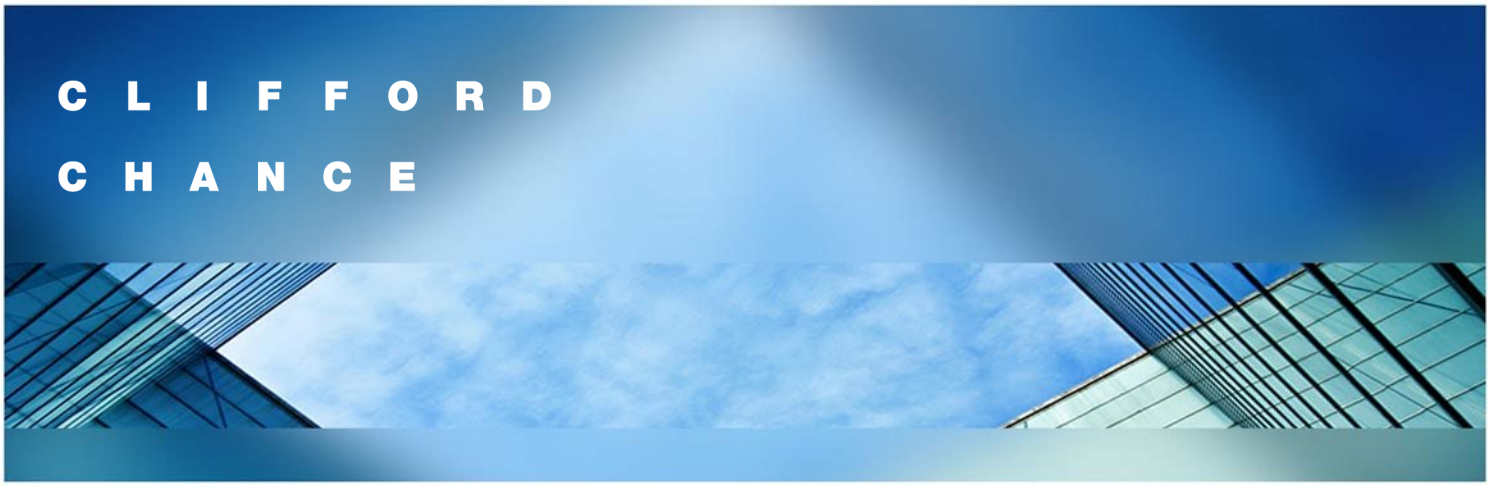

AGENCIES SIGNAL INCREASED SCRUTINY OF PRIVATE EQUITY INVESTMENTS IN HEALTHCARE MARKETS

On Tuesday, March 5, the U.S. Federal Trade Commission ("FTC"), U.S. Department of Justice ("DOJ"), and U.S. Department of Health and Human Services ("HHS") issued a blanket Request for Information ("RFI") related to consolidation in healthcare markets, focusing in part on private equity ("PE") acquisitions in healthcare. On the same day, the FTC held a workshop on the topic of private equity investment in healthcare markets, where participants voiced strong opposition to private equity investments in the space. These developments make clear that PE investments in the healthcare sector will remain a key focus for the DOJ and FTC.

I. FTC WORKSHOP ON PRIVATE EQUITY INVESTMENT IN HEALTHCARE MARKETS

The virtual workshop hosted by the FTC on March 5th, titled "Private Capital, Public Impact," discussed the role of private equity investment in healthcare markets, particularly in hospitals, physician practices, and other healthcare providers. Participants, including antitrust enforcers, academics, and healthcare professionals, uniformly expressed negative views about the effects of PE investment in healthcare. Objections to PE investments in healthcare providers fell primarily into four categories:

1. **Interference with clinical and professional autonomy.** Panelists—including multiple enforcers from the DOJ and FTC—stressed their concern about "faceless intermediaries" interfering with healthcare decision-making. FTC Chair Khan stated that "growing financialization in the healthcare industry can force medical professionals to subordinate their own medical judgment to corporate decision-makers' profit motives at the expense of patient health," while Commissioner Alvaro Bedoya stated that he "fear[ed] that private equity threatens to turn the Hippocratic Oath on its head." Panelists described how investors might control physician practices through management service agreements (giving the investor control over hiring, firing, billing, coding, scheduling, and other key decisions) and use non-competes and "gag" clauses to prevent staff from either leaving or speaking out against certain practices or the quality

of patient care. Enforcers noted that these contractual structures could serve as workarounds to states' restrictions on the corporate practice of medicine, allowing PE firms to achieve "de facto" ownership where state law prohibited actual ownership.

2. **Misaligned incentives and "strip-and-flip" practices.** Panelists expressed concerns about a potential lack of alignment between PE firms' incentives and public policy goals related to healthcare, with PE firms having short-term goals of achieving profits and returns that may be at odds with their healthcare portfolio companies' interests. Certain arrangements between PE firms and their portfolio companies—such as sale-leaseback agreements in which hospitals sell and lease back their real estate, as well as transaction fees and management fees paid by hospitals to PE firms—were described as posing conflicts of interest for PE firms, with PE firms directing lucrative payments to themselves from hospitals and returning dividends to their investors. Panelists also discussed the potential for providers to become unstable or insolvent from debt incurred as part of a PE investment.
3. **Lack of transparency.** Several panelists called for greater transparency regarding the extent of PE ownership and investment in healthcare markets, remarking that the stakeholders or authorities who endorse or approve of certain PE investments in healthcare may not fully comprehend the nature of the investments and how they might lead to financial vulnerabilities in the targets of investment. An enforcer at the state level noted that issues involving PE investments in healthcare may draw enforcers' attention only when notification of a change-in-control is required under state law.
4. **Insulation and immunity.** Panelists expressed concerns that complex PE structures, unlike other ownership models, often insulate PE firms from legal or financial consequences of their portfolio companies' actions.

Panelists described several categories of harms that had resulted from the above, including: (1) consolidation and cost increases due to increases in market power and "aggressive risk adjustment behavior"; (2) worse patient care because of staffing reductions and facility closures; and (3) harms to clinical workforces, including lower wages, unsafe working conditions, and staff burnout.

The federal antitrust enforcers at the event—including all three FTC Commissioners and the head of DOJ's Antitrust Division—highlighted several enforcement angles related to PE investments. First, the agencies continue to investigate serial acquisitions and industry "roll-ups," where acquisitions by a single firm that would not be anticompetitive standing alone might nonetheless affect competition in the aggregate. Second, the agencies are looking into acquisitions by PE firms where valuations are below HSR reporting thresholds, thus making it more difficult to detect potential serial acquisitions and industry roll-ups. Finally, the agencies continue to investigate and enforce violations of Section 8 of the Clayton Act, which prohibits the same person from serving simultaneously as a director or officer for competing firms. The enforcers noted that while these issues are not unique to healthcare, healthcare markets are an especially high priority.

Although a few comments from non-enforcer panelists acknowledged that there could be benefits from private capital in healthcare, namely capital

infusions that improve operations, finances, and staffing levels, the workshop was devoid of speakers advocating on behalf of private capital or expressing opposing viewpoints.

II. JOINT AGENCY REQUEST FOR INFORMATION ON HEALTHCARE CONSOLIDATION

Also on March 5th, the DOJ, FTC, and HHS announced that they had issued a Request for Information ("RFI") on "Consolidation in Health Care Markets."

The RFI seeks public comment "regarding the effects of transactions involving health care providers (including providers of home- and community-based services for people with disabilities), facilities, or ancillary products or services, conducted by private equity funds or other alternative asset managers, health systems, or private payers." With regard to transactions "conducted by private equity funds or alternative asset managers," the agencies are "interested in transactions where private equity funds make direct acquisitions, as well as transactions structured to facilitate private equity investment, circumventing applicable corporate practice of medicine restrictions." The agencies state that they are "concerned that some transactions may generate profits for those firms at the expense of patients' health, workers' safety, quality of care, and affordable health care for patients and taxpayers," and that the agencies are especially interested in learning about transactions that do not require a pre-merger notification under the federal antitrust laws.

The agencies note that the comments they receive "will inform the agencies' identification of enforcement priorities and future action, including new regulations." The agencies will accept comments from the public for a 60-day period ending May 6, 2024.

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