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Congress Responds to Proposed Health Care Mergers with Calls for Hearings and New Merger-Related Legislation

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December saw the announcement of several significant proposed mergers in the health care industry, each of which has the potential to reshape the industry. These transactions include both vertical mergers between health care providers and national health insurers and horizontal mergers among large multi-state hospital systems. Before any of these transactions can be completed, federal and state antitrust regulators will need to be heard from concerning the permissibility of these transactions.

However, as has become increasingly common, the merging parties are likely to face scrutiny from Congress as well. While Congress plays no formal role in the merger review process, Congress has increasingly taken a role in such matters through hearings and proposed legislation. Not surprisingly (given the size and scope of the announced transactions), the recently proposed mergers have evoked just such a response.

Specifically, Congressman Frank Pallone Jr. (D-NJ) has called upon House Energy and Commerce Committee Chairman Gregory Walden to hold a hearing on the mergers. In a letter to Chairman Walden, Congressman Pallone stated that the proposed transactions are "the most recent development in an ongoing trend of consolidation and market concentration in our health care system," and that "increasingly, health systems are offering insurance and insurers are buying or partnering with health care providers." Congressman Pallone further stated that it is "critical that Congress closely examine the changing relationships among health care entities and the impact these changing relationships have on the way health care is delivered in this country." At this time, no hearing has been held, but a hearing is likely to be convened in the new year. (The House reconvenes on January 3).

In the interim, others in Congress have already begun to introduce legislation that targets large-scale corporate mergers more generally. On December 19, Congressman Keith Ellison (D-MN) introduced the "21st Century Competition Act of 2017," H.R. 4686, which would create a new regulatory body that would examine the impact of corporate mergers on the economy as a whole. Notably, the legislation contains language indicating that it is the "sense of Congress" that "insufficient and permissive [merger] enforcement by the Department of Justice and the Federal Trade Commission necessitates that Congress convene [an] information gathering exercise as a form of oversight." To that end, the legislation would establish a "National Commission on Economic Concentration" that would study the effects of both horizontal and vertical mergers on the economy from both economic and non-economic perspectives, including issues like employment and the potential reduction in consumer rights. The legislation would require the Commission to author a report to Congress on this issue within three years of the enactment of the legislation.

In addition, earlier in December Congressman Ellison also introduced the "Merger Retrospective Act of 2017," H.R. 4538," which would require the DOJ and the FTC to conduct retrospective reviews of previously consummated mergers to assess their impact on competition and consumers. Specifically, each agency would be required to conduct at least five such reviews each year, and to issue findings regarding the effect of the mergers on (1) price and quality of the products affected by the merger; (2) the effectiveness of any divestitures that were required as a condition of merger approval; (3) the effects of the merger on employment; (4) the effect on research and development; (5) the impact on employee salaries; and (6) the use of arbitration

clauses, non-compete agreements and related contractual provisions applicable to employees and corporate officers. Notably, the Act would apply to mergers that were consummated up to two years prior to the enactment of the legislation, as well as all mergers consummated after enactment.

As all of this recent Congressional activity suggests, it seems highly likely that Congress intends to play an active role in shaping the regulatory course of these announced mergers, whether through formal hearings, legislative proposals or a combination of the two. Where it will lead remains uncertain at this time. Stay tuned for future Baker Donelson updates on this topic.