**Efficiencies Analysis in the Antitrust Evaluation of Healthcare Provider Mergers and Collaborations**

*This roundtable discussion is brought to you by the Antitrust Practice Group*

February 14, 2013 · 1:00-2:15 pm Eastern

Presenters:
Alexis J. Gilman, Federal Trade Commission, Washington, DC
Lisa Nolan Ahern, AlixPartners, LLP, Chicago, IL
Jeffrey W. Brennan, McDermott Will & Emery, LLP, Washington, DC

Moderator:
Christine White, Federal Trade Commission, New York, NY
Agenda

- Defining “Efficiencies” and Their Role in Competition Analysis
  - The FTC-DOJ *Horizontal Merger Guidelines* Framework
- Efficiencies in Healthcare Provider Mergers: Identification, Proof and Legal Issues
- The Role of the Efficiencies Consultant
- The FTC/DOJ Review Process
Defining Efficiencies and Their Role in Competition Analysis

- **Common definitions:**
  - *Efficiency*: “the ratio of the work done or energy developed by a machine, engine, etc., to the energy supplied to it”
  - *Economy*: “frugality in the consumption or expenditure of money, materials, etc.”
  - *Synergy*: “the interaction of elements that when combined produce a total effect that is greater than the sum of the individual elements”
  - *Quality*: “high grade; superiority; excellence”

- **Antitrust context:** Will the merger generate or improve these things?

- **Relevance of efficiencies depends on the merger’s anticompétitive potential**

-----------------------------
*Dictionary.com*
2010 Horizontal Merger Guidelines – Key Terms

- “Merger-specific”
  - “unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects”

- Substantiated
  - “Incumbent on” the parties to verify the likelihood, magnitude, time for development, cost and merger-specificity of each claimed efficiency

- “Cognizable”
  - Must not result from an anticompetitive reduction in output or service
    - “Purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value”
2010 Horizontal Merger Guidelines – Key Principles

- Must be likely to reverse the merger’s anticompetitive effects

- The greater the likely adverse effects, the greater must be the efficiencies

- Certain efficiencies “more likely to be cognizable and substantial”
  - Lower incremental costs from shifting production among facilities

- Others are less likely to be persuasive
  - Related to procurement, management, capital cost
Healthcare Provider Mergers –
Some Potential Efficiencies / Issues of Proof

- Cost reduction from service line consolidations
  - Elimination of redundancies (staff, equipment)
  - But how concrete and definite is consolidation plan?
- Capital expenditure avoidance
  - Merger unites complementary assets
  - How certain that but for the merger, the capital would have been spent?
- Purchasing economies
  - Would a joint purchasing program do the same thing? Merger specific?
- Acquiring system will bring synergy to seller (better cost & quality)
  - Can buyer show that system synergies improved quality and cost structure at the last hospital buyer acquired?
Healthcare Provider Mergers –
Some Potential Efficiencies / Issues of Proof (Cont’d)

- A single IT system saves cost; more clinical data aid benchmarking
  - Do you need your competitor’s data to benchmark? (merger-specificity)
- Combined service lines will become “centers of excellence”
  - Wholly dependent on execution of the consolidation plan
  - Aren’t the service lines excellent now? How will they improve?
- Higher volumes will help recruit better doctors
  - How has recruitment been lacking?
- Higher volumes = more repetition = more experience = better quality
  - The FTC disputes this as lacking empirical support
Starting the Process of Identifying Efficiencies

- If acquiring a competitor, **start early**
  - The other side of the same coin: rationale for this transaction
    - Agency staff will ask, and draw an adverse inference if parties can’t answer

- Focus on specific, concrete, real-world, verifiable benefits of merger

- Prepare to face a very skeptical Agency staff
  - FTC economist study of staff treatment of efficiencies claims, 1997-2007: Of 342 claims discussed in Competition (lawyer) staff memos, staff accepted 8%, rejected 32%, and expressed no view on 60%
  (See [http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf](http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf), Table 2)

- Even if staff is never convinced, a robust efficiencies analysis can affect prosecutorial discretion
Antitrust Legal Restrictions

- Gun-jumping (HSR Act)
  - Merging parties must retain their separate, independent, competitive identities until all HSR waiting periods expire
- Avoidance of collusion (Sherman Act)
  - Rivals’ access to each other’s competitively sensitive / confidential data can facilitate unlawful collusion
- Access to the information needed for detailed efficiencies analysis could raise issues under both Acts
- Dilemma
  - Agencies hold parties to high standard in proving efficiencies, but the Acts still apply
Navigating the Antitrust Legal Restrictions

- Bring in antitrust counsel early to help chart the course
- A good deal of analysis can be done using public information, non-sensitive competitor information, and the party’s internal know-how
- Parties should develop good sense of efficiencies opportunities early on, even at relatively high level
  - If they don’t, Agency staff may be skeptical that efficiencies were driver of the transaction
- For the “deeper dive,” an independent efficiencies consultant is key
- Consultant reports will use redactions and aggregation of data to shield competitively sensitive information
  - Antitrust counsel should review reports in advance
- It’s time to discuss the deeper dive . . .
The Role of the Efficiencies Consultant

- When and why to retain an efficiencies consultant?
  - Involvement during the early stages of the process allows for a thorough, well vetted analysis and appropriate coordination with all parties
    - Involvement and direction from both parties results in well supported and documented analysis as well as a valuable tool for post transaction implementation efforts
    - Appropriate coordination with in-house and outside counsel
    - Appropriate coordination with other consultants
The Role of the Efficiencies Consultant

Can the parties do the efficiency work themselves?

- The consultant works together with the parties to facilitate a client driven, realistic integration/consolidation plan and resulting efficiencies that meet the *Horizontal Merger Guidelines*
- There are limitations on competitively sensitive information that the parties can share with one another – a consultant is able to fully analyze all relevant data
- The consultant has experience in preparing a presentation that considers the areas the agencies will likely want to consider
The Role of the Efficiencies Consultant

Efficiency Study Approach

- Multi-faceted approach to identifying transaction specific efficiencies
  - Integration planning on a departmental or service line basis
  - Quantification of resulting efficiencies and additional efficiencies that may be independent of integrated service lines

- A phased approach may be appropriate given the situation
  - Initial Phase: Development of the more readily identifiable areas of integration and efficiency opportunities
  - Phase II: A deeper dive into potential opportunities that are less readily identifiable or that occur later in time
The Role of the Efficiencies Consultant

Integration Planning

- Detailed Review of Clinical and Non-Clinical Departments
  - Consolidation of a service line at a particular location may allow for improved quality of care
  - Personnel and equipment may not be necessary at duplicative locations in order to support collective volumes
  - Community needs may be better served by situating a service line in a particular location
  - Experience within a particular service line may allow for expansion to additional locations and improved access to care
  - Thorough analysis of the timing of all consolidations is determined

- Integration/Consolidation vs. Coordination
  - Ranges from full integration of a service line at a particular location to shared management, equipment and systems across locations
The Role of the Efficiencies Consultant

- **Efficiency Analysis**

  - The efficiency work incorporates and builds upon the integration planning for a cohesive, reasoned and supported overall plan

  - Categories of efficiencies often reviewed
    - Annual operating costs
    - Annual staffing costs
    - Planned capital purchases
    - Costs of achieving integration planning steps or otherwise
The Role of the Efficiencies Consultant

- **Annual Operating Efficiencies**
  - Examples of potential operating efficiencies
    - Outsourced contracts brought in-house through combined expertise or combining of outsourced contracts under one external vendor
    - Insurance policies
    - Advisor fees
    - Medical supply and pharmaceutical purchases
  - Consideration to be given to any offsetting costs incurred in order to achieve operating efficiencies
    - Incremental increases in vendor contracts
    - Increased GPO fees
The Role of the Efficiencies Consultant

**Annual Staffing Efficiencies**

- Examples of potential staffing efficiencies
  - Executive and managerial positions where duplication of duties exists
  - Overlapping and duplicative administrative medical director duties
  - Overlapping physician recruiting plans

- Consideration to be given to any offsetting costs incurred in order to achieve staffing efficiencies
  - Employee severance and retention payments
  - Additional FTEs required for expanded clinical and/or non-clinical functions
The Role of the Efficiencies Consultant

- Foregone Capital Purchases
  - Examples of potential capital efficiencies
    - Medical equipment
    - Bricks and mortar investments
    - Information technology
  - Consideration to be given to any offsetting costs incurred in order to achieve capital efficiencies
    - Build out of available space for integrated purpose
    - De-installation and/or re-installation of equipment to be relocated
    - IT hardware and software investments to achieve uniform platforms
The Role of the Efficiencies Consultant

- Examples of Additional Integration Costs to Consider
  - Operating costs associated with service line expansion
  - Costs of community expanded programs
  - Marketing and advertising costs
The Role of the Efficiencies Consultant

Quantifying Efficiencies

- In quantifying efficiencies, the consultant works collaboratively with the parties to identify and collect appropriate supporting documentation for areas identified:
  - Third party contracts and data
  - Information services related plans and existing equipment
  - FTE listings containing salary and benefit information, hire dates
  - Severance and retention policies
  - Strategic plans and/or long term planning documents
  - Planned and historical equipment purchase quotes and costs
  - Capacity of existing equipment and FTEs
- Vetting of data and documents with appropriate personnel throughout the process
The Role of the Efficiencies Consultant

- Reporting Efficiencies
  - Presentation of the efficiencies in conjunction with the *Horizontal Merger Guidelines*
    - Merger-specific
    - Verifiable, non-speculative and substantiated, particularly with past experience
      - Timing of when integration plan can be implemented and efficiencies can be achieved is addressed
    - Cognizable
  - Coordination with other consultants, including economist
  - The devil is in the detail
    - Prepare to provide both verbal detail and underlying documentation in support of the efficiencies to the agencies
What Are The Agencies Looking For?

- **In general**
  - Look for cognizable efficiencies under *Merger Guidelines*
  - See related analytical frameworks: Statements of Antitrust Enforcement Policy in Health Care; “ACO Antitrust Enforcement Statement”; Guidelines for Collaborations Among Competitors

- **In provider transactions/collaborations**
  - Quality improvements or stemming deterioration
  - Cost savings enabling new or expanded services/facilities, providing existing services at lower cost
  - Other efficiencies that benefit patients

- **Key is that efficiencies flow through to consumers**
Who Reviews Efficiency Claims?

- Initial agency reviewers
  - Staff attorneys
  - Economist and possibly financial analyst
- Other agency audiences
  - Bureau/Division management
  - Commissioners or Assistant Attorney General
- Other potential reviewers
  - Litigation experts
  - Federal judges
  - Administrative Law Judge and full Commission
Where Agencies Look for Substantiation?

- Sources of information about purported efficiencies
  - Press releases, news articles, other public statements
  - HSR filings – 4(c), (d) documents
  - Counsel communications with staff
  - Written and in-person presentations to staff
  - Consultant presentations
  - Responses to voluntary access letters
  - Market participants – interviews, CID and subpoena responses
  - Second Request responses (CID/subpoena in non-HSR deals)
  - Investigational Hearings and depositions
  - Quality rating organizations
  - Expert reports
Treatment of Efficiencies Under Case Law

- S. Ct. has not recognized the defense; lower courts have

- High legal standard, especially in § 13(b)/PI proceedings
  - “[l]n certain circumstances, a defendant may rebut the government’s prima facie case with evidence showing that the intended merger would create significant efficiencies” Univ. Health (11th Cir. 1991)
  - “[H]igh market concentration levels … require proof of extraordinary efficiencies *** [T]he court must undertake a rigorous analysis … to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.” Heinz (D.C. Cir. 2001)
  - “No court in a 13(b) proceeding … has found efficiencies sufficient to rescue an otherwise illegal merger.” ProMedica (N.D. Ohio 2011)
  - See also H&R Block (DDC 2011)
Recent Cases – OSF/Rockford Health System

- FTC challenged OSF’s acquisition of Rockford
  - 3-2 GAC hospital market; post-merger share of 64%
  - Combining 2 of 3 largest PCP groups; post-merger share of 37%
  - Alleged harm to quality, convenience, and breadth of services

- Both parties submitted expert evidence on efficiencies

- Parties’ efficiency, quality claims
  - Annual recurring cost savings based on clinical consolidation
  - One-time capital avoidance savings
  - Improved quality of care, other community benefits
  - Efficiencies will outweigh any anticompetitive effects
OSF/Rockford Health System (Cont’d)

- FTC disputed efficiency claims
  - Claims “fall well short of the substantial, merger-specific, well-founded, and competition-enhancing efficiencies that would be necessary to outweigh the [ ] significant competitive harm”
  - Claims made for litigation, outside of regular business planning

- N.D. Ill. ordered PI; found efficiencies fell short
  - Noted high legal standard, particularly in § 13(b) context
  - Consolidation savings uncertain, speculative; conflicting experts
  - Capital avoidance savings “not sufficiently certain at this time”
  - Clinical effectiveness best practices not certain, merger-specific
Recent Cases – ProMedica/St. Luke’s

- FTC challenged PHS’s acquisition of SLH
  - 4-3 GAC hospital market; 58% share post-merger
  - 3-2 OB services market; 80.5% share post-merger
  - Alleged efficiencies did not outweigh competitive, quality harm
- FTC obtained PI in N.D. Ohio
- In Part III trial, PHS claimed efficiencies but not as primary defense
  - PHS had integration consultant, economic expert, and financial expert testify but not its efficiencies consultant
  - Staff’s financial expert analyzed parties’ efficiency claims
ProMedica/St. Luke’s (Cont’d)

- In holding § 7 violated, ALJ credited some efficiencies
  - Increase in SLH credit rating and curing bond default
  - Certain cost, quality benefits (others found lacking)
- But ALJ found no significant economies
  - Capital projects: uncertain, not merger-specific
  - Inclusion of SLH in Paramount network: not merger-specific
  - PHS plans to fund SLH pension: do not outweigh harm
  - SLH professional liability insurance savings: not merger-specific
  - Back-office cost savings: unsubstantiated, not merger-specific
- In Commission appeal, PHS dropped efficiencies claims
Other Provider Cases

- **In re Carilion Clinic**
  - 3-2 acquisition of advanced OP imaging facility and ASC
  - Complaint: deal does not result in improved quality, efficiencies
    - Facilities already high-quality, low cost, lower priced than Carilion
  - Settled by consent requiring divestiture of both facilities

- **Oklahoma State Chiropractic Indep. Phys. Assoc.**
  - OSCIPA negotiated prices, set terms for 350 chiros. (45% of OK)
  - DOJ § 1 suit: contract negot. “not ancillary to any procompetitive purpose [ ] or reasonably necessary to achieve any efficiencies.”
  - Enjoined OSCIPA from, e.g., providing services to, communicating with, facilitating chiros w/r/t to contracting
Efficiency and Quality Claims Can Succeed

- Non-public investigation of hospital merger in northeast
  - Hospitals were closest geographically; strong competitors
  - B hospital had beds; A hospital needed beds: avoids new tower
  - B hospital in financial trouble; A hospital to invest >$100M in B
  - A hospital presented plans for consolidation of services, timeline
  - A hospital agreed to provide charitable care, financial assistance
  - Key: strong, early case for efficiencies, quality, and other factors
  - Investigation closed after Second Request issued

  - “Court is persuaded that the proposed merger would result in significant efficiencies” (CapEx avoided, operating efficiencies)
Best Practices

- Document efficiencies diligence, deliberations, and plans
- Seek health plan and constituent “buy in” for efficiencies
- Solidify (as many) efficiency plans (as possible)
- Raise efficiency claims early with staff (Adv. Op., BRL?)
- Show efficiencies were key deal driver, not just ancillary
- Explain how efficiencies benefit consumers, not parties
- Compare deal with what could do alone/with another
- Demonstrate past success in achieving efficiencies
- Tie efficiency claims to any financial condition arguments
- Identify what will be achieved shortly after close (Yr 1, 2)
Efficiencies Analysis in the Antitrust Evaluation of Healthcare Provider Mergers and Collaborations © 2013 is published by the American Health Lawyers Association. All rights reserved. No part of this publication may be reproduced in any form except by prior written permission from the publisher. Printed in the United States of America.

Any views or advice offered in this publication are those of its authors and should not be construed as the position of the American Health Lawyers Association.

“This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought”—from a declaration of the American Bar Association