Examining Equity and ESG Considerations in Healthcare Antitrust Enforcement

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Environmental, social, and governance (ESG) and equity factors have risen to the top of the agenda in many contexts, including in healthcare antitrust matters. In recent healthcare actions, federal and state antitrust agencies have more closely considered the potential for disparate impacts on vulnerable communities when evaluating business conduct and mergers. From insurance and medication costs, to limited access to care, and lack of reliable transportation, vulnerable communities are more likely than others to be disadvantaged by anticompetitive conduct in the healthcare space. For these reasons, antitrust agencies are focusing on how to account for the vulnerability of affected populations when deciding where to invest enforcement resources.

This article provides an overview of government enforcers' publicly shared perspectives on cases involving vulnerable populations and how recent healthcare antitrust enforcement actions have accounted for equity considerations. This article also discusses practical recommendations for parties contemplating mergers and activities in the healthcare industry to highlight equities and ESG improvements that mergers and business practices can produce.

Recent public statements indicate enforcers consider potential disparate impacts on vulnerable populations when making enforcement decisions.

The Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) are mindful of the vital importance of health care and health insurance to consumers, especially to vulnerable populations that can least afford health care or who may have challenges in accessing quality health care. As the cases below illustrate, the antitrust agencies are cognizant that healthcare deals may have ramifications that are more acutely felt by society's more vulnerable citizens.

During a recent panel, DOJ and FTC officials commented that antitrust enforcers are carefully examining transactions and conduct involving health insurance and the broader healthcare industry to better understand how transactions and business practices impact people, services, and geographies.[1] These officials indicated antitrust investigations should take a more holistic approach that considers the characteristics of vulnerable populations and that greater focus should be placed on cases that have an outsized impact on vulnerable communities. For example, older Americans often have fixed incomes, such that a price increase as a result of illegal conduct or an anticompetitive merger might have a greater impact on this population.

[1] American Bar Association Antitrust Law Section, Symptom or Source? Examining Equitable Healthcare Enforcement (June 4, 2021).

The emphasis on protecting vulnerable populations through antitrust enforcement also reflects the view of some enforcers that antitrust law should play a broader role in addressing various social ills, including wealth and income inequality, the erosion of privacy, and systemic threats posed by firms that are "too big to fail." FTC Chair Lina Khan has pushed to expand the "consumer welfare" standard beyond its focus on prices, output, and product quality to address broader public interests. During the FTC's July 2021 open meeting, the Democratic-majority voted to revoke a 2015 policy statement that limited the types of competition practices the agency would seek to challenge under Section 5 of the FTC Act.[2] In remarks delivered during the meeting, Chair Khan noted that the resolution represented an important step in rethinking the work of the FTC. Similarly, former Acting Chair Rebecca Slaughter proposed that antitrust can and should be used as a tool to address structural racism. She indicated that antitrust enforcement "ensure[s] that markets are competitive and inuring to the benefit of historically underrepresented and economically disadvantaged consumers rather than incumbents."[3]

Another example is the increased importance of ESG in business transactions. ESG is now a top priority for the majority of businesses and stakeholders, including large institutional shareholders, requiring greater transparency and accountability from companies on these factors. The CEO of BlackRock, Larry Fink, recently predicted a fundamental reallocation of capital towards investment strategies that place sustainability at the center of the investment approach.[4] As businesses continue to increase their commitment to ESG, it will be important to highlight this commitment to enforcers. Although the US antitrust agencies have not articulated a structural framework for weighing ESG factors, the SEC and other regulatory agencies have embraced the importance of ESG.[5]

Recent federal and state healthcare antitrust enforcement actions demonstrate how enforcers consider impacts on vulnerable populations.

Three recent antitrust decisions in the healthcare industry illustrate how the agencies assess competition impacting vulnerable communities.

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2 Press Release, Fed. Trade. Comm'n, Agency to Focus on Mergers, Repeat Offenders, Big Tech Companies, the Healthcare Industry, Harms Against Workers and Small Businesses, COVID-19 Scams (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities.

3 Rebecca Kelly Slaughter, Commissioner, Fed. Trade. Comm'n, Keynote Address at the GCR Conference: GCR Interactive: Women in Antitrust, at 4 (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

4 Larry Fink, *Larry Fink's 2021 Letter to CEOs*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (last visited Aug. 25, 2021).

5 Press Release, U.S. Sec. and Exch. Comm'n, SEC Division of Examinations Announces 2021 Examination Priorities: Enhanced Focus on Climate-Related Risks (Mar. 3, 2021), https://www.sec.gov/news/press-release/2021-39.

United States v. Aetna

In 2016, DOJ and nine attorney general offices sued to block the merger of two of the largest health insurers in the United States—Aetna and Humana.[6] The government's case focused on competition in the market for private health plans for seniors, known as Medicare Advantage, and the health insurance market on the public exchanges. The complaint alleged that the merger would have led to higher health insurance prices, reduced benefits, less innovation, and worse service. Further, the government argued the combination would have eliminated valuable competition between the insurers in 364 counties in 21 states.

According to DOJ, the loss of competition between the parties would have been particularly devastating for seniors, low- and moderate-income individuals, and families who buy insurance on the public exchanges. Seniors, who visit doctors and hospitals more than twice as often as the average person and have less income than the average American household, would have faced higher premiums for Medicare Advantage plans. The higher premiums likely would have affected the quality and accessibility of care available to seniors. Similarly, DOJ argued, low income individuals would face higher prices and reduced benefits as a result of the merger.

In his decision to block the Aetna-Humana merger, Judge John Bates of the District Court for the District of Columbia recognized the detrimental effects on vulnerable communities, noting that many seniors prefer Medicare Advantage to original Medicare because of the greater coverage Medicare Advantage typically offers and that these seniors would be unlikely to switch to original Medicare if prices for Medicare Advantage plans rose.[7] He held that head-to-head competition between Aetna and Humana benefited seniors by providing broader networks and lower costs.

Jefferson-Einstein

In 2020, the FTC and the Pennsylvania Attorney General unsuccessfully challenged the proposed merger of the Jefferson Health System and Albert Einstein Healthcare Network. The complaint argued that the merger was illegal because it combined two of the leading providers of inpatient general acute care hospital services and inpatient acute rehabilitation services in Philadelphia and Montgomery Counties, Pennsylvania. The complaint alleged that the hospital systems' merger would eliminate robust competition between the parties for inclusion in health insurance companies' hospital networks to the detriment of patients.[8] Further, the government claimed that the parties' history of upgrading medical facilities, improving patient access, and offering more competitive reimbursement rates and terms to commercial insurers would suffer as a result. After six

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6 Complaint, *United States v. Aetna Inc.*, No. 1:16-cv-01494, 2016 WL 3920816 (D.D.C. July 21, 2016.).

7 *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 41-42 (D.D.C. 2017).

8 Complaint at 13, *Thomas Jefferson Univ.*, Docket No. 9392 (F.T.C. Feb. 27, 2020), https://www.ftc.gov/system/files/documents/cases/d09392_administrative_part_iii_complaint.pdf.

days of evidentiary hearings, a federal judge rejected the FTC's argument and declined to issue a preliminary injunction to block the merger.[9]

Some of the significant concerns for vulnerable populations raised in this case centered on cost and access to care. The Albert Einstein Healthcare Network's largest hospital, Einstein Medical Center Philadelphia, is considered a "safety net hospital" because it has one of the highest percentages of government-insured inpatients—eighty seven percent or more—among large hospitals in the United States. Additionally, the Philadelphia area has a large elderly population with less access to private vehicles and who therefore rely more on public transportation to access medical care. An increase in healthcare costs could have disproportionately impacted this population because of the need for access to affordable healthcare.

Allegiance Health

This anticompetitive conduct case provides a different perspective on how enforcers consider disparate impact in making enforcement decisions. The complaint alleged that various Michigan hospitals violated Section 1 of the Sherman Act by entering into agreements to limit marketing of competing healthcare services by geographic locations. The complaint further alleged that the Defendants' agreements disrupted the competitive process and harmed patients, physicians, and employers.[10] In particular, because the marketing involved free health fairs and other services, certain citizens were excluded from being able to receive free health benefits as a result of the illegal agreements.

The same day that DOJ filed the complaint, all defendants except Allegiance agreed to settle the case.[11] The settlement prohibited the defendants from entering into any future agreements to allocate marketing territories and mandated compliance measures to prevent similar violations. The antitrust case against Allegiance continued for two and a half years, but ultimately was settled through a more restrictive consent decree.[12]

Why it matters: investigating healthcare mergers and business conduct remains a priority for both agencies.

Healthcare transactions and conduct have regularly received antitrust scrutiny. For example, beginning in 2016, the DOJ cautioned that naked wage-fixing or no-poaching agreements can be the subject of criminal prosecution. In 2020, the DOJ initiated the first

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9 *FTC v. Thomas Jefferson Univ.*, 505 F.Supp.3d 522 (E.D. Pa. 2020).

10 Complaint at 2, *United States v. Hillsdale Cmty. Health Ctr.*, No. 15-cv-12311, 2015 WL 4724523 (E. D. Mich. Jun. 25, 2015).

11 Stipulation and Proposed Final Judgment, *United States v. Hillsdale Cmty. Health Ctr.*, No. 2:15-cv-12311 (E.D. Mich. Jun. 25, 2015), https://www.justice.gov/atr/case-document/file/628931/download; *see also* Order, *United States v. Hillsdale Cmty. Health Ctr.*, No. 15-cv-12311, 2015 WL 10013774 (E. D. Mich. Oct. 21, 2015).

12 Final Judgment, *United States v. W. A. Foote Mem'l Hosp.*, No. 5:15-cv-12311 (E. D. Mich. May 21, 2018), ECF No. 127, https://www.justice.gov/atr/case-document/file/1064846/download.

criminal no-poach prosecution against the owner of Texas healthcare services provider,[13] and has since brought additional criminal charges alleging anticompetitive employment practices in the healthcare industry.[14]

Similarly, the FTC has not lessened its focus on this area. During the ABA's 2021 Antitrust Law Virtual Spring Meeting, Mark Seidman, Assistant Director at the FTC, commented that reviewing healthcare industry consolidation is a priority for the FTC, as evidenced by the FTC's study into the impact of mergers of physician groups and healthcare facilities. The FTC is considering more than well-established theories for directly substitutable services in an isolated area, including the effects of all types of mergers. Moreover, in March 2021, the FTC announced a working group with its global counterparts to rethink how pharmaceutical mergers are analyzed and to better understand how deals in the sector can impact competition.

Consideration of these issues will remain important as the number of healthcare deals is increasing. During the first quarter of 2021, healthcare transactions were up more than 50% than the same period in 2020.[15] Sectors like life sciences, physician services, and health care IT saw the most activity. Many factors motivate these strategic M&A transactions. In particular, the aftermath of the COVID-19 pandemic could also accelerate the growing trend of healthcare consolidation among not just hospitals but also private practices, as the pandemic has caused major financial losses among some facilities.

Highlighting Equities and ESG Efforts

As parties contemplate transactions in the healthcare industry, it is important to account for the increased scrutiny of ESG and equity factors in this area. Consequently, parties should be prepared to demonstrate how vulnerable populations would benefit from proposed mergers or business conduct. For example, mergers and business conduct may produce synergies that lower healthcare costs, improve quality, and enhance innovation. In turn, these procompetitive changes can have an outsized benefit for vulnerable populations. In particular, parties should examine how past mergers or conduct resulted in improved service offerings and greater access to care. Evidence that past transactions and conduct benefitted consumers is one of the most effective ways to demonstrate that similar actions will similarly help vulnerable populations and other consumers.

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13 Press Release, U.S. Dep't of Just., Former Owner of Health Care Staffing Company Indicted for Wage Fixing, (Dec. 10, 2020), https://www.justice.gov/usao-edtx/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

14 *United States v. Surgical Care Affiliates*, No. 3:21-cr-00011-L (N.D. Tex. Jan. 5, 2021); *United States v. Ryan Hee*, No. 2:21-cr-0098 (D. Nev. Mar. 26, 2021).

15 Gary W. Herschman *et al*., *Health-Care M&A Deals in Q1 Set Record Pace as Economy Recovers*, BLOOMBERG LAW (Apr. 27, 2021), https://news.bloomberglaw.com/securities-law/health-care-m-a-deals-in-q1-set-record-pace-as-economy-recovers.

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