

Planning For Healthcare-Private Equity Antitrust Enforcement

By **Ryan Quillian and John Kendrick** (April 2, 2024, 5:23 PM EDT)

The federal antitrust agencies have been increasingly focused on the intersection of private equity and healthcare. While that attention has not yet led to many enforcement actions, recent developments suggest that may change.

On March 5, the U.S. Department of Justice, the Federal Trade Commission, and the U.S. Department of Health and Human Services jointly issued a request for information, or RFI, seeking public comments about acquisitions of healthcare providers and related entities by "private equity funds or other alternative asset managers, health systems, or private payers."

Later the same day, the three agencies held a virtual workshop examining "the role of private equity investment in health care markets," featuring commentary by government officials, academics, and industry stakeholders — including nurses and doctors.

The RFI is notable for what could follow. Prior RFIs have resulted in more in-depth industry studies, investigations and enforcement actions, and there is reason to expect the same here. For example, the RFI may be a precursor to a 6(b) study by the FTC, which would involve broad document subpoenas targeted at industry participants.

Also possible are additional regulations, nonpublic investigations and enforcement actions, from either federal or state enforcers. Private equity firms and other entities involved in healthcare transactions should prepare accordingly.

The Agencies' Request for Information

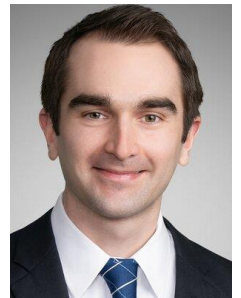
In recent years, the federal antitrust agencies have expressed increasing concern about the role of private equity — particularly in healthcare — through statements by agency leadership,[1] policy and rule changes,[2] and a couple of enforcement actions.[3]

Building off those steps, the March 5 RFI seeks public comment about acquisitions of healthcare providers and related entities by "private equity funds or other alternative asset managers, health systems, or private payers."

The scope of covered healthcare providers is broad: The RFI lists numerous examples — including hospitals, nursing homes, hospice facilities, and behavioral health providers — along with ancillary products or services like billing management, staffing services, labs, information technology and data



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analysis.

The RFI seeks five categories of information about these healthcare transactions:

- Effects on four groups of stakeholders, with potential effects for each group, generally focused on cost and quality of care:
 - Patients;
 - Public and private payors (i.e., insurance organizations),
 - Healthcare providers and their workers; and
 - Employers that provide health insurance to their employees.
- Whether adverse effects are more often associated with particular types of acquirers — e.g., private equity versus health systems — and particular types of acquired healthcare entities.
- Transactions' expected business objectives, whether those objectives were realized, and, if so, who benefited — e.g., were profits reinvested in the business, used to keep prices lower, or paid out to shareholders?
- Actions the agencies could take to identify and address potentially problematic transactions in this space.
- A catch-all for any "other impacts from health care market transactions," paired with a note encouraging stakeholders to also address "related issues" beyond the specific questions asked.

The RFI states that the agencies are "especially" interested in transactions that were not reportable under the Hart-Scott-Rodino Act — typically, smaller transactions — and therefore may not have been subject to prior antitrust review.

Areas of Concern Highlighted During the March 5 Workshop

The agencies' workshop, which took place the same day as the issuance of the RFI, provided greater detail on areas of particular concern to the FTC and the DOJ.

Those areas suggest potential focal points for future agency investigations and potential outcomes of the RFI.

FTC Chair Lina Khan's opening remarks began by acknowledging that private investment "can sometimes be an important source of capital, especially for small to midsize companies that can benefit from the access that this financing provides," and that "[s]ome private equity firms take a more long-term view and focus on creating real operational improvements to generate value in ways that provide broader benefits."

Her remarks went on to highlight three particular strategies she views as concerning — paired with potential antitrust solutions — and those three themes featured prominently in remarks by the other panelists.

1. "Strip and Flip" Deals

So-called strip and flip deals were the most frequently mentioned area of concern throughout the

workshop. Khan described the strategy as "us[ing] large amounts of debt to acquire companies with the goal of increasing profits quickly so that [the acquirer] can resell and reap returns a few years later."

Many panelists noted how — in their view — this strategy can lead to staffing cuts, decreased quality of care and worsened long-term prospects for the acquired healthcare provider. Several panelists suggested labor-side antitrust enforcement as a possible solution.

For example, one panelist stated that "non-competes and gag clauses prevent physicians and clinical staff from leaving or speaking out if they have concerns about these practices," and referenced the FTC's proposed ban on noncompete agreements. Similarly, Assistant Attorney General Jonathan Kanter referred to the DOJ's criminal enforcement efforts against wage-fixing and employee allocation agreements.

2. Serial Acquisitions

Khan reiterated her concern with "serial acquisitions" — that "[b]y consolidating power gradually and incrementally through a series of smaller deals, [private equity] firms have sometimes sidestepped antitrust review." Both Khan and Kanter pointed to relevant language in the merger guidelines in reference to how to address this concern.

3. Stakes in Competing Firms

Finally, Khan said that when private equity and other firms buy significant shares in multiple competitors in a single industry, competition can decrease because firm managers have "incentiv[es] ... to consider their common ownership interests in decisions about pricing[,] output and business strategy."

Both she and Kanter linked this concern to their agencies' respective efforts to enforce the Clayton Act's ban on certain interlocking directorates.

Other Areas Highlighted During the Workshop

Two other key themes emerged from the workshop: (1) the federal antitrust agencies are concerned with transparency, and (2) enforcement by state attorneys general in the healthcare space may increase.

1. Difficulty in Detecting Serial Acquisitions

Many panelists said that problematic transactions can be difficult to identify, either because they are too small to be reportable under the HSR Act or because private equity's role is unclear due to complicated ownership structures.

Panelists highlighted various ways that this issue is being — and could be — addressed, such as the proposed changes to the HSR rules, state statutes with analogous transaction-notification requirements and the HHS's regulatory efforts to promote ownership transparency.

2. State-Level Enforcement

The workshop highlighted the role of state enforcers in scrutinizing healthcare transactions along antitrust and other dimensions. Rhode Island Attorney General Peter Neronha described various tools

available to state enforcers, including state analogues to federal antitrust laws, consumer protection statutes and "very broad parens [patriae] authority," which he said can apply in the absence of any explicit state authority.

When discussing state enforcement, FTC Commissioner Rebecca Kelly Slaughter said that "[w]e're always looking for ideas."

Predicting and Preparing for the Agencies' Next Moves

After the agencies have received and reviewed responses to the RFI — which are due May 6 — there likely will be additional, targeted agency investigations of companies involved in this space. Antitrust enforcers have suggested as much in previous public statements, and prior RFIs have led to more in-depth industry studies, investigations and enforcement actions.

Section 6(b) Study and Associated Investigative Subpoenas

The RFI may be a precursor to a more targeted, in-depth study pursuant to Section 6(b) of the FTC Act, which could require individual companies to produce extensive documents and data. RFIs have been precursors to 6(b) studies in the past.

For example, a February 2022 RFI on the role of pharmacy benefit managers, or PBMs, led to thousands of public comments and was soon followed by a June 2022 6(b) study.

As part of that study, the FTC requested documents and data from the six largest PBMs, and in 2023 it expanded its requests to include certain affiliated group purchasing organizations.

Potential Enforcement Actions or Broader Regulations

Additional enforcement actions or regulations, from either federal or state enforcers, are also a possibility.

The RFI itself explains that comments received "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."

State enforcers will also have access to the RFI comments and might use those materials to identify potential enforcement targets of their own.

Key Takeaways

Private equity firms and other entities involved in healthcare transactions should bear in mind that the antitrust agencies continue to focus their enforcement resources in this area.

Significant players in the space and entities identified in public RFI responses should prepare for in-depth investigations and, potentially, enforcement actions. That preparation could include the following:

- Review and update document retention and related policies, considering in particular the agencies' recent guidance that failure to preserve data from ephemeral messaging platforms and collaboration tools could lead to criminal obstruction of justice charges.
- Assess risks related to board interlocks under Clayton Act Section 8, and set up mechanisms to catch violations that could arise over time from future deals or other changed circumstances.
- Bear in mind that individual transactions should be evaluated in the context of the company's prior — and future planned — acquisitions in the same industry, and small, nonreportable transactions could be challenged as part of a roll-up theory, even if they occurred long ago.
- Early in the process of evaluating an acquisition, assess antitrust risk — both state and federal — and account for that risk in transaction agreements.

Finally, interested parties should take the opportunity to respond to the RFI, bearing in mind that all information produced to the agencies will be publicly available. The deadline to submit comments is May 6.

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[1] This issue dates back to at least July 2020, when then-FTC Commissioner Rohit Chopra expressed concern about "significant consolidation through roll-up transactions not subject to HSR reporting" undertaken by private equity firms, particularly "in the health care sector." Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Commission File No. P110014 (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf. Other Democrat-appointed antitrust enforcers joined the chorus in the following years. For example, in June 2022, FTC Chair Lina Khan and the Assistant Attorney General (AAG) for the DOJ's Antitrust Division, Jonathan Kanter, made similar statements to the Financial Times, vowing an aggressive approach to private equity roll-up acquisitions. S. Palma, M. Vandeveld, & J. Fontanella-Khan, Lina Khan vows 'muscular' US antitrust approach on private equity deals, Financial Times (June 9, 2022), <https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797>. In her statement to the Financial Times, Khan warned of "life and death consequences" from private equity buyouts of nursing homes. A February 2024 speech by Khan to a group of physicians echoed these themes. Matthew Perlman, FTC's Khan Calls Healthcare 'Key' To Fight For Competition, Law360 (Feb. 15, 2024), https://www.law360.com/competition/articles/1803338?nl_pk=88cdf2bb-9da9-4970-9e59-5472659c2b21&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2024-02-16&read_main=1&nlsidx=0&nlaidx=0

[2] The FTC's November 2022 Section 5 enforcement policy statement notes that "a series of mergers or

acquisitions" could be an unfair method of competition under Section 5 of the FTC Act, even if the acquisitions "individually may not have violated the antitrust laws." Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202, (Nov. 10, 2022). The recently finalized Merger Guidelines strike a similar tone. One of the eleven guidelines targets a "strategy of multiple acquisitions in the same or related business lines," while another targets "acquisitions involv[ing] partial ownership or minority interests." Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Merger Guidelines, (Dec. 18, 2023). Finally, under the FTC's proposed HSR rules, merging parties would have to list prior acquisitions over a ten-year period, rather than the current five years. And all acquisitions would need to be included: the proposed rules eliminate the current size thresholds. Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (June 29, 2023) (to be codified at 16 CFR 801, 803).

[3] For example, in June 2022, the FTC announced two consent decrees addressing its concerns with two acquisitions of veterinary clinic operators by private equity firm JAB Consumer Partners. In a statement accompanying one of the consent decrees, Khan and the other Democrat-appointed commissioners — Rebecca Kelly Slaughter and Alvaro Bedoya — expressed broader concern about private equity activity in healthcare, "including anesthesiology, emergency medicine, hospice care, air ambulances, and opioid treatment centers." Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, In the Matter of JAB Consumer Fund/SAGE Veterinary Partners Commission File No. 2110140, (June 13, 2022).