

# Coordinated Agency Activities: FTC, DOJ, and HHS Launch Cross-Government Inquiry on Effect of Transactions in Health Care

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On March 5, the Federal Trade Commission (FTC), the US Department of Justice (DOJ) Antitrust Division, and the US Department of Health and Human Services (HHS) launched a cross-government inquiry into the role private equity firms, other alternative asset managers, health systems, and private payers play in health care transactions.

## The Request for Information

The federal agencies jointly issued a [Request for Information \(RFI\)](#) seeking public comment on the effect of transactions in the health care industry. These transactions can involve a wide array of providers and facilities, such as dialysis clinics, nursing homes, hospice providers, hospitals, home health agencies, behavioral health providers, billing and collection services, revenue cycle management companies, pharmacy benefit managers (PBMs), group purchasing organizations (GPOs), health care payers, and data/analytics services.

In the RFI and corresponding press release, the FTC, DOJ, and HHS note the growing number of transactions in the health care industry, focusing on increased profits at the expense of patient health and worker safety. As a result, the agencies are concerned with: (1) the effects of transactions involving health care providers on participants in the health care market, including patients, communities, payers, employers, providers, and other health care workers and businesses; (2) the goals and objectives of these transactions; and (3) the experiences of patients and health care workers who have been directly affected after a facility or provider was a party to a health care transaction.

The agencies are particularly concerned with the following structures:

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- Transactions involving a private equity fund's acquisition of a health care provider or facility, such as a hospital, nursing home or specialty service provider.
  - Transactions conducted by health systems involving health care providers, facilities, or ancillary products or services.
  - Transactions conducted by private payers involving health care providers, pharmacies, facilities, or ancillary products or services.
  - Transactions involving assets other than stock and bonds, such as private credit funds and real estate investment trusts (REITs), such as when a REIT acquires the underlying real estate of a hospital or nursing home.
  - Transactions that would not be noticed by the FTC and DOJ under the Hart-Scott-Rodino Antitrust Improvements Act, which requires companies to file premerger notifications with these agencies for certain acquisitions.

The RFI also invites stakeholders to comment on actions that the three agencies can take to identify and address transactions that, as a result of market consolidation or corporate control issues, may adversely impact patients, public and private payers, providers, health care workers and support staff, and employers who provide health insurance to their employees.

## **Purpose of the RFI**

The RFI reflects the longstanding cross-agency goal of promoting transparency and competition in health care and acknowledges that increased competition in health care provider and payer markets can lead to innovation and enhanced patient care. The FTC, DOJ, and HHS have [previously](#) recognized the potentially negative influence that transactions can have on the health care industry, specifically noting that “anticompetitive acquisitions and practices can chill fair competition.” The agencies believe that public comment will only strengthen the agencies’ identification of enforcement priorities and future action aimed at “promoting and protecting competition in health care markets and ensuring appropriate access to quality, affordable healthcare items and services.”

Private equity in health care has been previously subject to governmental scrutiny, with the Centers for Medicare & Medicaid Services’ (CMS) new requirement that Medicare- and Medicaid-participating nursing homes disclose certain ownership, managerial and other information, and with several states implementing notice and approval requirements of certain health care transactions, as discussed in a recent ArentFox Schiff [article](#). It is most certain that governmental scrutiny of private equity and other health transactions will only continue to increase. Therefore, private equity firms and other corporations, health systems, and private payers already involved in or seeking to conduct health care transactions should be mindful of the growing attention from regulatory agencies, as there could be unified enforcement from the FTC, DOJ, and HHS in the future on transactions that may be perceived to harm the US health care system.

Public comments to the RFI must be submitted no later than May 6.

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