, along with the potential competition issues, the parameters of the COPA and whether it shields the Acquisition from liability under Section 7 of the Clayton Act." This appears to leave the door open to a scenario in which the FTC may find the COPA to confer immunity from ultimate liability, but only after it has received an HSR filing and used the waiting period to investigate. As an exhibit to its complaint, LCMC included email exchanges between its outside counsel and counsel in the FTC Premerger Notification Office, reflecting some uncertainty about whether the FTC had in the past perhaps informally declined to pursue parties that elected not to file HSR where the transaction in question had been granted a COPA. To the extent that there was any question about the FTC's *current* position, its decision to file litigation should resolve it. But ultimately the court may decide whether COPAs can shield parties from the burden, expense, and delay of having to file HSR — one of the primary benefits of COPA immunity to many parties.

III. A CALL TO ACTION FOR PRACTITIONERS, PARTICIPANTS

In order to provide effective advice to provider and payor clients or investors in the healthcare space it will be necessary to coordinate among healthcare regulatory, transactional, and antitrust teams, whether within a single firm or across multiple firms that service common clients. Because reporting requirements in the U.S. have remained relatively static for some time, tracking these developments may require new "muscles" for U.S.-focused transactional antitrust practitioners in particular.

· **Designate a team to track state laws and understand when they go into effect and what transactions may be affected**. State lawmakers are moving fast in this area and the window within which new laws may be in effect can be as shorter than the timeline for some sale processes and acquisitions. With several pending state bills targeting effective dates early in 2024 or even within 2023, and the expectation that new HSR rules will be in effect at the end of the year, keeping an eye on changes in real time will be important.

· **Designate a team to track developments, rulemaking and other guidance from state regulators related to existing laws**. Whether the responsibility sits with a healthcare regulatory, transactional, or antitrust team, monitoring developments and the evolution of guidance from state regulators will be critical to determining how state laws may affect transactions. What was true last time you looked at the details of a particular requirement may no longer be true: Particularly where a regulatory scheme is new and developing, revisions to implementing rules and issuance of FAQs may reveal critical changes in how the law applies. In addition, clients may wish to contribute comments to rulemaking processes to provide perspective, lobby for changes, request clarification, or even challenge the laws in court.[36]

· **Provide for regular touchpoints among the healthcare regulatory, transactional, and antitrust teams to share intelligence**. Having a crack antitrust team assigned to keeping up with developments will be meaningless if transactional team is not aware of new waiting periods that affect timelines and filing requirements that will affect budgets and strategic considerations such as antitrust risk-shifting provisions in definitive agreements. Conducting an initial orientation and then establishing an expectation of check-ins when transactions potentially involve

· **Buyers and sellers should involve antitrust counsel in early phases of business and pipeline planning on the buy side as well as reverse due diligence on the sell side**. In the current environment, understanding regulatory risk by jurisdiction should be part of determining where to deploy capital as a buyer and spend time as a seller. As a buyer, being in a position to identify targets that, all other things being equal, are not going to present antitrust issues because of a lack of concentration or other factors that might trigger an extended investigation by a state or federal agency is a strategic advantage. As a seller kicking off an auction process, asking questions regarding presence in individual states and service lines, for example, should allow for informed comparison of potential buyers' relative merits.

· **In-house and external counsel should manage expectations of business leaders by providing education about proliferating and shifting reporting requirements**. For many business leaders in the healthcare space, particularly those who have experience with transactions below HSR and state law thresholds, the reaction to new or expanded reporting requirements will range from irritation to dismay over additional expense, time, and disruption of what may be well-worn paths from LOI to close. But under any circumstances, it is better for everyone to know about these changes as far in advance as possible as opposed to the middle of a negotiation, after an agreement has been signed, at the time that a regulator seeks to apply what feels like an out-of-left-field condition, or, worst of all, after a transaction has closed.

36 See *Oregon Ass'n of Hosps. v. Oregon*, Civ. No. 22-01486 (D. Or.) (challenging the constitutionality of Oregon's Health Care Market Oversight regime).

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