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Health Care Transactions and Civil Investigative Demands: What Third Parties Need to Know

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Mergers and acquisitions in health care markets are viewed with heightened scrutiny by the Federal Trade Commission (FTC) and U.S. Department of Justice, Antitrust Division (Division) (collectively, the Agencies). These transactions may require further investigation to determine whether there will be anticompetitive effects, such as higher prices, in the affected market. As part of these investigations, the Agencies may issue civil investigative demands (CIDs) for documents and statements from third parties that do not have direct involvement in the transaction. The CID process can become a protracted and expensive undertaking if it is not properly managed from the outset by experienced counsel. This article provides an overview of current antitrust scrutiny of health care markets, and then offers guidance on how to effectively respond to CIDs in connection with the antitrust enforcement process.

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Key Take-Aways

- Despite uncertainty in the post-COVID economy, the latter half of 2023 has seen an uptick in health care transactions. Industry leaders predict that this trend will continue in 2024.
- The Agencies take industry context into account when considering antitrust enforcement actions. Because health care markets are often highly concentrated, the Agencies are likely to investigate any merger or acquisition that may lessen competition, such as when a company acquires a competitor. The focus is whether the competitive effects of the transaction would result in higher prices, inferior quality of care, or patient safety issues, and reduced availability of service in these markets.
- The Agencies issue CIDs, which are broad administrative subpoenas, to learn about the relevant market and potential competitive effects of a transaction. These subpoenas, which compel the production of documents, responses to interrogatories, and oral testimony from executives and employees, often have tight deadlines. The importance of engaging experienced counsel as soon as the CID is served cannot be overstated. The penalties for non-compliance are steep. The Agencies can seek a court order to enforce the CID in federal district court, and parties who do not comply can be held in contempt. In contrast, prompt outreach from counsel to the Agencies' representatives following issuance of a CID can often provide more flexibility for recipients to respond.
- The demands imposed by a CID are both a significant burden on time as well as resources, particularly for third parties not otherwise involved in the subject transaction. Seasoned counsel will understand the complexities of antitrust law and the Agencies' substantive focus and investigation tactics. As a result of their expertise, these attorneys understand what documents and information the Agencies need and can effectively negotiate to narrow the scope of production and burden with respect to employee interviews and depositions—all while offering cooperation designed to demonstrate the good faith of the responding entity.

2023 Trends and 2024 Projections in Health Care Markets

Despite several high-profile deals in the health care sector, M&A transactions slowed in the beginning of 2023. Industry experts attributed the decrease in activity to rising interest rates, scrutiny from regulators—particularly the FTC—and concern that the economy could enter a recession.^[1] For example, in September 2023, the FTC filed a notable complaint alleging antitrust violations against a health care provider and the private equity firm that owns the provider, alleging a “multi-year anticompetitive scheme to consolidate

anesthesia practices” that allowed them to “drive up the price of anesthesia services” for patients and “increase their own profits.”^[2] Nonetheless, 2023 is expected to end on a high note. In Q3 2023, 18 hospital and health systems deals were announced, up from the ten transactions announced in Q3 2022.^[3] Health care executives are optimistic about the upcoming year. In a survey of 600 leaders in the health care sector, 68% expect health care deals to increase in 2024.^[4]

Why Antitrust Enforcers Scrutinize the Health Care Industry

The FTC and the Division closely examine the competitive effects of health care transactions because of the impact that reduced competition can have on consumers trying to obtain medical care. According to the FTC, competitive effects of horizontal mergers (among competitors) consist of (i) unilateral effects such as the ability of a merged firm to raise prices without losing sales; and (ii) the ability of firms to coordinate on price, output, or other dimensions of competition.^[5]

Health care markets are often susceptible to competitive effects because they may have:

- *High barriers to entry.* High capital investments and start-up costs, as well as the highly regulated environment, make it difficult for businesses to enter and compete in the relevant market;
- *Price inelasticity.* Prices can be increased without a substantial reduction in demand; and
- *High market concentration.* One, or a small number of firms, have a dominant market share in the relevant market, increasing the risk that these firms can charge supra-competitive prices.^[6] When a health care market has these characteristics—as many do—the FTC or the Division will investigate the likelihood that further consolidation will result in higher prices, inferior quality, and/or reduced availability of goods and services.

An Overview of CIDs

A CID is an administrative subpoena issued by a government agency, including the FTC and the Division.^[7] The Agencies have broad discretion to issue CIDs; there is no requirement that they first seek court approval or even open an investigation. Rather, the standard is whether the agency has “reason to believe” that a company or individual has possession, custody, or control of documentary materials or evidence relevant to a civil antitrust investigation.^[8] CIDs can impose significant burdens akin to discovery in litigation on recipients—and this includes third parties that are not participating in the underlying transaction—by requiring them to:

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- Produce documentary materials defined as “the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, and any product of discovery”[\[9\]](#) as well as electronic documents;
- Submit written responses to interrogatories—i.e., questions that are required to be answered—with “definiteness and clarity;” and
- Provide oral testimony from executives and employees of the company to the Agencies and any state attorneys general who participate in the interviews.[\[10\]](#)

As set forth in the revised Merger Guidelines issued on December 18, 2023, the Agencies draw upon a variety of sources when evaluating the impact of a merger.[\[11\]](#) Given the concern about competitive effects in health care markets, the Agencies may issue CIDs to “customers, workers, industry participants, and observers” to obtain a broad swath of information ranging from “their own purchasing behavior and choices” to “their views about the effects of the merger itself.”[\[12\]](#)

Responding to CIDs

Upon receiving a CID, the first and most important step is to retain experienced legal counsel with insight as to how the FTC and the Division operate and their concerns about competitive effects. Time is of the essence because companies typically only have 30 days to respond to a CID.[\[13\]](#) In many cases, the FTC and the Division are sympathetic to the burden imposed on third parties. They may agree to extend the deadline for responding to the CID. Equally important (if not more important) than timing is the scope of the ultimate response. Experienced counsel who understand the government’s enforcement priorities in the health care industry are best positioned to narrow the scope of the CID as a whole because they also understand what information the Agencies need to evaluate competitive effects in the relevant market. In practical terms, experienced counsel may have success in reducing the volume of documents that must be produced and the number of witnesses who are called for interviews. Attorneys who frequently represent clients in antitrust investigations also understand the value of cooperation. The Agencies are more inclined to work with parties who communicate with them on a regular basis and make good-faith efforts to provide information as quickly as possible.

A motion to quash a CID must be filed within 20 days of service.[\[14\]](#) This tactic is a last resort and rarely successful. The grounds for quashing a CID are limited to three considerations: whether (i) the inquiry is within the authority of the agency; (ii) the demand is not too indefinite; or (iii) the information sought is reasonably relevant. The first step in challenging a CID is for the parties to have a meet and confer. If the meet and confer does not resolve the dispute, the recipient can file a petition with the agency that issued the CID, which is unlikely to reverse its decision. If a party still refuses to comply, the issuing

agency can ask a federal district court for an order to enforce the CID. The failure to comply with that order may result in a finding of contempt.

Although responding to a CID requires counsel with sufficient expertise, and it is important that the measures be right-sized to the specific circumstances, the mechanics of responding to a CID are similar to a court-ordered subpoena. The steps may include:

- Calendar all deadlines;
- Implement a litigation hold to preserve all documents that may be responsive to the CID;
- Explain to executives and employees what is required to comply with the CID and the importance of timely responses;
- Determine the executives and employees who are most likely to have responsive documents and/or relevant information;
- Compile and produce responsive documents, which include electronic documents and pertinent instant messages, with the assistance of counsel;
- Meet with the executives and employees who are most likely to be interviewed;
- Draft written responses to interrogatories, which must propound answers “with definiteness and certainty”;[\[15\]](#)
- Ensure all communications with the Agencies are done through counsel or with counsel present;
- Strategize whether and how to limit the number of executives and employees who must submit to an interview; and
- If necessary, prepare witnesses for interviews.

Conclusion

With the expected increase in health care merger activity comes the likelihood of greater investigatory scrutiny by government authorities. Even third parties uninvolved in the transaction may be faced with costly, intrusive, and disruptive discovery burdens. Given the potentially significant implications of non-compliance or insufficient compliance, recipients of CIDs and subpoenas would do well to take those demands seriously and act promptly and comprehensively, including by engaging experienced counsel.

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^[1] See Ron Southwick, *Healthcare Mergers: Expecting more in 2024*, CHIEF HEALTHCARE EXEC., Aug. 18, 2023, at 2-3, <https://www.chiefhealthcareexecutive.com/view/healthcare-mergers-expecting-more-in-2024>.

^[2] See FTC, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas*, accessed Dec. 7, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>; Compl. at ¶ 1, accessed Dec, 7, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2010031usapcomplaintpublic.pdf.

^[3] See Kaufman Hall, *M&A Quarterly Activity Report: Q3 2023*, Oct. 12, 2023, at 1, <https://www.kaufmanhall.com/insights/research-report/ma-quarterly-activity-report-q3-2023>.

^[4] See Andres Gonzalez, *Healthcare Execs Expect M&A Activity to Rise Again in 2024-Survey*, REUTERS, Nov. 14, 2023, at 1 (quoting survey by Jeffries Financial Group, Inc.), <https://www.reuters.com/business/healthcare-pharmaceuticals/healthcare-execs-expect-ma-activity-rise-again-2024-survey-2023-11-14>.

^[5] See FTC, *Competitive Effects*, accessed on Dec. 4, 2023, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects#:~:text=There%20are%20two%20ways%20that,prices%20profitably%20on%20its%20own>.

^[6] See generally Dr. Thomas Philippon, Max L. Heine Prof. of Fin. at the New York Univ. Leonard N. Stern Sch. of Bus., *The Economics and Politics of Market Concentration*, NAT'L BUREAU OF ECON. RES., Dec. 2019, <https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration>.

^[7] See 15 U.S.C. § 57b-1 (FTC investigations) & § 1312 (Division investigations).

^[8] 15 U.S.C. § 57b-1(c)(1) & § 1312(a).

^[9] 15 U.S.C. § 57b-1(a)(5) & § 1311(g).

^[10] 15 U.S.C. § 57b-1(c)(3)-(6) & § 1312(b)(2)-(4).

^[11] See U.S. Dep't of Justice & FTC, MERGER GUIDELINES, Dec. 18, 2023, at 34, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

^[12] *Id.*

^[13] 15 U.S.C. § 57b-1(c)(1) & § 1314(b).

^[14] 15 U.S.C. § 57b-1(c)(1) & § 1314(b).

^[15] 15 U.S.C. § 57b-1(b)((5)(A) & § 1312 (b)(3)(A).