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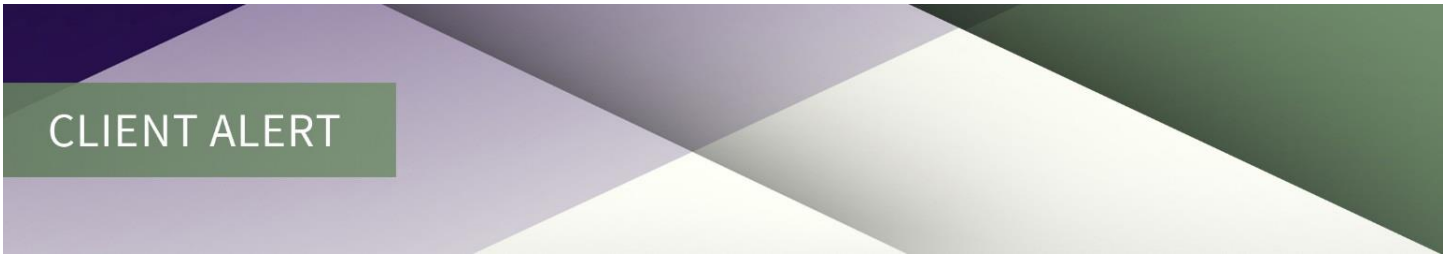

FTC, DOJ, and HHS Launch Cross-Government Inquiry on Private Equity Investment in Healthcare

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On March 5, 2024, the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and Department of Health and Human Services ("HHS," together the "Agencies") announced a cross-government inquiry on private equity investment in healthcare, followed shortly thereafter by the FTC's virtual workshop "Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care."[1] The Agencies' efforts come on the heels of the December 2023 announcement of a bipartisan Senate Budget Committee investigation, led by Senators Charles Grassley (R-IA) and Sheldon Whitehouse (D-RI), regarding private equity ownership of hospitals.[2]

All three developments signal the administration's continuing scrutiny of competitive issues in the healthcare industry—scrutiny that, according to the Agencies, will extend to private equity transactions that fall outside the HSR reporting thresholds. Consistent with the administration's "whole-of-government" competition policy,[3] the DOJ, FTC, and HHS are already exchanging data and information "to help identify potentially unlawful transactions that might otherwise sidestep

1 A Federal Trade Commission release described the initiative as a "cross-government inquiry on impact of corporate greed in health care." *See* Federal Trade Commission, Press Release, Federal Trade Commission, the Department of Justice and the Department of Health and Human Services Launch Cross-Government Inquiry on Impact of Corporate Greed in Health Care (March 5, 2024), available here.

2 Press Release, Senate Budget Committee Digs Into Impact of Private Equity Ownership In America's Hospitals (December 06, 2023), available here.

3 Executive Order on Promoting Competition in the American Economy (July 9, 2021), available here.

review."[4] California's Office of Healthcare Affordability may soon be able to contribute to that effort: on April 1, 2024, new regulations will require healthcare entities to notice "material change transactions" to the California state government.[5]

The Practices Drawing Scrutiny

Private equity investment in healthcare is not itself the problem for the Agencies. As FTC Chair Khan noted, "private equity firms [may] take a more long-term view and focus on creating real operational improvements to generate value in ways that provide broader benefits."[6] However, the Agencies harbor deep concerns about the forms of "financialization" that, in their view, reduce the quality and quantity of healthcare, which (they say) causes adverse outcomes for patients. The workshop's academic participants pointed to a number of practices that they considered problematic, including:

- collecting unjustified "monitoring fees";
- selling hospital-owned real estate that the hospital must then lease back;
- saddling healthcare assets with debt; and
- rolling up assets in serial acquisitions to achieve market leverage in order to "command higher prices," "exploit" various payment loopholes, and engage in other forms of financial engineering.

These practices, theorized the academics, allow private equity owners to extract "outsized" profits from the healthcare assets, putting a strain on the asset's financial resources (they say) that then affects the quality of medical services.

The Potential Antitrust Violations

In *FTC v. U.S. Anesthesia Partners Inc., et al*., the current FTC's first suit against a private equity investor in healthcare, the FTC asserted claims under Section 7 of the Clayton Act and Section 5 of the FTC Act. We expect to see the FTC develop and extend their list of potential enforcement tools to include:

- **Section 7 of the Clayton Act: Retroactive challenges.** Section 7 of the Clayton Act, which allows the DOJ and FTC to challenge mergers that substantially lessen competition, applies to already-consummated mergers.[7] Notably, the FTC's case against U.S. Anesthesia Partners ("USAP") and private equity investor Welsh, Carson, Anderson & Stowe ("Welsh Carson"), which was filed in September 2023, alleged harm from a series of already-

4 Remarks by Chair Lina Khan, Private Capital, Public Impact Workshop on Private Equity in Healthcare (March 05, 2024) at 4, available here (hereinafter "Khan Remarks").

5 22 Cal. Code Regs. 97435.

6 Khan Remarks at 1.

7 Because of the HSR notice requirement, however, most government challenges occur prior to a merger's completion. The FTC and DOJ seek injunctive relief when suing to block a proposed merger.

consummated acquisitions of anesthesiology physicians groups in Texas.[8] The FTC claimed that the series of acquisitions (sometimes referred to as a "roll up") of anesthesiologist groups allowed USAP to obtain market power and bargaining leverage when negotiating with insurers, ultimately causing premiums to rise.[9] Notably, the at-issue acquisitions occurred between 2012 and 2020, long before the FTC filed suit. The FTC may have singled out USAP and Welsh Carson because of existing attention on the Texas anesthesia market.[10] With litigation against USAP and Welsh Carson pending, the Agencies may now try to identify other series of putatively anticompetitive acquisitions of physicians groups brokered by private equity firms. Specifically, the Agencies may seek cases where physicians groups with market power appear to have obtained outsized negotiating leverage—vis a vis hospitals and insurers—causing prices and premiums to rise.

- **Section 7 of the Clayton Act: Theories of harm articulated in the 2023 Merger Guidelines.** The 2023 Merger Guidelines ("Guidelines"), issued jointly by the DOJ and the FTC, newly articulated several analytical frameworks likely to be relevant, including (i) increased concentration through a series of acquisitions, (ii) monopsony power in the labor markets, and (iii) foreclosure of rivals in vertical transactions.[11] The Guidelines are not legally binding on courts, but courts have considered prior versions in reaching decisions in merger challenges.

- **Section 5 of the Federal Trade Commission (FTC) Act:** The FTC currently takes a broad view of its authority under Section 5, which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[12] According to the FTC, this gives it the authority to "stop[] unfair methods of competition in their incipiency based on their tendency to harm competitive conditions" and allows it to "proceed against a broader range of anticompetitive conduct that can be reached under the Sherman and Clayton Acts."[13]

- **Section 8 of the Clayton Act and interlocking directorates:** FTC Chair Khan and the Assistant Attorney General ("AAG") for the DOJ Antitrust Division Jonathan Kanter both noted that the acquisition of partial ownership shares in competing healthcare firms may lead to derivative legal issues, including interlocking directorates. Section 8 of the Clayton Act provides that "no person shall, at the same time, serve as a director" on the boards in any two corporations" for which "the elimination of competition by agreement between them would constitute a violation of

8 *Fed. Trade Comm. v. U.S. Anesthesia Partners, et al.*, 23-cv-03560 (S.D. Tex. 2023), ECF #1 (Complaint).

9 In their motion to dismiss, which is pending, USAP and Welsh Carson conversely argued that the FTC failed to specifically allege that the at issue transactions caused increases in inflation-adjusted premiums.

10 *See*, *e.g. Doctors Accuse United Healthcare of Stifling Competition*, NEW YORK TIMES (June 10, 2021), available here.

11 U.S. Department of Justice and the Federal Trade Commission, 2023 Merger Guidelines (issued December 18, 2023), available here. We evaluated the Guidelines in a client memorandum, available here.

12 15 U.S.C. § 45(a)(1).

13 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (issued Nov. 10, 2022) at 5, 10.

the antitrust laws."[14] Section 8 is a "per se" statute, meaning that the likelihood of anticompetitive effects is not relevant to an analysis of whether a violation took place.[15]

AAG Kanter and Chair Khan have expanded Section 8 enforcement and pursued novel theories of harm during their respective tenures at the DOJ and FTC. Under Kanter, fifteen supposedly interlocking directors have voluntarily resigned from their board seats in response to DOJ pressure.[16] Notably, some cases of supposed overlap were not of a single "natural person" serving on multiple boards, but rather of a private equity firm with overlapping ownership shares in competing firms exercising its contractual board appointment rights. For its part, the FTC applied Section 8 to a partnership in reaching a consent agreement related to an investment by private equity firm Quantum Energy Partners ("Quantum") into EQT Corporation, a natural gas producer. The transaction would have allowed Quantum the right to appoint a director to EQT's board. The FTC alleged that this arrangement would have ran afoul of Section 8, even as the text of Section 8 refers only to "corporations."[17]

Neither the DOJ's application of Section 8 to common owners nor the FTC's application of Section 8 to partnership boards has been reviewed by federal courts.

The Agencies' Request for Information (RFI)

The Agencies' are actively soliciting the industry stakeholders, academics, and the public to submit comments in response to a series of questions relevant to potential enforcement. The RFI asks the public to provide information about their experience or expertise related to a variety of transactional forms,[18] including:

- Acquisitions of health care-related physical infrastructure by real estate investment trusts (REITs).
- Horizonal and vertical transactions involving health systems, such as
  - hospitals
  - ambulatory care centers

[14] 19 U.S.C § 19(a)(1)(B).

[15] However, for Section 8 to apply, the two corporations must each have a net worth above $48,559,000 and sales above $4,855,900 (as adjusted annually for inflation). See 19 U.S.C § 19(a)(1), (2).

[16] DOJ Press Release, Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates (August 16, 2023), available here.

[17] *In the Matter of QEP Partners, LP*, Docket No. C-4799, Decision and Order (October 10, 2023), available here.

[18] Department of Justice, Department of Health and Human Services, and Federal Trade Commission, Request for Information on Consolidation in Health Care Markets, Docket No. ATR 102, (March 05, 2024), available here (hereinafter "RFI.")

- physician practice groups
- nursing homes
- hospice facilities.

- Horizontal and vertical transactions involving private payers.[19]

Submissions are encouraged to address the effects of consolidations, the claimed business objectives for transactions, notable transactions, need for government action, and other impacts.[20]

Conclusion

Comments in response to the Agencies' RFI are due on May 6, 2024. Given the scope of the RFI, there are likely to be thousands of responses, referencing hundreds (if not thousands) of transactions. The Agencies have not committed to any particular outcome. But prior proceedings offer some glimpse into the possibilities. For example, in 2020, the FTC held a workshop regarding non-competes,[21] subsequently receiving and reviewing over 300 comments.[22] In 2023, the FTC noticed a proposed rule that purported to invalidate almost all non-compete agreements and announced[23] in tandem that it had entered two consent decrees requiring respondent firms to nullify their existing non-competes.[24]

The political focus on healthcare ensures that the Agencies will review and consider the information that they receive carefully. And they may, as the FTC did previously, consider parallel enforcement action to demonstrate their commitment to their approach. Willkie's cross-disciplinary attorney team is well-situated to assist clients in assessing their options in such proceedings while navigating the complexity of the current enforcement landscape.

19 RFI at 3–4.

20 RFI at 5–7 (full prompts available therein).

21 The workshop was entitled "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues," and was held on January 9, 2020. The event page is available here.

22 FTC Non-Rulemaking Docket, FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts, Docket ID # FTC-2019-0093, available here.

23 Notice of Proposed Rulemaking for Non-Compete Clause Rule (Jan. 5 2023), available here. We evaluated the FTC's proposed rulemaking in a client memorandum, available here.

24 *See, e.g., In re Anchor Glass Container Corp. et al.,* Agreement Containing Consent Order, File No. 211-0182 (Feb. 1, 2023), available here; *In re Prudential Security, Inc*., File No. 211-0026 (Jan. 4, 2023), available here.

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