Barley Snyder

New FTC Guidance on Nonprofit Mergers and Acquisitions

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New federal guidance means more nonprofit hospitals and senior living organizations involved in a merger or acquisition could be subject to costlier federal reviews.

Larger nonprofit entity mergers have been subject to Federal Trade Commission review under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 and its later amendments. Some of the large non-profit deals - especially within the health care and senior living fields, which are more likely to fall within the HSR reporting requirements due to deal size - have been able to obtain a waiver based upon their board structure, allowing them to escape the federal review and save tens or even hundreds of thousands of dollars in filing fees. But now, the new guidance could reduce the availability of the waivers.

While the former waiver analysis simply looked at the control of the board of the acquired entity, the new guidance - issued in late October in a "Tip Sheet" from the FTC's Premerger Notification Office - said the office will look beyond board of director control to other "indicia of control" in making a determination as to whether or not a transaction is exempt from premerger notification requirements.

The new interpretation seeks to clarify whether the nonprofit transaction is an "acquisition" resulting in a party "holding" voting securities or assets. Beneficial ownership of assets will determine whether a reportable acquisition is proposed, rather than solely an analysis of board control. Various structural approaches previously employed to avoid HSR premerger review in nonprofit combinations may no longer be effective.

Here are the current monetary thresholds for notification to the Premerger Notification Office:

• Transactions valued at less than $84.4 million are not reportable

• Transactions valued at more than $84.4 million but not more than $337.6 million are reportable only if one party has assets or annual net sales of at least $16.9 million and the other party has assets or annual net sales of at least $168.8 million (unless an exemption applies)

• Transactions valued at more than $337.6 million are reportable, regardless of the parties' size (unless an exemption applies).

The FTC filing fee for transactions valued above $84.4 million but less than $168.8 million is $45,000 and fees for larger deals are substantially higher. Obtaining a waiver from review for the nonprofit entities involved avoids the filing fees.

While participants in hospital transactions have long been sensitive to competition law concerns, participants in the senior living space will increasingly find it necessary to more carefully analyze the structure of their deal in light of competition law and HSR premerger notification compliance.

If anyone has any questions on how the new guidance could apply to their potential transaction, please contact either Tim Dietrich, Daniel Desmond or anyone in the Barley Snyder Senior Living Industry Group.

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