TOP TAKEAWAYS

FTC HOSTS WORKSHOP, SOLICITS PUBLIC COMMENTS ON PRIVATE EQUITY IN HEALTHCARE

On March 5, 2024, the Federal Trade Commission (FTC) hosted "Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care" to examine the role of private equity investment in healthcare markets. The same day, the FTC, US Department of Justice (DOJ) and US Department of Health and Human Services (HHS) issued a Request for Information (RFI) seeking public comments on the effects of transactions involving healthcare providers and ancillary services by private equity funds, health systems and payors.

1

PROFITS OVER PATIENTS?

The RFI expresses a concern that certain "transactions may generate profits for those firms at the expense of patients' health, workers' safety, and affordable health care for patients and taxpayers." This theory was a central theme of the workshop. FTC Chair Lina Khan said that the private equity model does not invest in research and development because of the exit timeline: "These short-term profit extraction strategies can undercut long-term value in the context of healthcare, having life or death consequences."

2

STAFF & SUPPLIES

Several workshop participants expressed the view that private equity-backed facilities cut staffing ratios, are chronically understaffed, and do not have adequate supplies or drugs, all of which leads to adverse outcomes for patients. Some also complained about low wages, worker underpayments and long hours.

3

HOSPITAL DEBT

Several workshop panelists criticized private equity's use of debt to purchase healthcare companies, arguing that the companies are left with repayment obligations. Commentators cited the potential long-term impact on quality and company financials.

4

MEDICARE AND MEDICAID COSTS

Jonathan Blum, a representative from the Centers for Medicare and Medicaid Services (CMS), said consolidation and private equity ownership in healthcare has increased Medicare and Medicaid costs.

5

OWNERSHIP TRANSPARENCY

Workshop participants repeatedly called for increased transparency in private equity ownership of healthcare firms. Assistant Attorney General (AAG) Jonathan Kanter stated that too often, healthcare providers cannot help their patients because of "faceless intermediaries." Other policymakers expressed frustration in regulating the space due to a lack of information regarding ownership structures.

6 DIRECTOR & OFFICER INTERLOCKS

In the workshop, both FTC Chair Khan and AAG Kanter emphasized enforcement of Clayton Act Section 8, which prohibits the same individual from simultaneously serving as an officer or director for two competing companies. Kanter said that the agencies continue to look for interlocking directorates imposed by private equity and others.

7 SERIAL ACQUISITIONS

Under the new FTC and DOJ Merger Guidelines, when a merger is part of a series of multiple acquisitions, the agencies may now examine the entire series. The FTC is pursuing this theory through the challenge of an anesthesiology platform. In the workshop, Chair Khan said, “We will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies.”

8 HSR CHANGES PENDING

The FTC and DOJ have proposed significant changes to the Hart-Scott-Rodino (HSR) reporting form, including production of ordinary course strategic plans for the prior year and information on acquisitions during the past 10 years where there is competitive overlap between the parties. This move could capture prior transactions that were not HSR-reportable at the time.

9 DOCUMENTING INVESTMENTS & IMPROVEMENTS

The RFI requests information on the effect of transactions on patients, payors, providers, staff and employer health coverage. The RFI also solicits details regarding whether stated objectives for a transaction were realized post-closing (including “claimed efficiencies from scale, innovation in the organization and delivery of care, investments in care and quality improvements, the claimed or projected reduction in costs of delivering care resulting from these innovations and investments,” and who benefited from these efficiencies). Post-acquisition, management teams should consider maintaining a record-keeping system for documenting investments and improvements in care delivery, outcomes, quality, efficiency, scope of services, patient experience, provider training, valued-based care and access.

10 DOCUMENT CREATION & COMMUNICATIONS

Transaction and management teams should be mindful of the FTC’s theories and enforcement priorities when creating ordinary course documents such as strategic plans, market assessments and operating reports, as well as transaction-specific documents such as confidential information memorandums. The same attention should be given to all forms of communication, including emails, text messages and chats.

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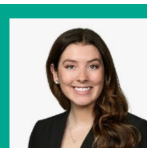

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