

DEPARTMENT OF JUSTICE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
FEDERAL TRADE COMMISSION

Docket No. ATR 102

Request for Information on Consolidation in Health Care Markets

AGENCY: Department of Justice; Department of Health and Human Services; and Federal Trade Commission.

ACTION: Request for Information.

SUMMARY: The United States Department of Justice’s Antitrust Division, the Federal Trade Commission, and the Department of Health and Human Services believe that robust competition in health care markets promotes lower health care costs and improved working conditions, while fostering high-quality patient care and driving innovation across the health care system. Given recent trends, we are concerned that transactions may generate profits for those firms at the expense of patients’ health, workers’ safety, and affordable health care for patients and taxpayers. We are issuing this Request for Information to seek 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,¹ conducted by private equity funds or other alternative asset managers, health systems, or private payers. We are interested in public input regarding the goals or objectives of these transactions, as well as their effects on participants in the health care market including patients, communities, payers, employers, providers, and other health care workers and businesses.

¹ Ancillary services include other services relevant to the provision of health care, but that do not involve providing direct care. These include, but are not limited to, out-of-network billing management, IT services, laboratories, staffing services, and other related services.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before May 6, 2024.

ADDRESSES: You may submit comments, identified by Docket No. ATR 102, through the Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

- *Postal Mail or Commercial Delivery:* If you do not have internet access or electronic submission is not possible, you may send written comments to Grace Lee, Competition Policy and Advocacy Section, Antitrust Division, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Suite 3337, Washington, DC 20530. To ensure proper handling, please reference the agency name and Docket No. ATR 102 on your correspondence.
- *Please note that comments submitted by email or fax may not be reviewed by the agencies.*

Privacy Note: The agencies' general policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Grace Lee, Attorney Advisor, Competition Policy and Advocacy Section, Antitrust Division, U.S. Department of Justice, (202) 227-1711 (this is not a toll-free number). If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), please call the toll-free Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

The Department of Justice’s Antitrust Division, the Federal Trade Commission, and the Department of Health and Human Services (collectively, the “agencies”) believe that robust competition in health care markets promotes lower health care costs and improved working conditions, while fostering high-quality patient care and driving innovation across the health care system. Given recent trends, we 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. We are issuing this Request for Information to seek 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,² conducted by private equity funds or other alternative asset managers, health systems, or private payers. We are interested in public input regarding the goals or objectives of these transactions, as well as their effects on participants in the health care market including patients, communities, payers, employers, providers, and other health care workers and businesses.

We are particularly interested in information on transactions in the health care market conducted by private equity funds or other alternative asset managers, health systems, and private payers, especially those transactions that would not be noticed to the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act, 15 USC 18(a). These transactions could involve dialysis clinics, nursing homes, hospice providers, primary care providers, hospitals, home health agencies, home- and community-based services providers, behavioral health providers, billing and collections services, revenue cycle

² Ancillary services include other services relevant to the provision of health care, but that do not involve providing direct care. These include, but are not limited to, out-of-network billing management, IT services, laboratories, staffing services, and other related services.

management services, support for value-based care, data/analytics services, and other types of health care payers, providers, facilities, Pharmacy Benefit Managers (PBMs), Group Purchasing Organizations (GPOs), or ancillary products or services. We are also interested in hearing directly from patients and health care workers about how their experiences in the health care system changed after a facility or other provider where they work or receive treatment or services was acquired or underwent a merger.

Public comments submitted in response to this Request for Information will inform the agencies' identification of enforcement priorities and future action, including new regulations, aimed at promoting and protecting competition in health care markets and ensuring appropriate access to quality, affordable health care items and services. This RFI complements the Centers for Medicare & Medicaid Services' recent RFI on Medicare Advantage³ that seeks public feedback on enhancing Medicare Advantage data capabilities and transparency, including on healthy competition and vertical integration.

There is a large, well-established body of research showing that competition in health care provider and payer markets promotes higher quality, lower cost health care, greater access to care, increased innovation, higher wages, and better benefits for health care workers. The agencies have a long history of working to promote competition in health care markets, including through enforcement and regulatory actions.⁴

Academic research and agency experience in enforcement actions has shown that patients, health care workers, and others may suffer negative consequences as a result of

³ 89 Fed. Reg. 5,907 (Jan. 30, 2024), <https://www.federalregister.gov/documents/2024/01/30/2024-01832/medicare-program-request-for-information-on-medicare-advantage-data>.

⁴ Press Release, Fed. Trade Comm'n, DOJ and HHS Work to Lower Health Care and Drug Costs, Promote Competition to Benefit Patients, Health Care Workers (Dec. 7, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-hhs-work-lower-health-care-drug-costs-promote-competition-benefit-patients-health-care>.

horizontal and vertical consolidation of a range of different types of providers—including not-for-profit providers.⁵ In this RFI, we request information on the effects of transactions involving health care providers, facilities, or ancillary products or services, conducted by entities where there are concerning trends and recent research indicating these categories of transactions may harm health care quality, access, and/or costs.

- *Transactions conducted by private equity funds or other alternative asset managers:*
The agencies are interested in learning more about the impact of transactions involving health care providers, facilities, or ancillary products or services conducted by private equity funds or other alternative asset managers. Alternative asset investments include private equity funds, private credit funds, and real estate investments. Examples of private equity transactions include a private equity fund’s acquisition of a health care provider such as a hospital, nursing home, or specialty service provider. We 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. Recent research suggests that transactions conducted by private equity funds have adversely affected patients, health care workers, and other stakeholders in some cases including through worse patient outcomes and higher costs for care. We are also interested in transactions involving other alternative asset classes, which are investments in assets other than stock and bonds, such as private credit funds and real estate investment trusts (REITs). An example of the latter

⁵ See, e.g., Kaiser Family Foundation, *What We Know About Provider Consolidation* (Sept. 2, 2020), <https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation>; Sneha Kannan, Joseph Dov Bruch & Zirui Song, *Changes in Hospital Adverse Events and Patient Outcomes Associated with Private Equity Acquisition* (Dec. 26, 2023), <https://jamanetwork.com/journals/jama/article-abstract/2813379>; Elena Praeger & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397–427 (2021).

is when a REIT acquires the underlying real estate of a hospital or nursing home and leases it back to the facility.

- *Transactions conducted by health systems:* The agencies are interested in learning more about the impact of mergers and other transactions involving health care providers, facilities, or ancillary products or services conducted by health systems. A health system is “an organization that includes at least one hospital and at least one group of physicians that provides comprehensive care (including primary and specialty care) who are connected with each other and with the hospital through common ownership or joint management.”⁶ Health systems can be organized as both non-profit and for-profit entities, with some for-profit entities being publicly traded corporations and others being privately held. Examples of health system transactions include vertical integrations such as when a health system acquires an independent physician practice, an ambulatory surgery facility, or a nursing home, or horizontal integrations such as 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. Although some have highlighted benefits of vertical integration, following these acquisitions, concerns have been raised that the involved facilities and providers may have less of an incentive to compete for patients, payers, and health care workers. Also, concerns have been raised that the acquiring health system may have the ability and incentive to weaken rival providers and facilities by changing their referral patterns away from rival providers and facilities and towards their own providers and facilities.

⁶ Agency for Healthcare Research & Quality, *Defining Health Systems*, AHRQ (last visited Jan. 5, 2024), <https://www.ahrq.gov/chsp/defining-health-systems/index.html>.

- *Transactions conducted by private payers:* The agencies are interested in learning more about the impact of transactions involving health care providers, pharmacies, facilities, or ancillary products or services conducted by private payers. Private payers can be insurers and/or administrative service organizations. Examples of this type of transaction include when insurers purchase primary care practices outright or when they become partial owners of these practices. Following these types of transactions, concerns have been raised that the acquiring payer may have the ability and incentive to weaken rival payers by charging higher prices for the rival's members to use the acquired practice, removing the acquired practice from rival payers' networks, or otherwise worsening contracting terms. Concerns have also been raised that these types of transactions may result in vertical integration between certain types of entities such as insurers, pharmacy benefit managers, and pharmacies, which may affect pricing and access to prescription drugs for patients and costs to the government as a payor.

REQUEST FOR INFORMATION: The agencies are seeking information from stakeholders, including but not limited to patients, consumer advocates, doctors, nurses, health care administrators, employers, private insurers, PBMs, GPOs, nursing homes, hospices, home health agencies, hospitals, and other health care providers, facilities, providers of and entities that provide ancillary health care products or services. The agencies also seek comment from academics and other experts who have studied market consolidation, corporate control in health care, and related issues. Patients and workers are also encouraged to share information on how acquisitions and mergers in the healthcare industry have affected them directly. Respondents may address any, all, or none of the following questions and may address additional topics related to market consolidation, organizational forms, and anticompetitive conduct affecting the

health care industry. Please identify, where possible, the question numbers your comments are intended to address.

DO NOT include sensitive or confidential information in the comments including: social security numbers, dates of birth, driver's license numbers or other state identification numbers, financial account information, sensitive health information, or competitively sensitive information. Comments will be posted on the Internet and made available to the public (subject to exceptions such as for personal privacy information of persons other than the submitter).

The agencies invite written responses to the following questions:

1. **Effects of Consolidation:** How has a transaction involving health care providers (including providers of home- and community-based services), facilities, or ancillary products or services conducted by private equity funds or other alternative asset managers, health systems, or private payers (*e.g.*, a health system, a private payer, or a private equity fund buying independent ambulatory surgery centers, dialysis clinics, PBMs, GPOs, or nursing homes) affected:
 - i. *Patients: e.g.*, through changes in their costs of obtaining care, costs of health insurance coverage, medical debt and access to charity care, quality of clinical or non-clinical care, quality of the patient's experience, access to and denials of care, language access, types of goods and services offered, safety, utilization of services, drug utilization, staffing levels, mix of providers and medical support staff, practices regarding prior authorizations, other utilization management, or reimbursement strategies, referral practices, site of service for procedures, ease of access to providers, patient billing, collections, financial assistance practices, access to or sharing of patient information, differences in these areas in rural

compared to urban settings, and differences in areas for marginalized patient populations, including differences by race, ethnicity, gender, sexual orientation, income level, disability, Tribal status, or citizenship status.

- ii. *Public and private payers: e.g.*, through changes in their reimbursement rates for in-network providers, out-of-network rates and costs to patients, quality of care including the patient's experience, access to and denials of care, utilization of services, medical loss ratio, coding practices, rates of fraudulent billings or claims, coverage and formulary design, referral practices, claims processing, network adequacy, ability to implement innovative payment models, ability to implement value-based care plans, and ability to negotiate with the facility and with competing facilities.
- iii. *Providers, health care workers, and support staff: e.g.*, through changes in their take-home pay, workplace safety, compensation model (*e.g.*, from fixed salary to volume based), policies regarding patient referrals, mix of patients, the volume of patients, the way providers practice medicine (*e.g.*, incentives, prescribing decisions, forced protocols, restrictions on time spent with patients, or mandatory coding practices), administrative or managerial organization (*e.g.*, transition to a management services organization), patient billing, collections, financial assistance practices, data reporting requirements, claims processing, employment benefits, staffing levels, scope and/or duration of non-compete agreements or other restrictions on worker mobility and working conditions such as training repayment agreements, and differences between rural and urban settings as to these issues.

- iv. *Employers who provide health insurance for their employees: e.g., through changes in prices for health insurance coverage, changes in prices for medical care, coverage and formulary design, and/or changes or reductions in choices in facilities or providers for their employees.*
2. **Claimed Business Objectives for Transactions:** What were the claimed business goals and objectives for the transaction, and have these goals and objectives been realized post-transaction? These could include but are not limited to claimed efficiencies from scale, innovation in the organization and delivery of care, investments in care and quality improvements, the claimed or projected reduction in costs of delivering care resulting from these innovations and investments, complementarities between business units, or increased business valuations. Who benefited from the realization of claimed business goals and objectives of the transaction? Did the transaction, for example, require the acquired entity to take on any additional debt or restructure the ownership or leasing of any real estate or physical facilities? To the extent the transaction generated any surplus profits, were those profits used to reinvest in the acquired business, finance additional acquisitions, or paid out to shareholders in the form of dividends?

3. **Notable Transactions:** Are there particular types of entities, such as private equity funds or other alternative asset managers, health systems, or private payers, most associated with transactions that result in adverse impacts on entities listed in question 1(i)-(iv)? Are there particular facilities, providers, payers, and ancillary products or services that are most often the targets of these harmful transactions? Who are these targets?
4. **Need for Government Action:** What actions should the Department of Health and Human Services, Federal Trade Commission, and United States Department of Justice consider taking to identify and address transactions that, due to market consolidation or corporate control issues, may have major adverse impacts on entities listed in question 1(i)-(iv)? Should the agencies promote greater transparency and enhanced availability of information to the public on mergers, acquisitions, and other transactions involving health care facilities, providers, payers, and ancillary products or services, and if so, how?
5. **Other Impacts:** Have there been other impacts from health care market transactions that you would like to report to the agencies?

These questions are not meant to be exhaustive, and stakeholders are encouraged to address these and/or other related issues and to submit research and data that inform their comments on these topics. Responses to these questions may result in the need for additional proceedings, including workshops or other public engagement, to learn more about the identified concerns.

Date: 2/29/2024

s/ Jonathan Kanter
Jonathan Kanter
Assistant Attorney General
Antitrust Division
Department of Justice

Date: 2/29/2024

s/ Xavier Becerra
Xavier Becerra
Secretary
Department of Health and Human Services

Date: 2/29/2024

s/ Lina M. Khan
Lina M. Khan
Chair
Federal Trade Commission