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Commentary

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US Regulators Announce Inquiry Into Healthcare Consolidation

Companies should prepare for increased regulatory scrutiny into healthcare transactions and increased emphasis on compliance programs.

The Federal Trade Commission (FTC), the Department of Justice (DOJ), and the Department of Health and Human Services (HHS) have announced a new public inquiry into the impact of corporate consolidation and practices in the healthcare sector, with a focus on what they are calling "corporate greed in healthcare." We are tracking the inquiry and summarize here the key focus areas and outline steps companies can take to prepare themselves. We will be hosting a webcast on May 30, 2024, to share what we have learned so far and how we think this may play out over time.

Understanding the Inquiry

On March 5, 2024, the FTC, DOJ, and HHS jointly announced a cross-government public inquiry, seeking to understand how certain healthcare market transactions, including those not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, may harm patient health, worker safety, and the affordability and overall quality of care. According to the announcement, these agencies are seeking to respond directly to *their stated concerns* that private equity investors and other types of corporate entities may be prioritizing profits at the expense of patient care.

Key points from the agencies' press release include the following:

- The inquiry will examine the alleged increasing role in healthcare by private equity firms and other corporate actors.
- The agencies have issued a 12-page request for information (RFI), inviting public comment on a wide range of transactions involving healthcare providers and services.
- FTC Chair Lina M. Khan openly criticized private equity-driven buyouts that lead to staffing cuts and reduced quality, stating, "[P]atients lose out."
- Assistant Attorney General for the DOJ's Antitrust Division Jonathan Kanter emphasized the importance of competition in healthcare markets for the well-being of Americans.

- HHS Secretary Xavier Becerra highlighted the need for more understanding of the impact of corporate dealmaking on healthcare policy and enforcement.

The agencies will accept public comments from all market participants regarding this inquiry until May 6, 2024, via Regulations.gov.

FTC Chair's Remarks

Some of Chair Khan's recent observations on March 5, 2024, at a virtual public workshop hosted by the FTC, include:

- **Critique of Staffing and Quality Cuts:** "A common theme across these comments is that growing financialization in the healthcare industry can force medical professionals to subordinate their medical judgment to corporate decision-makers' profit motives at the expense of patient health," she remarked. She cited instances in which she said private equity buyouts have led to a decline in patient care quality because of reduced staffing.

- **Focus on Profit Over Care:** Chair Khan raised general concerns about shifts in healthcare that she says prioritize efficiency and profits at the expense of patients and accessible, quality healthcare.

- **Roll-Ups and "Strip-and-Flip" Tactics:** "Healthcare is being transformed from a social good into a commodity that can be bought, sold, and sold again for private gain," she stated, drawing attention to the FTC's scrutiny of roll-ups and so-called "strip-and-flip" tactics that can potentially enrich executives at the public's expense.

Practical Implications

The FTC/DOJ/HHS RFI and Chair Khan's comments underscore a sharpened focus by regulators across agencies on scrutinizing healthcare transactions of all types. Given the government's ongoing focus on healthcare investment, investors and healthcare companies can prepare for increased scrutiny by:

- **Capitalizing on Due Diligence for Strategic Advantage:** With enforcement expected to intensify, all stakeholders involved in healthcare transactions can tailor their diligence process to identify potential issues early and ensure remediation as needed. In particular, investors can design their diligence process to place heightened focus on enterprise-wide compliance, active compliance monitoring and reporting, as well as a deep understanding of how business opportunities may impact patient care. With these focus areas in mind, due diligence can be designed to go beyond risk assessment and actively identify opportunities for operational improvement and patient care enhancement.

- **Reinforcing Commitments to Post-Transaction Compliance and Patient Care:** Regulators have indicated they intend to place heightened scrutiny not only on investments in healthcare companies, but also on the operational impacts and implications for patient care quality *after* any transaction has been completed. New investors and owners in healthcare businesses may benefit from developing plans to monitor overall compliance program effectiveness and patient care impact post-transaction.

Latham & Watkins is at the forefront, ready to help your company understand these trends and adapt accordingly.

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