PAUL HASTINGS

Stay Current

March 2024

Follow @Paul_Hastings

Antitrust Authorities Keep Pressure Up on Private Equity, Focusing on Healthcare

By Michael Wise

A recent government initiative announced on March 5, 2024 signals that more antitrust scrutiny for private equity firms and asset managers is on the horizon. The U.S. antitrust agencies, the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ"), partnered with the Department of Health and Human Services ("HHS") to announce plans to identify anticompetitive harm in the health care industry, focusing especially on the impact of private equity investment. The three agencies issued a 12-page Request for Information, seeking public input on acquisitions that have occurred "at the expense of patients' health, workers' safety, and affordable health care for patients and taxpayers."[1] The request also seeks information on potentially anticompetitive deals by health systems and private payers.

This focus on the intersection between private equity investment and healthcare delivery is not entirely new. For example, the Request for Information cites research suggesting that healthcare acquisitions by private equity firms have resulted in higher prices and worsened patient outcomes. Those same concerns have been raised on several occasions, including in mid-2022, when the FTC challenged a veterinary clinic acquisition (see our related note). Moreover, the government's antitrust concerns about private equity investment have not been limited to the healthcare sector, as then-FTC Commissioner Rohit Chopra highlighted in 2020.[2] While the DOJ and FTC have announced a handful of actions targeting antitrust violations related to private equity during the current administration, the March 5 Request for Information indicates that agency leadership at the FTC, the DOJ, and HHS believes that there is a need for much more enforcement.

One particular concern raised by the agencies in the Request for Information is that they face an information disadvantage when it comes to identifying anticompetitive effects in private equity deals in the healthcare sector. Many acquisitions that occur in the healthcare space are already notified in advance under the Hart-Scott-Rodino Act ("HSR Act"). However, the HSR Act has various exemptions that can come into play, and also does not cover acquisitions falling below certain size thresholds (most notably, the Size of Transaction threshold that is currently set at $119.5 million). Thus, the HSR Act notification requirement may be particularly ineffective when it comes to certain categories of investment—such as a series of small acquisitions aimed at establishing a consolidated position in a particular field of service or geography. It also may come up short when evaluating connections between affiliated private equity funds, which are not always disclosed in the context of an HSR Act notification.

Given these issues, the Request for Information could be seen as an attempt to crowd-source information on anticompetitive behavior in the healthcare industry. This would allow the agencies to

bring additional merger enforcement actions, since the antitrust laws can be used to target transactions even if they fall below the HSR Act notification thresholds. It also might be used by the DOJ and FTC to support or advocate for additional legislation or regulatory changes that focus on curbing alleged anticompetitive practices in healthcare. And, if nothing else, it creates an avenue for anyone who believes they have been disadvantaged as the result of a private equity deal in the healthcare space, to bring their complaint to the attention of the antitrust enforcers. In some cases, this may mean the agencies will pursue enforcement actions. In many others, it will likely mean that certain companies will face the burden of responding to government inquiries, producing significant business information, and explaining the legality of their actions.

For private equity firms and asset managers that are active in the healthcare sector, two key responses are prudent.

First, these entities should ensure that they have an accurate handle on areas of heightened risk. This would include identifying situations where there is a strategy to develop or augment a market presence in the healthcare ecosystem or where steps are underway to increase margins in a particular segment at a more aggressive pace than the historical norm. While these strategies may not be illegal *per se*, they could invite scrutiny in the current regulatory environment. Understanding the risk areas allows for appropriate consideration of future opportunities, such as additional acquisitions or partnerships.

Second, an intentional strategy for antitrust compliance is critical. Private equity firms and asset managers engaged in acquiring or operating businesses in the healthcare space need an understanding of what types of statements or actions generate antitrust concerns. They also need to be aware of when to involve legal counsel before engaging in a course of action. In both cases, the wisest course of action is to have a documented antitrust compliance plan, including appropriate training at both the fund level and the portfolio company level.

The government interest in targeting anticompetitive behavior by private equity firms, particularly in healthcare, is likely to remain elevated for the foreseeable future. Meanwhile, investment in this space is likely to continue to be attractive for many private equity firms and asset managers. In this environment, an appropriate level of caution when it comes to antitrust compliance is likely to yield disproportionate benefits in terms of avoiding the time and expense of government scrutiny.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Michael F. Murray
1.202.551.1730
michaelmurray@paulhastings.com

Ryan Phair
1.202.551.1751
ryanphair@paulhastings.com

Michael S. Wise
1.202.551.1777
michaelwise@paulhastings.com

[1] https://content.govdelivery.com/attachments/USDOJOPA/2024/03/05/file_attachments/2803589/DOJ-FTC-HHS%20HCC%20RFI%20-%2003.04.24%20-%20FINAL.pdf

[2] https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf