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Hospital Mergers: Knowing Your ABC's Can Boost Antitrust Approval Odds

By James M. Burns

Management consultant Kaufman Hall & Associates recently reported the number of hospital mergers announced in 2017 was the most ever, an attention-grabbing 115 transactions totaling more than $63 billion. Many of the largest deals were announced late in the year, including a proposed transaction between Ascension and Providence St. Joseph, which would create the nation's largest hospital operator with combined revenues of more than $44 billion. Another major transaction was the proposed combination of Catholic Health Initiatives and Dignity Health—entities with almost $30 billion in combined revenue—and a Carolinas Health System/UNC tie-up that would have more than $13 billion in revenue.

All these deals have one thing in common: None of them can be completed without obtaining the necessary antitrust approvals from federal and state regulators. In addition, as events of the last few years have confirmed, gaining such approvals has become increasingly more difficult. In fact, the CHS/UNC Healthcare merger has reportedly already been derailed in part based upon an initial, unfavorable reaction by North Carolina regulators.

So, with federal and state antitrust regulators increasingly looking more carefully at such deals, and with the repercussions of a failed (or even delayed) deal becoming even more significant in terms of lost time and money, how can merging parties reduce the likelihood of an extended regulatory review and increase the likelihood of a favorable regulatory outcome? Adherence to the "ABC's" of merger review would likely be an excellent place to start.

A Always have a compelling, procompetitive reason for a proposed transaction. In merger review, the ultimate question is always whether the proposed transaction will have adverse market effects, which often boils down to whether consumers are likely to be harmed by the transaction.

In hospital mergers, this potential for harm typically is expressed in terms of higher prices and/or reduced options for care. In hospital transactions that have been approved by regulators, the merging parties typically can demonstrate their transaction is motivated by a desire to become more efficient, driving down expenses and permitting them to deliver healthcare to patients at lower cost. Oftentimes the parties also maintain that, once combined, they will be in a better position to innovate and/or enhance the quality of their services. Where the parties can persuasively demonstrate their merger would produce procompetitive benefits—rather than higher prices and/or diminished options for care—they have a recipe for gaining antitrust approval.

B Begin preparing and advocating for your deal at the earliest possible opportunity. It is not enough for the parties (or their counsel) to be able to make claims about the potential consumer benefits of a proposed transaction after an investigation begins, or even after a transaction is announced.

The path to regulatory approval is enhanced where the parties' internal planning documents describing the proposed transaction, as well as their public statements announcing the deal, reflect that these procompetitive objectives are the very reason why the transaction has been proposed, and not an after-thought. Conversely, where a party's internal documents tell a different story about why the acquiring hospital desires to complete the deal, having

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nothing to do with increased efficiency and consumer benefit, the likelihood of gaining regulatory approval can be severely compromised. At the very least, the parties will also have made the entire process a more difficult—and thus more costly—one.

C Community support for the deal is critically important. Antitrust regulators do not assess the competitive implications of a proposed transaction in a vacuum. To determine the likely effects of a deal, the regulators reach out to the hospital's customers (both payors and patients) to inquire about their views of the transaction. For this reason, support for a proposed deal from both payors and patients (or at least the absence of significant opposition) can be critical to the parties' ability to gain swift antitrust approval.

Specifically, such support typically does two things: (1) it reinforces in the minds of regulators that the parties' contentions that the transaction will result in consumer benefits—i.e., lower prices, enhanced services and higher quality—is accurate; and (2) as a practical matter, support from the community deprives the regulators of key witnesses with stories about the harm that the deal will bring—evidence that is critically necessary to any successful challenge to the deal in court. For these reasons, merger partners that succeed in obtaining strong support for their deal from payors, local businesses, and local community and governmental leaders are significantly more likely to obtain regulatory approval.

D Do not run from market share data about the deal; embrace such data when it is positive, and when it is not, explore whether the data accurately reflects the state of competition in the market and/or whether it will likely do so in the future.

Any professional familiar with the merger review process knows an important part of any regulatory review is an examination of the potential increase in market concentration that will result if the transaction is permitted to proceed.

Indeed, the FTC/DOJ Horizontal Merger Guidelines expressly direct regulators to calculate current market shares, and the anticipated market shares post-closing (the so-called Herfindahl-Hirschman "HHI" test), to provide them with an initial assessment of this critical issue. Further, based upon these calculations, the Guidelines set forth "presumptions" about the likely impact on the market associated with this change in market shares.

That notwithstanding, it is important to keep in mind these are nothing more than presumptions (as the Guidelines expressly acknowledge), and market definition—both the definition of the product market and the geographic market—can have a profound impact on market shares. For this reason, it should come as no surprise that regulators frequently approve mergers even where the presumptions have been triggered (and rightly so), particularly where the merging parties can demonstrate the market share data initially relied upon may not be completely accurate, may not accurately predict future competition, or for a host of other legitimate and sound reasons.

In short, while an initial calculation of the parties' combined market share may yield potentially troubling results, it is important to remember these numbers often do not tell the whole story or accurately predict whether a merger will be approved.

While it is impossible to predict, with certainty, whether a proposed merger—in healthcare or any other industry—will draw a regulatory challenge, by remembering your "ABC's" you will undoubtedly be on the right track in determining whether the deal is likely to gain approval from antitrust regulators.

James M. Burns is a partner in the healthcare practice group at Akerman LLP with extensive experience handling healthcare antitrust matters. He is a member of the firm's Washington office. He can be reached at or james.burns@akerman.com or (202) 824-1725.

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