

March 18, 2024

CONSOLIDATION IN HEALTH CARE: AGENCIES SOLICIT PUBLIC COMMENT ON THE IMPACTS OF THE CORPORATE OWNERSHIP TREND IN HEALTH CARE

Christina Principe, Esq.

The Department of Justice's ("DOJ") Antitrust Division, the Federal Trade Commission ("FTC") and the Department of Health and Human Services ("HHS") (collectively, the "agencies") jointly launched a public inquiry into health care market transactions conducted by health systems, private payers, private equity funds, and other alternative asset managers that involve health care providers and facilities that provide ancillary products or services which may have an adverse impact on competition, patients' health, workers' safety, and the quality and cost of health care (the "transactions"). The Request for Information ("RFI") seeks public comment from all market participants regarding the goals or objectives of the transactions, along with their effects on participants in the health care market including patients, communities, payers, employers, providers, and other health care workers and businesses. Notably, the RFI requests information on transactions that would not be reported to the Justice Department or FTC for antitrust review under the Hart-Scott-Rodino Antitrust Improvements Act, 15 USC 18(a). Any comments by the public must be submitted no later than May 6th. Once submitted, all comments will be available for public viewing on the Federal eRulemaking Portal at [Regulations.gov](https://www.regulations.gov).

This inquiry emanates from growing concern over the impact of private equity and corporate dealmaking on policymaking, regulatory decisions, and enforcement actions of the agencies. Private equity firms and other corporate owners are increasingly involved in health care system transactions, which has the potential to maximize profits for firms at the expense of quality patient care. While consolidation through mergers and acquisitions and other potentially anticompetitive practices have the potential to increase efficiency and help struggling providers, it can also reduce market competition and relieve pressure on providers to lower prices or invest in quality improvements. To tackle rising health care costs and increase the affordability and quality of care, some have proposed strengthening antitrust regulation, which aims to protect competitive markets.

At the federal level, the FTC and the DOJ share responsibility for enforcing federal antitrust laws and challenging anticompetitive practices of health care providers. The agencies believe that robust competition in health care markets promotes higher quality, lower cost health care, greater

Florham Park

220 Park Avenue
Florham Park, NJ 07932
973-539-1000

Paramus

115 West Century Road
Suite 100
Paramus, NJ 07652
201-262-1600

Sparta

351 Sparta Avenue
Sparta, NJ 07871
973-295-3670

New York

9 East 40th Street
New York, NY 10016
646-652-7775

access to care, increased innovation, higher wages, and better benefits for health care providers. As such, this RFI will enable the agencies to gain insight into the modern market realities of the health care industry and aid in vigorously enforcing the law against unlawful deals.

The agencies are seeking information from stakeholders, including but not limited to patients, consumer advocates, doctors, nurses, health care administrators, employers, private insurers, pharmacy benefit managers, group purchasing organizations, dialysis clinics, nursing homes, hospice providers, home health agencies, hospitals, and other health care providers and facilities that provide ancillary health care products or services. In particular, the agencies have stated that they are most interested in receiving feedback on the following types of transactions conducted by:

Private Equity Funds or Other Alternative Asset Managers: Such as direct acquisitions by a private equity fund of a health care provider, as well as transactions structured to facilitate private equity investment, circumventing applicable corporate practice of medicine restrictions and resulting in worse patient outcomes and higher costs for care;

Health Systems: Such as vertical integrations, when a health system acquires an independent physician practice, an ambulatory surgery facility, or a nursing home, or horizontal integrations, when a health system partially acquires a hospital, resulting in the ability to influence the decisions and financial interests of a competing hospital, despite having a passive or minority ownership interest; and

Private Payors: Such as when insurers purchase primary care practices outright or when they become partial owners, resulting in an increased incentive by the acquiring payer to weaken rival payers by charging higher prices or otherwise worsening contract terms.

Comments submitted in response to the joint RFI will inform the agencies' enforcement priorities and future policy efforts relating to consolidation in the health care sector, including potential regulations aimed at promoting and protecting competition. This action by the agencies serves as a continued commitment by the Justice Department, FTC, and HHS to lower health care costs, while promoting competition to benefit both patients and health care workers. This RFI builds upon the Centers for Medicare & Medicaid Services' recent RFI on enhancing Medicare Advantage data capabilities and transparency and a RFI issued by the FTC and HHS on how pharmaceutical middleman groups may be contributing to drug shortages.

If you are planning to engage in a health care system transaction such as those mentioned in this article and are seeking counsel for proceeding in a regulatory compliant manner, contact Schenck Price Associate Christina Principe at cp@spsk.com or 973-540-7350.

***DISCLAIMER:** This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.*