



## Federal Regulators Launch Inquiry into PE-Backed Healthcare Deals

On March 5, 2024, the Department of Justice's (DOJ's) Antitrust Division, the Federal Trade Commission (FTC), and the Department of Health and Human Services (HHS), announced the launch of a multi-agency inquiry – in the form of a request for information (RFI) and public workshop – focusing on the increasing control of private equity (PE) and other corporations over the healthcare industry.<sup>1</sup> This Health Capital Topics article discusses the agencies recent actions and how it appears to be in line with the government's recent moves to crack down on anticompetitive actions in healthcare.

The RFI poses five major overarching sets of questions relating to healthcare investments by PE funds and other healthcare industry players:

- (1) How have transactions involving facilities, healthcare providers, ancillary services or products “by PE funds or other alternative asset managers, health systems, or private payers” impacted patient care, the treatment of private and public payors, employers who provide employees health insurance, and the conditions under which healthcare workers, support staff, and providers work?
- (2) What were the claimed business goals for the transaction, and were those objectives post-transaction? Who benefited from the achievement of those objectives post-transaction? Did the transaction require the acquired entity to undergo restructuring or take on additional debt? If the transaction generated surplus profits, did the surplus profits get reinvested in the acquired business, or were they paid to shareholders?
- (3) Are there certain types of entities, such as PE funds or health systems, in these transactions that seem to have the greatest adverse impact on private and public payors, patients, providers, or employers that provider health insurance for employees? Are there particular providers, payors, facilities, and ancillary services or products that are most often the target of these harmful transactions, and if so, who are these targets?
- (4) What actions should federal agencies take to address and identify transactions that may have major adverse impacts on private and public payors, patients, providers, or employers that provide employees health insurance? Should the agencies promote greater transparency and availability of information to the public on mergers, acquisitions, and other transactions involving ancillary services or products, payors, providers, and healthcare facilities, and if so, how?
- (5) Are there any other impacts from transactions in the healthcare market of which the agencies should be aware?<sup>2</sup>

The agencies specifically requested input from various healthcare industry stakeholders, including hospitals, post-acute care providers, physicians, nurses, patients, consumer advocates, healthcare administrators, employers, insurers, pharmacy benefit managers (PBMs), group purchasing organizations (GPOs), and other healthcare providers and facilities.<sup>3</sup> The agencies also welcomed comments from “academics and other experts who have studied market consolidation, corporate control in health care, and related issues.”<sup>4</sup> In addition, DOJ, FTC, and HHS are interested in receiving input from healthcare workers and patients on their experiences after a merger or acquisition.<sup>5</sup> Comments in response to the RFI can be submitted through May 6, 2024.<sup>6</sup>

In addition to the RFI, the three agencies participated in a virtual public workshop on March 5, 2024, with practitioners, economists, academics, and other members of the public.<sup>7</sup> The workshop explored the impact of PE in healthcare, and discussed what the government was doing to address any harmful effects.<sup>8</sup>

The concerns expressed within the cross-government inquiry are supported by recent research on the topic. For example, one study found concerning changes in patient outcomes and hospital adverse events associated with PE acquisition and ownership of hospitals.<sup>9</sup> Another study found that the purchasing patterns of PE firms have led to the sharp decline in the number of independent physician practices, with insurers and health systems also acquiring physicians at an accelerated rate over the last ten years.<sup>10</sup> The research on PE involvement in healthcare over the past few years, and specifically its impact on the quality of care and patient outcomes, has motivated both lawmakers and federal regulators to further investigate

PE's impact on the healthcare industry increase regulatory scrutiny.<sup>11</sup>

These recent moves by the DOJ, FTC, and HHS are just the latest in the federal government's increasingly emboldened moves in the healthcare antitrust space over the past few years. As discussed in previous Health Capital Topics articles:

- In December 2018, the HHS, Treasury, and Labor, issued a report entitled, "Reforming America's Healthcare System Through Choice and Competition," exploring how to improve the U.S. healthcare delivery system by increasing competition in the healthcare industry;<sup>12</sup>
- The FTC has been challenging an increasing number of hospital mergers and acquisitions, indicating heightened regulatory scrutiny of hospital transactions;<sup>13</sup>
- In August 2022, the FTC published a policy paper and fact sheet regarding the use of Certificates of Public Advantage laws (COPAs) by states in regulating healthcare mergers. Specifically, the FTC asserted that COPAs negatively impact healthcare costs, quality of care, and hospital staff wages;<sup>14</sup>
- In January 2023, the FTC published a proposed rule that would ban employers from imposing non-compete clauses on their employees. A final rule regarding this issue is expected later in 2024;<sup>15</sup>

- On September 21, 2023, the FTC sued U.S. Anesthesia Partners (USAP), a Texas-based anesthesia provider, and Welsh, Carson, Anderson & Stowe (Welch Carson), a PE firm. The FTC alleged that the two companies executed an anticompetitive scheme for multiple years to consolidate anesthesiology practices in Texas, boost their profits, and drive up the price of anesthesia services rendered to patients.<sup>16</sup>

Assistant Attorney General Jonathan Kanter of the DOJ's Antitrust Division stated that "preserving competition in health care markets is a priority for the Justice Department because of its important impact on the health and well-being of Americans."<sup>17</sup> Kanter also said that the RFI "will enable the agencies to accurately understand the modern market realities of the health care industry and forcefully enforce the law against unlawful deals. Hearing from patients, workers and market participants will be critical in developing future enforcement and policy efforts relating to consolidation in the health care sector."<sup>18</sup> FTC Chair, Lina Khan, added that "when private equity firms buy out healthcare facilities only to slash staffing and cut quality, patients lose out."<sup>19</sup> Khan also stated that "through this inquiry, the FTC will continue scrutinizing private equity roll-ups, strip-and-flip tactics and other financial plays that can enrich executives but leave the American public worse off."<sup>20</sup>

Historically, lawmakers, judges and regulators have found it difficult to scrutinize PE transactions (and the motivations behind them) due to their transactional and organizational complexity.<sup>21</sup> However, recent efforts to increase transparency in healthcare may make it easier to decipher – and challenge – these transactions. As PE's involvement in the U.S. healthcare system grows, regulatory scrutiny and enforcement will likely (continue to) follow.

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1 "Justice Department, Federal Trade Commission and Department of Health and Human Services Issue Request for Public Input as Part of Inquiry into Impacts of Corporate Ownership Trend in Health Care" Office of Public Affairs, Department of Justice, March 5, 2024, <https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-department-health-and-human-services-issue> (Accessed 3/6/24); "Request for Information on Consolidation in Health Care Markets" Department of Justice, Department of Health and Human Services, Federal Trade Commission, February 29, 2024, [https://content.govdelivery.com/attachments/USDOJOPA/2024/03/05/file\\_attachments/2803589/DOJ-FTC-HHS%20HCC%20RFI%20-%202003.04.24%20-%20FINAL.pdf](https://content.govdelivery.com/attachments/USDOJOPA/2024/03/05/file_attachments/2803589/DOJ-FTC-HHS%20HCC%20RFI%20-%202003.04.24%20-%20FINAL.pdf) (Accessed 3/12/24).

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5 *Ibid.*

6 *Ibid.*

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