

FTC and DOJ Signal Greatly Increased Scrutiny of Private Equity Firms' Acquisitions in Health Care

The top enforcers at the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) are sending strong signals that private equity (PE) firms are likely to be the next target in the Biden Administration's aggressive antitrust enforcement agenda.

Workshop Outlines Government's Concern

In a "Virtual Workshop of Private Equity in Health Care" earlier this week, the heads of antitrust enforcement at FTC and DOJ, as well as senior officials at Health and Human Services (HHS) and Centers for Medicare and Medicaid Services, suggested that PE firms' investments in healthcare have increased health care costs, while also reducing quality and access.

The enforcers attributed these concerns to the incentive structure in the PE model, which they said prioritizes short-term profits over quality of care and patient well-being. According to FTC Chair Lina Khan, "short-term, high-risk, and low-consequence ownership can encourage a 'flip and strip' approach."

The workshop is significant because while there have been a handful of merger challenges targeting PE firms' M&A transactions, antitrust enforcers have allowed the vast majority of health care deals involving PE buyers to close without investigation or challenge.

This may change going forward. The rhetoric suggested that enforcers will investigate more deals involving PE firms and may take enforcement action based on concerns about how the PE firms will operate health care companies post-transaction.

Perhaps the most striking comments from enforcers related to the relationship between PE ownership and mortality rates. According to Chair Khan, "one study estimated that private equity takeovers of nursing homes and the staffing cuts that followed have led to increased mortality rates—specifically around 20,000 excess deaths among nursing home patients over the course of just 12 years."

Doctors and nurses on the panel related their experiences of working at community hospitals acquired by private equity firms. They shared anecdotes of how private equity ownership led to reduced staff, shortages of drugs and supplies, and a decline in patient care.

Academics invited to the workshop echoed Chair Khan's concerns. Dr. Eileen Applebaum, an economist at the Center for Economic and Policy Research, cited a range of effects that can be attributed to PE ownership:

1. Taking profits that could be used to invest in new facilities, staffing, or technology.
2. Manipulating CMS capitated reimbursement programs in ways that limit access to health care for seniors.
3. Reducing staffing in ways that reduce quality and cause harm to patients and workers.
4. Encumbering acquired health care companies with debt that reduces their long-term viability.
5. Selling off real estate owned by acquired health care companies and entering them into oppressive long-term leases.

Other participants expressed concerns over PE's increasing ownership of specialty physician groups, like anesthesiologists and ophthalmologists, hospice facilities, skilled nursing facilities, and home health agencies. DOJ Assistant Attorney General Jonathan Kanter noted that "private equity firms who have inserted themselves at virtually every level of the health care system are now positioned as intermediaries with the ability to pull these levers of healthcare."

The Joint Agency Inquiry Into Healthcare and Corporate Greed

The workshop coincided with the FTC, DOJ, and HHS issuing a new Request for Information (RFI) seeking the public's input on "Corporate Greed in Healthcare." That cross-government inquiry "seeks to understand how certain health care market transactions may increase consolidation and generate profits for firms while threatening patients' health, workers' safety, quality of care, and affordable health care for patients and taxpayers." The RFI also requests information "on deals conducted by health systems, private payers, private equity funds, and other alternative asset managers that involve health care providers, facilities, or ancillary products or services" including deals that do not need to be reported under the Hart-Scott-Rodino (HSR) Act.

The new provision in the merger guidelines that prohibits anticompetitive "roll up acquisition strategies" was mentioned several times by the enforcers. This new guideline will likely be included in any arguments in future enforcement activity against PE firms.

What Does This Mean for You?

- Whether the FTC and DOJ will investigate or challenge a particular PE transaction will be fact specific. Among other things, the agencies may consider prior acquisitions by a PE firm and the impact of those transactions on quality, access, and price.
- The new Merger Guidelines, the Workshop, the RFI, and the pending new HSR regulations all make very clear that the Biden Administration is not slowing down on executing its 2021 Executive Order to use the antitrust laws as a tool to address economic and moral issues it sees in certain industries such as healthcare.
- Early analysis and planning with Polsinelli's Antitrust Group is an essential component of any M&A strategy to assess the best way to mitigate and minimize enforcement risk.