

Axinn Antitrust Insight: Public and Regulatory Sentiment Point to Increased Healthcare Merger Enforcement

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PRACTICE AREAS

Antitrust

Axinn Update

As the Federal Trade Commission (“FTC”) and US Department of Justice Antitrust Division (“DOJ”) continue their ambitious merger enforcement agenda, public comments on potential revisions to the agencies’ Merger Guidelines and statements from FTC Chair Lina Khan signal increased scrutiny for private equity healthcare acquisitions.

Commenters Favor Increased Enforcement, Particularly Concerned With Healthcare

In January 2022, the FTC and DOJ launched a joint request for information (“RFI”) soliciting public comments on ways to modernize the federal merger guidelines to better detect and prevent anticompetitive deals. In response to the RFI, the agencies received 5,825 comments—compared with just 74 public comments on the agencies’ draft vertical merger guidelines in 2020. The head of DOJ’s Antitrust Division, Jonathan Kanter, called the response “completely unprecedented” but confirmed in September that the agencies have read through each and every submission.

Economists and data scientists at Cornerstone Research have used natural language processing (“NLP”) tools to summarize the publicly-posted comments and identify major themes. NLP can assess how frequently words appear together in documents to identify important topics. It can also analyze the sentiment of a block of text and determine whether it is generally positive or negative.

Using this technology, researchers found that commenters broadly favored increased merger enforcement—mirroring findings conveyed in AAG Kanter’s September remarks. Digging deeper, however, NLP analysis shows that healthcare was by far the most dominant topic. Roughly one-fourth of the 1,906 publicly-posted comments were healthcare-related. Further analysis of this group showed that private equity was mentioned in over half of the healthcare-related comments, where commenters

attributed lower quality of care and reduced access to care to private equity investment. Many also expressed concerns that PE firms may escape scrutiny because they are not obviously direct competitors in the healthcare space.

Healthcare PE in Chair Khan's Crosshairs

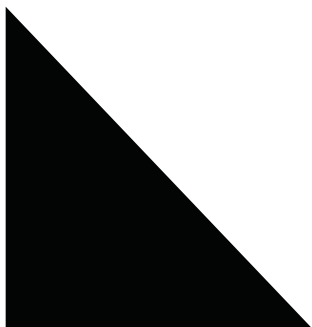
FTC Chair Lina Khan has indicated that she also is assessing private equity investment in healthcare. In her June 2022 statement on PE firm JAB's acquisition of SAGE Veterinary Partners, the Chair called revision of the merger guidelines an opportunity to address "the expanding role of private equity in our economy." She noted that PE firms have been particularly active in healthcare and stated that a focus on short-term profits in that context can lead to serious quality degradation, increased costs, and worse patient outcomes. Her remarks also cited research suggesting PE roll-ups in healthcare have resulted in increased mortality rates at nursing homes.

The Commission imposes conditions on the SAGE acquisition, requiring JAB to divest veterinary clinics in multiple markets. It also requires JAB to seek prior Commission approval for acquisitions of specialty or emergency veterinary hospitals within 25 miles of a then-existing clinic within California or Texas and orders JAB to provide prior notice to the Commission for any similar proposed acquisitions outside of those geographies. The Chair, along with the other two Democratic Commissioners, reasoned that the notice provision, reaching outside the relevant geographic markets at issue, would allow the FTC to better address "stealth roll-ups" resulting from smaller acquisitions that would ordinarily escape antitrust agency review.

Healthcare providers and investors are also awaiting the results of an FTC market study initiated in January 2021 to assess the impact of acquisitions of physician groups and non-hospital healthcare facilities by looking at historical data from 2015-2020, which may portend greater enforcement action in the future to address physician practice consolidation.

Continued Inquiries into Interlocking Directorates, Especially in PE and Healthcare

Coming on the heels of the DOJ's proactive enforcement action to address interlocking directorates and force resignations across five company boards, it appears that the DOJ has turned its sights to private equity firms' placement of directors on boards of companies they own in the



same sector. Several news sources report that the DOJ has issued Civil Investigative Demands (“CIDs”) to a number of private equity firms, with a potential focus on their board seats on healthcare companies. A recent research paper by academics at Stanford University analyzing over 2,000 life science companies’ board compositions showed a high degree of interlocks among such companies, a trend that appears to have accelerated in the last 20 years. This research is likely to fuel further antitrust agency interest in interlocking directorates in the broader healthcare and life science sector.

Key Takeaways

Regulators continue to have significant concerns about consolidation in the healthcare and life sciences industries, and they have attributed many quality and access issues to private equity investment. Firms considering investments or acquisitions in healthcare or life sciences should expect added scrutiny, particularly where existing portfolio investments may overlap with new ones, even if they fall below Hart-Scott-Rodino Act filing thresholds. The updated Merger Guidelines, drafts of which are expected to be published for public comment in the near future, may place private equity acquisitions in healthcare and life sciences squarely in the antitrust agencies’ crosshairs.

