

Antitrust Division Signals Increased Focus on Private Equity in Health Care

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In a [recent speech](#), the Deputy Assistant Attorney General (DAAG) at the Department of Justice (DOJ) Antitrust Division stated that DOJ intends to closely examine certain private equity transactions; in particular, those in the health care industry. This speech continues a [trend of public statements by top antitrust officials emphasizing enhanced antitrust scrutiny of private equity transactions](#).

In the speech, given on June 3, 2022, DAAG Andrew Forman discussed DOJ's concerns with private equity transactions in health care, an industry in which the Antitrust Division "feels a unique duty to safeguard the competitive process." Forman said that DOJ views certain private equity transactions in health care as showing "an undue focus on short-term profits and aggressive cost-cutting."

Forman outlined four main ways that DOJ will increase scrutiny of private equity transactions in health care.

First, Forman reiterated the DOJ's focus on "roll-up" transactions. "Roll-up" strategies involve an acquirer that acquires multiple smaller players in an industry in order to create a single large player. Consistent with a recent interview by Assistant Attorney General Jonathan Kanter, Forman said that DOJ will look to increase scrutiny of these transactions because cumulatively, they can lead to "a substantial lessening of competition." In addition to evaluating traditional roll-up transactions more closely, DOJ will also analyze whether private equity transactions tend to create power "across a 'stack' of technology or other products/services."

Second, Forman said that DOJ will focus on incorporating "competition on the merits" into its analysis of private equity transactions. He explained that DOJ would consider whether private equity investments decrease a target company's incentive to act as "a maverick or a disruptor in health care markets" or otherwise contribute to a target company focusing more on short-term financial performance than on "advancing innovation or quality."

Third, Forman said that DOJ will focus on enforcing any interlocking directorate violations, which can occur when a private equity firm places representatives in leadership positions at competing companies. Forman said that DOJ is committed to taking "aggressive action" under Section 8 of the Clayton Act to counter private equity investments in competitors that create board interlocks.

Fourth, Forman stated that DOJ is concerned with unspecified "HSR filing deficiencies in the private equity space" and is evaluating steps to increase compliance.

In addition, outside of his discussion of private equity, Forman reiterated DOJ’s skepticism of remedies to allegedly anticompetitive transactions, noting that “it will be a steep hill to climb” for even DOJ’s preferred form of remedy—structural remedies—“because of risks such as determining the appropriate scope of the assets, whether those assets can thrive in other hands, ongoing entanglements, and buyer capabilities.”

Takeaway

Overall, these announcements should make private equity firms—in particular, those making health care investments—aware that antitrust enforcers will be reviewing their transactions, and their portfolio company board appointments, more closely. Private equity firms will want to involve antitrust counsel to ensure that they will not attract the attention of the antitrust enforcers’ increased scrutiny.

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