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## Antitrust

### Analysis of Past Enforcement Suggests DOJ's Merger Guidelines Followed

**A**n analysis of publicly available information on 12 proposed or consummated health insurance mergers reviewed by the Department of Justice and Federal Trade Commission between 1995 and 2010 suggests the agencies generally followed the horizontal merger guidelines in reviewing the proposed deals, according to a report issued by the American Health Lawyers Association Antitrust Practice Group Aug. 17.

The report, *Evaluating Federal and State Antitrust Reviews of Health Insurance Mergers*, said available information concerning DOJ's and FTC's review of proposed health plan mergers does not support a charge, offered by some critics, that the agencies have somehow failed to discharge their responsibilities in enforcing federal antitrust laws in this arena.

Rather, "public information regarding health plan mergers is consistent with DOJ and FTC applying the principles and steps of the Merger Guidelines," the report concluded. It noted that elements of horizontal merger guidelines analyses "appear throughout the documents released by the federal investigators," even if not all aspects of the merger guidelines framework are discussed with respect to each of the transactions.

"The public information does not support an argument that the federal agencies touched every point of the Merger Guidelines framework in every transaction," the report said. "Nevertheless, the agencies appear to have engaged in systematic reviews consistent with the Merger Guidelines framework and to have

sought remedies in any transaction for which they perceived competitively harmful aspects."

**Past Criticism.** "The greatest criticism of DOJ and FTC likely arises in relation to the investigations for which the agencies provided no public discussion," the report said. "In those instances, it is not clear whether they have been true to the Merger Guidelines process or reasonable in their interpretations."

"Overall, however, there is little in the record from health plan transactions to support claims that federal investigations of health plan mergers have been haphazard," the report concluded.

Toby G. Singer, with Jones Day, Washington, said the report provides important insight into the health insurer transactions that have received antitrust scrutiny and concludes that, by and large, the agencies—and DOJ's Antitrust Division in particular—have adhered to the principles set forth in those guidelines.

"It is an objective survey of the actions taken by federal and state enforcement agencies in light of the merger guidelines that were in place at the time and notes, in several places, where the analytical approach of the antitrust agencies' revised merger guidelines is similar to or different from the analysis of the transactions reviewed in the report," Singer added.

Douglas Ross, with Davis Wright Tremaine LLP, Seattle, said the report partially answers criticisms that

DOJ has not enforced the antitrust laws aggressively enough with respect to health plan mergers.

**The report “confirms that when the agencies did act they did so in a manner consistent with established antitrust principles.”**

DOUGLAS ROSS, DAVIS WRIGHT TREMAINE LLP, SEATTLE

“While the report focuses on actions the agencies took, and so necessarily doesn’t shed light on whether there were occasions where the agencies should have acted but failed to do so, the report nonetheless confirms that when the agencies did act they did so in a manner consistent with established antitrust principles,” Ross said.

The report looked not only at whether DOJ has followed the 1992 horizontal merger guidelines applicable to health insurer mergers, but also assessed how DOJ’s antitrust enforcement policy evolved over the 15-year period and how it differed across transactions. The report set out the factual background on each of the 12 transactions and reviewed the basic merger guidelines framework, acknowledging that a new set of revised guidelines were issued Aug. 19.

**Twelve Transactions Reviewed.** The report specifically reviewed 12 separate transactions that garnered the attention of federal regulators and, in most cases, state antitrust enforcement officials as well. They all occurred between 1995 and 2010, beginning with the Harvard Community Health Plan Inc. and Pilgrim Health Care Inc. merger consummated in 1995 and concluding with the Blue Care Network of Michigan and Physicians Health Plan of Mid-Michigan merger, announced in September 2009 and abandoned in the face of federal and state enforcement pressure in March.

The 10 other transactions reviewed in the report include the merger of:

- United Healthcare Corp. and MetraHealth Co., investigated by DOJ and Missouri regulators, and completed in 1995 subject to compliance with a divestiture order;

- Aetna and Prudential Healthcare, announced in 1998 and consummated in 1999 after DOJ and the Texas attorney general investigated, issued a complaint, and resolved the matter in a final judgment that called for certain divestitures;

- Yellowstone Community Health Plan and Blue Cross Blue Shield of Montana, proposed and consummated in 1999 after FTC and the state investigated and the state imposed provider contracting restrictions;

- Anthem Inc. and WellPoint Health Networks Inc., proposed in 2003, investigated by DOJ and regulators in both California and Georgia, and approved in 2004 after the companies agreed to make payments to fund state health initiatives;

- United Healthcare Corp. and Oxford Health Plans, proposed and consummated in 2004 after DOJ investigated and declined to file a complaint;

- UnitedHealth Group Inc. and PacifiCare Health Systems Inc., proposed and consummated in 2005 following investigation by DOJ and the filing of a complaint and final judgment;

- Group Health Inc. and Health Insurance Plan of Greater New York, cleared by DOJ and New York regulators in 2005 but challenged in litigation brought by New York City that was dismissed in May;

- Highmark Inc. and Independence Blue Cross, proposed in 2007, reviewed twice and cleared twice by DOJ, and ultimately abandoned in 2009 in face of objections by Pennsylvania regulators;

- UnitedHealth Group Inc. and Sierra Health Services Inc., investigated and consummated in 2008 under a final judgment resolving concerns of DOJ and Nevada regulators; and

- UnitedHealth Group Inc. and Health Net, investigated by DOJ and allowed to proceed in 2009.

One section of the report discusses the actions of the federal antitrust agencies in the nine transactions for which information about their analyses has been released publicly—in court filings, competitive impact statements, closing agreements, press releases, and even speeches by agency officials—while a separate section examines how state authorities have evaluated health plan mergers, both in comparison to the federal agencies and among each other.

The transactions discussed in this last section include three mergers with joint or parallel action by federal and state regulators, two in which DOJ deferred to states’ actions, three that involved state actions after DOJ’s clearance, and one involving litigation by New York City after both federal and state regulators had cleared the transaction.

**Analysis.** The report looked at each transaction and the available information on regulatory review, both at the federal and state level, to assess each review in light of merger guidelines requirements and with an eye to exploring the regulators’ assessments of the unique sets of product markets, threats to competition, and other relevant considerations involved with respect to each.

The report looked at how regulators assessed market power in each case with respect to its effect on competition among sellers—employers and other purchasers of health insurance products—as well as among buyers—here, physicians, hospitals, and other providers. It reviewed available information in each case concerning the nature of the likely competitive harms perceived by regulators with respect to each transaction and the remedies, if any, chosen to address their regulatory concerns.

In looking at anti-competitive effects, the report focused primarily on unilateral effects—those post-merger effects stemming from the actions of the merged entity alone—rather than coordinated effects that, according to the report, are less likely to occur where the market involves heterogeneous health insurance products.

The report also looked at whether low barriers to market entry by new competitors, or efficiencies stemming from a merger that might benefit consumers, played any role in the agencies’ review of specific transactions. While they may have played a role in mergers that the agencies did not challenge, “as a practical mat-

ter, entry and efficiency arguments are unlikely to assuage competitive concerns if the agencies believe that the merger is likely to produce significant anticompetitive effects,” the report said.

The report also noted that “there is some sense that the states have taken on the mantle of the primary antitrust enforcers for health plan mergers” and noted that, in the Highmark merger case for example, “health plan mergers have been subjected to widely publicized scrutiny by state attorneys general or insurance commissioners in the absence of apparent action by the federal antitrust agencies.”

Many state attorneys general and insurance commissioners reviewed health insurance mergers to ensure that the transactions created no competitive harm, the report said. “In at least nine of the health insurance mergers announced between 1995 and 2010, state officials have been actively involved in such competitive reviews.”

While the report considered the role of state regulators in each case, it also observed that state and federal regulatory authorities and agendas are not necessarily coextensive or even overlapping. Where the focus of the merger guidelines is strictly on the likelihood of a merger harming competition among sellers, purchasers, or both, state agencies “often consider other aspects of mergers, including a plan’s nonprofit status, its social mission, or even its executive compensation,” the report noted.

In the end, the report said, the lack of publicly available information on state health plan merger reviews and any “single, unifying analytical framework like the Merger Guidelines” makes it difficult to ascertain whether there is any consistency among states in their approaches.

The authors of the report are David A. Argue, with Economists Inc., Washington; Michele Cerullo, with the University of South Florida Office of the General Counsel, Tampa, Fla.; Aimee E. DeFilippo, with Jones Day, Washington; Katherine I. Funk, with Sonnenschein Nath & Rosenthal LLP, Washington; Clifton E. Johnson, with Hall Render Killian Heath & Lyman PC, Indianapolis; Colin McCulloch, with the University of Maryland School of Law, Baltimore; Brian T. McGovern, Cadwalader Wickersham & Taft LLP, New York; Alexander M. McIntyre Jr., Baker Donelson Bearman Caldwell & Berkowitz PC, New Orleans; Thomas J. Quinlan, Reed Smith LLP, San Francisco; Mary H. Richard, Scoggins & Cross PLLC, Oklahoma City; and Fiona Schaeffer, with Jones Day, in New York.

BY PEYTON M. STURGES

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*Members of the AHLA Antitrust Practice Group are entitled to a free copy of the report. Other AHLA members and the public may obtain the report for a fee at <http://tinyurl.com/37zglm>.*