ML STRATEGIES

FTC Hosts Panel and Launches Public Inquiry with DOJ and HHS on Private Equity and Health Care

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1. As part of the Biden administration's State of the Union blitz, the Federal Trade Commission (FTC) convened a **workshop** on private equity (PE) investments in the health care industry on March 5, 2024. Immediately prior to the workshop, the FTC, the Department of Justice (DOJ), and the Department of Health and Human Services (HHS) announced a joint **request for information** (RFI) on the effects of PE transactions in the health care industry.
2. During the workshop, regulators asserted that enforcing antitrust law against PE investments in the health care space is a top priority for both the FTC and DOJ. FTC Commissioner Rebecca Kelly Slaughter called on fellow enforcers "to attack the underlying model…not just the name of 'private equity.'"
3. Comments on the RFI may be submitted through **this web portal** and are due by May 6, 2024. Given the stated priority that the antitrust enforcement agencies are giving to scrutinizing PE transactions, as reflected in the **recently revised merger guidelines**, interested stakeholders are highly encouraged to closely track developments related to and participate in the RFI.

In a clearly choreographed roll out in connection with President Biden's State of the Union address, the Federal Trade Commission (FTC) convened a **workshop** on March 5, 2024, to examine "the role of private equity investment in health care markets."

Hours before the workshop began, the FTC, the Department of Justice (DOJ), and the Department of Health and Human Services (HHS) announced a **public inquiry** on "private-equity and other corporations' increasing control over health care."

It is not surprising that the current antitrust regulators have been concerned with the competition effects of private equity transactions and "roll-ups." These concerns are reflected in the revisions in the new merger guidelines specific to private equity and the **now pending FTC enforcement action in Texas**.[1] Much of the regulators' stated concerns have dealt with private equity (PE) activity in the health care sector. Through both the cross-agency RFI and the workshop on March 5, 2024, regulators indicated that they will continue to subject this activity to great scrutiny.

Cross-Agency Inquiry on PE and Health Care Launched by FTC, DOJ, and HHS

In their **request for information** (RFI), the FTC, DOJ, and HHS are seeking public comment on "the effects of transactions involving health care providers… facilities, or ancillary products or services, conducted by private equity funds or other alternative asset managers, health systems, or private payers."

In other words, the focus goes beyond private equity firms to include other types of investors, health systems, and private payer transactions. With respect to health systems and private payers, the agencies expressed concern about vertical as well as horizontal integration and their effect on pricing, referral patterns, and incentives to compete.

The RFI notes that the agencies involved are "particularly interested" in hearing about the impact of those "transactions that would not be noticed to the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act…" The RFI provided a laundry list of providers and other types of businesses that could be at issue. A review of that list seems to indicate that the agencies are focused on smaller transactions that are part of an overall roll-up strategy.

The comments submitted pursuant to this RFI "will inform the agencies' identification of enforcement priorities and future action, including new regulations, aimed at promoting and protecting competition in health care markets and ensuring appropriate access to quality, affordable health care items and services."

The agencies are requesting input from stakeholders across the health care industry, including "patients, consumer advocates, doctors, nurses, health care administrators, employers, private insurers, PBMs, GPOs, nursing homes, hospices, home health agencies, hospitals, and other health care providers, facilities, providers of and entities that provide ancillary health care products or services." Comments are also welcomed from "academics and other experts who have studied market consolidation, corporate control in health care, and related issues." In particular, the agencies are seeking input from patients and health care workers regarding their experiences after an acquisition or merger.

The RFI poses five questions related to investments involving health care providers by PE funds, alternative asset managers, health systems, and private payers.

1. **Effects of Consolidation**: How will a transaction involving health care providers, facilities, or ancillary products or services "by private equity funds or other alternative asset managers, health systems, or private payers" impact patient care, the treatment of public and private payers, employers who provide health insurance for their employees, and the conditions under which providers, health care workers, and support staff work?
2. **Claimed Business Objectives for Transactions**: What were the claimed business goals for a transaction (efficiencies of scale, innovation in providing care, increased business valuations), and have these objectives been realized post-transaction? Who benefited from the realization of the claimed business goals of the transaction? Did the transaction require the acquired entity to take on additional debt or undergo restructuring? If the transaction generated surplus profits, were those profits reinvested in the acquired business or paid out to shareholders?
3. **Notable Transactions**: "Are there particular types of entities, such as private equity funds or other alternative asset managers, health systems, or private payers, most associated with transactions that result in adverse impacts" on patients, public and private payers, health care providers, or employers who provide health insurance for their employees. "Are there particular facilities, providers, payers, and ancillary products or services that are most often the targets of these harmful transactions? Who are these targets?"
4. **Need for Government Action**: What actions should the FTC, HHS, and DOJ take "to identify and address transactions that, due to market consolidation or corporate control issues, may have major adverse impacts" on patients, public and private payers, health care providers, or employers who provide health insurance for their employees? "Should the agencies promote greater transparency and enhanced availability of information to the public on mergers, acquisitions, and other transactions involving health care facilities, providers, payers, and ancillary products or services, and if so, how?"
5. **Other Impacts**: Are there any other impacts from health care market transactions that agencies should be aware of?

The tone of the RFI and accompanying press releases display a suspicion — if not hostility — toward PE transactions in the health care industry. Again, this posture is not new, and should not lead one to assume that any concrete actions will emerge from the RFI process. However, as three agencies with different jurisdictions are involved in this RFI, continued scrutiny and monitoring is required.

Comments on this RFI can be submitted through **this web portal** and are due by May 6, 2024. As this RFI may inform future enforcement actions on the part of FTC, DOJ, and HHS, interested stakeholders are highly encouraged to comment.

FTC Hosts Workshop on PE and Health Care

The remarks by antitrust enforcers at the FTC workshop that followed the announcement of the RFI conveyed their skeptical attitude towards PE activity in the health care space.

Chair Lina Khan of the FTC opened the proceedings by asserting that "private equity acquisitions of health care service providers" is a "top of mind" area for the Commission. While acknowledging that "private investments can sometimes be an important source of capital" for small and medium health care service providers, Chair Khan condemned what she called a "growing financialization in the health care industry [that] can force medical professionals to subordinate to corporate decision-makers [and] profit motives, at the expense of patient health."

With regard to the conduct of PE firms in the health care industry, Chair Khan discussed three "concerning extractive practices" to which the FTC is paying particularly close attention:

1. **"Flipping and Stripping"**: Chair Khan argued that a "short-term, high-risk, and low consequence ownership" model could encourage a "flip and strip approach," whereby portfolio companies are purchased on debt, stripped of their assets, and then sold. These "short-term profit extracting strategies," contends Khan, can "undercut long-term value" and "worsen patient care." As such, she asserted that the FTC will continue to scrutinize this business practice.
2. **Serial Acquisitions**: "By consolidating power gradually and incrementally through a series of smaller deals, firms have sometimes sidestepped antitrust review," argued Khan. As discussed in our **report on the 2023 Merger Guidelines**, new portions of the Guidelines specifically focus on private equity and indicate that the FTC and DOJ "may look at past and concurrent acquisitions by a firm as part of the analysis of whether a particular deal may substantially lessen competition in a given market."
3. **Interlocking Directorates**: Chair Khan expressed the view that PE firms are "buying up significant stakes in rival firms that compete within the same industry, reducing competition by softening firms' incentive to compete." This so-called "common ownership" problem is, contends Khan, subject to regulation by Section 8 of the Clayton Act. In August 2023, the FTC brought its **first case enforcing the Section 8 prohibition** on interlocking directories in four decades. "We will continue reinvigorating the full scope of Section 8's prohibition on interlocking directorates," asserted Khan.

Khan closed her remarks by warning that while the workshop's proceedings and the cross-agency RFI principally concerned PE activity in health care, "firms of all types should be on notice that we are on the lookout for these strategies and will continue to deploy the full scope of our authority to protect the American public from anticompetitive and unlawful tactics." Commissioner Rebecca Kelly Slaughter echoed Chair Khan in the panel's closing remarks, asserting that health care is "not the only market where there is a private equity problem…it's all over the place."

Assistant Attorney General of the DOJ's Antitrust Division Jonathan Kanter began his statement by asserting that the FTC and DOJ are, through their enforcement actions and inquiries, "taking on the entire health care sector…" With regard to applying antitrust law to PE transactions in the health care space, Kanter asserted that "the antitrust laws can make our health care system more free, more functional, and more fair…" He characterized the cross-agency RFI on PE and health care as a means to give the agencies involved "the information to tackle private equity…head on."

Conclusion: PE Health Care Transactions in the Crosshairs

During the FTC's workshop, regulators struck a combative tone, asserting that their respective agencies would fully utilize the tools at their disposal to scrutinize, prevent, and, if needed, undo certain PE investments in the health care space. "We need to attack the underlying model," stated Commissioner

Slaughter, “not just the name of ‘private equity.’”

Along with the convening of the panel and RFI on PE and health care, the Biden administration has recently launched a DOJ- and FTC-led “**Strike Force on Unfair and Illegal Pricing**.” The regulators’ vehemence with regard to PE activities in the health care space during the recent workshop and concurrent actions taken by the Biden administration suggests that these actual and planned enforcement activities will play a role in the upcoming State of the Union address.

The pending **FTC enforcement action in Texas against US Anesthesia Partners** will, as explained in a September 2023 report, serve as “an opportunity for the FTC to test its policy positions in court” and will, therefore, play a significant role in determining the course of future enforcement actions against PE firms. In this enforcement action, the FTC has alleged that a PE roll-up strategy led to market power, higher prices, and other anticompetitive effects. The points at issue in the case are being hotly litigated, including the appropriateness of naming the PE firm involved as a defendant.

We will continue to monitor, analyze, and issue reports on these developments. Please feel free to contact us if you have questions as to current practices or how to proceed.

Endnotes

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[1] Complaint, FTC v. US Anesthesia Partners, Inc., Case No. 4:23-CV-03560 (S.D. Tex.).

Authors

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