

FTC and DOJ focus on private equity investment in healthcare

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On March 5, 2024, the FTC, the DOJ and the U.S. Department of Health and Human Services announced that they are seeking public comment on private equity investment in the healthcare sector. The announcement coincided with the FTC's workshop, *Private Equity, Public Impact: An FTC Workshop on Private Equity in Health Care*. Both initiatives sharply criticize private equity investment in healthcare providers, facilities and other ancillary products or services.

In general, the Request For Information and the Federal Trade Commission (FTC) workshop emphasized similar concerns with private equity (PE) practices in health care. The speakers and panelists generally presented a highly critical and one-sided perspective on PE in healthcare. This approach is consistent with other FTC workshops conducted during the current administration, but in contrast to FTC programs during earlier administrations, which typically sought greater diversity of viewpoints. During the workshop, the FTC, Antitrust Division of the U.S. Department of Justice (DOJ) and U.S. Department of Health and Human Services (HHS) representatives underscored their agencies' commitment to partnership in addressing PE in healthcare, and repeatedly requested comments in response to their Request for Information.

It remains to be seen how effective the agencies will be in translating their general policy sentiments into effective enforcement actions. The agencies remain bound by existing law and precedent. But we expect continued and heightened efforts by the agencies to develop cases and theories targeting PE investments in health care. Below we provide a high-level summary of the Request for Information and the FTC workshop.

Request for Information on Consolidation in Health Care Markets

On March 5, 2024, the FTC, DOJ, and HHS issued the joint [Request For Information on Consolidation in Health Care Markets](#) (RFI). In announcing the RFI, the agencies expressed concern that "private equity firms and other corporate owners are increasingly involved in health care system transactions, and, at times, those transactions may lead to a maximizing of profits at the expense of quality care."

The RFI is intended to "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." The agencies seek public comment on transactions involving private-equity firms, health systems, private payers, and alternative asset managers. The agencies will [accept public comment](#) through May 6, 2024.

Underscoring the FTC's hostility toward PE, the agency's press release for the RFI characterized the inquiry as focused on "the impact of corporate greed in health care."

Private Equity, Public Impact: An FTC Workshop on Private Equity in Health Care

Also on March 5, the FTC hosted [Private Equity, Public Impact: An FTC Workshop on Private Equity in Health Care](#) (the FTC workshop). (A full recording is available [here](#).) The FTC workshop presented a fairly uniform and negative view of PE conduct in health care and did not include anyone directly involved in PE investment or affiliated with PE sponsors.

FTC workshop themes

Panelists, including government enforcers, health care practitioners, and PE critics focused on the following themes. They cited various studies to support their claims, including research completed by participants of the second panel.

- **PE firms prioritize profits over patient care.** Health care practitioners expressed concern that PE investment encourages doctors and nurses to increase patient loads beyond a reasonable standard of care. Panelists alleged that this conduct includes: (1) prioritizing lower-risk patients over higher-risk patients who are more expensive to treat; (2) prioritizing patients with better health insurance; (3) reducing staff, which leads to longer treatment times; and (4) insufficient patient care due to ward and department closures.
- **PE firms engage in anticompetitive acquisition strategies.** Consistent with the FTC's [action against Welsh Carson](#), panelists alleged that private-equity firms engage in “serial acquisitions” that fall below the HSR threshold in order to acquire monopoly-level shares without agency detection. These concerns, along with additional concerns voiced by panelists on the lack of transparency in PE ownership and overlapping director roles, prompted the FTC and the DOJ in June 2023 to propose new HSR filing rules (described further in our [client update](#)) that would require filing parties to provide additional information about prior acquisitions in any overlapping industries in the past ten years (increased from the current five-year period) without a *de minimis* exclusion (reduced from the current \$10 million threshold). Both changes appear targeted towards addressing non-reportable and roll-up acquisition strategies.
- **PE firms impose significant debt burdens on health care facilities.** Panelists criticized sale-leasebacks and real estate investment trusts (REITs) as tools to increase profits for PE firms while disadvantaging health care providers.

Government enforcer and policy maker remarks

The FTC workshop included opening remarks by FTC Chair Lina Khan, Assistant Attorney General, DOJ Antitrust Division Jonathan Kanter, HHS Inspector General Christi A. Grimm, and Principal Deputy Administrator & Chief Operating Officer, Centers for Medicare & Medicaid Services (CMS) Jonathan Blum. FTC Commissioner Alvaro Bedoya provided short comments, and FTC Commissioner Rebecca Kelly Slaughter hosted a fireside chat with Rhode Island Attorney General Peter Neronha.

- [Chair Khan](#) acknowledged that PE investment can “sometimes be an important source of capital, especially for small to mid-sized companies that can benefit from the access that this financing provides.” Still, she noted that the FTC will be “on the lookout” to challenge three allegedly PE-related behaviors:
- 1. **“Flip and strip” approaches.** Chair Khan expressed concern that PE firms use large amounts of debt to acquire companies with the goal of increasing profits quickly so they can resell health care assets. “These short-term profit-exacting strategies can undercut long-term value” and have “life or death consequences” for patients. These comments seem relatively remote from the FTC’s mission of antitrust enforcement and consumer protection, at least as traditionally understood, and more about issues of industrial policy.
- 2. **Serial acquisitions.** As noted above, Chair Khan emphasized her concern with practices that allow firms to consolidate ownership through a series of small non-HSR reportable transactions.
- 3. **Illegal interlocking directorates.** Consistent with the FTC’s director interlock settlement with [EQT/Quantum](#), Chair Khan confirmed the FTC’s focus on enforcing the interlocking directorate prohibition, even against non-corporate interlocks.
- AAG Kanter largely echoed Chair Khan. He highlighted the policy and enforcement partnership between DOJ, FTC, and HHS, and noted the DOJ’s success in targeting interlocking directorates.
- Christi A. Grimm of HHS emphasized the need for greater transparency of PE ownership structures in health care.
- Jonathan Blum of CMS advocated for five tools to oversee PE health care investments: (1) information sharing with regulators, (2) increased ownership transparency, (3) stronger oversight standards, (4) careful contractor selection,

and (5) greater financial stability of potential partners.

- Focusing on the Hippocratic Oath, Commissioner Bedoya argued that physicians and medical professionals, not PE firms, should own health care facilities. He did not address how their ownership would be financed.
- Commissioner Slaughter and RI AG Peter Neronha expressed support for states to challenge allegedly anticompetitive PE conduct in the health care sector.

Industry and research panels

The FTC organized two industry and research panels addressing patient and provider concerns with PE investments, reiterating many of the themes covered by the enforcers and policy makers.

Panel One – The Human Impact of Private Equity in Health Care

- **Panelists focused on allegations of hospital mismanagement following PE acquisitions.** Panelists, predominantly health care workers, including nurses and doctors from rural areas, expressed concern with conduct following PE investment including: (1) insufficient staff to patient ratios, (2) mismanagement leading to bed shortages, (3) unreasonable or dangerous patient transfers, (4) usage of insufficient or improper equipment, (5) insufficient inventory, and (6) decisions to prioritize profit at the risk of patient lives.
- Picking up on one of Chair Khan’s themes, several panelists emphasized the impact of a “flip and strip” approach on rural hospitals, where such facilities are the primary or only source of health care.

Panel Two – Buyouts in Health Care: Who Wins, Who Loses?

- **Panelists argued that PE investment reduces patient safety.** PE critics and researchers identified concerns including: (1) a lack of transparency in PE ownership structures; (2) PE firms’ short-term profit incentives; and (3) PE firms’ ability to exploit “payment loopholes.”
- One panelist, Erin Fuse Brown, a professor at Georgia State University Law School, suggested five policy solutions, reflecting others’ comments: (1) increase ownership transparency; (2) use antitrust tools to address monopolies and anticompetitive behaviors; (3) increase fraud and abuse enforcement; (4) protect clinician autonomy; and (5) close payment loopholes to minimize PE profit incentives.
- Professor Brown’s comments highlighted earlier remarks by Eileen Appelbaum, Co-Director, Center for Economic and Policy Research, who presented extensive research on the negative impact of PE ownership on health care institutions, focusing primarily on the PE profit structure.

Conclusion

The FTC/DOJ/HHS RFI and FTC workshop all highlight agency hostility to PE investment in health care and suggest that this will continue to be a focus of agency enforcement. But philosophical hostility does not automatically translate into enforcement actions. The agencies will need to find ways to fit their views into traditional antitrust and consumer protection statutes and precedents. At a minimum, PE firms should continue to expect ongoing scrutiny by the FTC and DOJ, particularly for conduct in the health care sector.

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