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FTC Workshop Argues That Private Equity Incentives Are Not Aligned With Quality Health Care

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On March 5, the Federal Trade Commission (FTC) hosted a public workshop titled “[Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care](#).” The event is part of the agency’s effort to publicize and encourage enforcement targeting private equity investments in health care. The speakers from five federal and state agencies included all three sitting FTC commissioners, Assistant Attorney General for the Antitrust Division Jonathan Kanter, Inspector General of the U.S. Department of Health & Human Services (HHS) Christi A. Grimm, Principal Deputy Administrator and Chief Operating Officer at the Centers for Medicare & Medicaid Services (CMS) Jonathan Blum, and Attorney General of the State of Rhode Island Peter F. Neronha. The workshop also included health care providers, academics, and policy professionals, all of whom were critical of private equity ownership.

The speakers and agency representatives argued that the private equity model and the financial incentives that drive those models have led and will continue to lead to negative consequences in health care. The speakers identified certain structural and commercial practices as harmful to health care, and argued that such practices are more prevalent and uniquely problematic when under private equity ownership. The harmful activities identified include sale and leaseback arrangements of real estate on which health care facilities are located, staff reductions, elimination of less profitable services, use of lower quality equipment, and negotiating higher reimbursement rates. The speakers did not directly address or credit the potential of private equity investments to make medical practices more sustainable, achieve better terms for the practices from financial sponsors, or allow physicians to focus more on the practice of medicine and less on administrative tasks and burdens.

The presenters seemed to have a monolithic view of private equity firms. They asserted that private equity firms typically invest with the intention of exiting within approximately three years and seek quick profits by cutting costs and burdening the operating companies with massive debt. In the speakers’ view, this short investment horizon conflicts with the providers’, patients’, and operating companies’ long-term interests.

The workshop also highlighted the speakers’ concerns regarding the ability of the agencies to police private equity. For example, the presenters noted that a significant number of private equity health care deals fall below the HSR reporting thresholds. Additionally, the structure of investments often make it difficult to identify owners and pierce the corporate veil of the operating companies to reach their equity holders.

The event concluded with a “Fireside Chat” between Commissioner Slaughter and Rhode Island Attorney General Peter Neronha. Their discussion highlighted the collaboration between the FTC and states on enforcement and the growing number of state laws requiring premerger notification for these types of health care transactions at the

state level regardless of any HSR notice obligations. Both enforcers urged all states to use every tool, regulation, or statute available to them to examine and challenge private equity health care transactions.

The FTC, U.S. Department of Justice (DOJ), and HHS simultaneously issued a request for information (RFI) seeking public comments on the “[Impacts of Corporate Ownership Trend in Health Care](#).” The RFI seeks information on several “concerning” categories of health care deals, including transactions by private equity funds or other alternative asset managers. The requested information specifically pertains to (1) the effects of consolidation; (2) “claimed business objectives for transactions”; (3) the specific types of transactions that are troubling; (4) how HHS, FTC, and DOJ should identify and address transactions that may adversely affect health care because of market consolidation or corporate control issues; and (5) any other impacts resulting from health care market transactions.

This FTC workshop and the request for comments on private equity in health care are only the latest steps in the FTC’s and DOJ’s campaign targeting private equity acquisitions. For example, the [December 2023 Merger Guidelines](#) target roll-up or serial acquisitions and partial ownership transactions. The agencies have also targeted private equity by unwinding or opposing overlapping directors.^[1] We should expect the focus on private equity to continue.

Private equity firms buying health care providers should be clear in their investment committee communications and other documents analyzing the transaction if they do not have a short-term, cost-slashing investment philosophy. Regardless of philosophy, firms should be clear that patient outcomes matter; you should not assume that this is self-evident in the current enforcement environment. When cost-cutting decisions are made by the operating company or recommended by employees related to private equity investor owners, the potential impact of implementation of those decisions on patients and staff should be considered at the time the decision is made. Consider whether a firm that already has substantial market share needs to make another acquisition in the same service or geographic market, or any acquisition that increases its leverage in negotiations, in order to achieve the firm’s investment goals.

Early involvement of experienced legal counsel in areas of corporate governance, antitrust, and health care regulation is recommended to identify and mitigate risk.

^[1] See agency press releases related to EQT/Quantum, N-able/SolarWinds, Sun Country Airlines/Atlas Air Worldwide matters, available at <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt> and <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal>

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