UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

July 2, 2024

VIA ELECTRONIC MAIL

The Honorable Thomas Umberg
Chair, Senate Judiciary Committee
California State Senate

The Honorable Scott Wilk
Vice-Chair, Senate Judiciary Committee
California State Senate

Re: AB-3129

Dear Senators Umberg and Wilk,

I understand that the California legislature is considering AB-3129, a bill that would give state enforcers greater ability to review and block private equity firms or hedge funds from purchasing healthcare facilities. Specifically, the bill requires that private equity groups and hedge funds seeking to purchase or acquire control over a healthcare facility or provider give advance notification to state officials. The bill also gives the Attorney General authority to permit or block such transactions, depending on whether they serve the public interest. Finally, the bill would reinforce certain aspects of California's state bar on the corporate practice of medicine and its state bar on noncompete agreements. In light of the FTC's experience with healthcare consolidation and private equity investment in healthcare markets, I write to support California's efforts to more closely monitor mergers and acquisitions within healthcare and to halt deals that undermine the availability and affordability of quality healthcare.

I. Experience of the FTC

The Federal Trade Commission's (FTC) mission includes promoting fair competition in healthcare markets that benefits patients, healthcare employees, and the public at large. To carry out this mission, Congress has charged the FTC with enforcing the Clayton Act, which prohibits mergers and acquisitions whose effect may be substantially to lessen competition or tend to create a monopoly.[1] The FTC also enforces the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Pursuant to its statutory mandate, the FTC investigates mergers and acquisitions, business practices, and other activities that may violate the Clayton Act or the FTC Act and brings enforcement actions to stop and remedy violations of these laws.

Vigorous competition among healthcare providers in an open marketplace provides patients with the benefits of lower prices, higher quality, greater access, innovation for goods and services, and

[1] *See* Clayton Act, 15 U.S.C. § 18.
[2] *See* Federal Trade Commission Act, 15 U.S.C. § 45.

improved wages and benefits for employees.[3] Challenging unlawful mergers and anticompetitive conduct in healthcare markets has long been a focus of FTC law enforcement, research, and advocacy. The FTC also has significant experience with evaluating the effects of efforts by state and local governments to enact legislative reforms affecting competition.

Federal antitrust enforcers are deploying existing authorities to address the risks posed by roll-ups and serial acquisitions in healthcare, including when they are driven by private equity firms whose tactics may undermine competition in healthcare markets. The 2023 Merger Guidelines make clear that to faithfully enforce the Clayton Act, we cannot turn a blind eye to serial acquisitions and just look at each deal in isolation. As the guidelines note, we will "consider individual acquisitions in light of the cumulative effect of related patterns or business strategies."[4] The Commission has also brought a case charging U.S. Anesthesia Partners, Inc. with undertaking an illegal roll-up scheme to monopolize anesthesiology markets in Texas.[5] Finally, the Commission has proposed updates to the Hart-Scott-Rodino (HSR) form that firms must file before certain large mergers and acquisitions occur. These proposed changes would require firms to provide expanded information on ownership, business rationales, and prior acquisitions, better equipping us to identify roll-up strategies relevant to mergers under agency review.[6]

The FTC is also working with agencies across the federal government to ensure that illegal roll ups do not evade antitrust scrutiny. Recently, the FTC, the Department of Justice, and the Department of Health and Human Services issued a Request for Information to understand how certain healthcare market transactions may increase consolidation while threatening patient health, worker safety, quality of care, and affordable health care for patients, employers, and taxpayers.[7] The FTC and the Department of Justice have also launched a joint inquiry to identify serial acquisitions and roll-up strategies that have led to consolidation and harmed competition.[8] The FTC and the Department of Health and Human Services have committed to exchange data and information to help antitrust enforcers identify potentially unlawful transactions that might

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[3] See Nat'l Soc. of Prof. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (The antitrust laws reflect "a legislative judgment that, ultimately, competition will produce not only lower prices, but also better goods and services . . .. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain - quality, service, safety, and durability- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023) [hereinafter "2023 Merger Guidelines"], https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf, Guideline 8.

[5] Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sep. 21, 2023), https://www.ftc.gov/news-events/news/pressreleases/2023/09/ftc-challenges-private-equity-firms-scheme-suppresscompetition-anesthesiology-practices-across.

[6] Premerger Notification Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (proposing amendments to 16 C.F.R. pts. 801, 803).

[7] Press Release, Fed. Trade Comm'n, Federal Trade Commission, the Department of Justice and the Department of Health and Human Services Launch Cross-Government Inquiry on Impact of Corporate Greed in Health Care (Mar. 5, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/federal-trade-commission-departmentjustice-department-health-human-services-launch-cross-government.

[8] Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy (May 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy.

otherwise sidestep review.[9] These types of collaborations between agencies can strengthen our respective individual efforts and ensure that the agencies are deploying every resource at their disposal to protect Americans from predatory tactics in healthcare markets.

II. Private Equity in the Healthcare Industry

Private equity firms have been significantly expanding into healthcare markets.[10] Given both empirical research and accounts from market participants, I have a growing concern about the public impact of private equity acquisitions of healthcare service providers such as outpatient clinics, nursing homes, and physician practices.[11] The FTC, alongside the Department of Justice, solicited public input as part of our efforts to update the Merger Guidelines. As part of that process, many healthcare professionals shared concern about needing to subordinate their own medical judgement to corporate decision-makers' profit motives at the expense of patient health.[12]

Private investments can sometimes be an important source of capital, especially for small to mid-sized companies that can benefit from the access that this financing provides. Some private equity firms take a long-term view and focus on creating real operational improvements to generate value in ways that provide broader benefits. However, some private equity firms take a different approach, in which they load up companies with enormous amounts of debt, strip valuable assets and sell them off to enrich the private equity owners, and pursue financial engineering tactics that leave the underlying firm weaker and worse off.[13] This approach

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[9] Press Release, FTC, 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.

[10] Private equity acquired physician practices sites increased from 816 across 119 metropolitan areas in 2012 to 5,779 across 307 metropolitan areas in 2021. Ola Abdelhadi, et al., Private-Equity Acquired Physician Practices and Market Penetration Increased Substantially, 2012-21, 43 Health Affairs No. 3, 354-62 (2024); *see also* Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Healthcare*, 76 STAN. L. REV. ___, 13-14 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4373557 ("Private equity investment in health care initially focused on facilities such as nursing homes and hospitals. In recent years, however, PE investment in physician practices has dramatically accelerated, as reduced returns from more conventional investment targets pushed private equity investors to seek more specialized providers. By one estimate, from 2013 to 2016, PE acquired 355 physician practices encompassing 1,426 locations and 5,714 physicians. The rate and volume of physician practice acquisitions have been increasing, from 75 deals in 2012 to 484 deals in 2021, a six-fold increase in that decade.").

[11] Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks at the Private Capital, Public Impact Workshop on Private Equity in Healthcare (Mar. 5, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.05-chair-khan-remarks-at-the-private-capital-public-impact-workshop-on-private-equity-in-healthcare.pdf.

[12] For example, one physician's assistant shared that private equity entry into health care had led to punishing hours and sharp decline in patient care—including shortages of basic drugs and supplies. Comment by Barbara Ticking, Regulations.gov, Draft Merger Guidelines for Public Comment, FTC-2023-0043-0306, https://www.regulations.gov/docket/FTC-2023-0043/comments. A doctor in Minnesota told us that years of consolidation in her field and the increasing focus on efficiency and profits have resulted in patients having to travel farther and farther distances for lower quality care. Comment by Elizabeth Slattery, FTC-2023-0043-0551. A registered nurse wrote to us about how she has seen mergers and private equity acquisitions in health care result in a "disenfranchisement" in the health care system that leads patients to forgo care. Comment by Sandy Whitley, FTC-2023-0043-0234.

[13] *See generally*, EILEEN APPELBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET (2014).

extracts, rather than generates value. In health care, this can have devastating consequences for patients, doctors, nurses, and the broader public.

III. The States' Role in Protecting Healthcare Markets and AB-3129

States have a key role to play in protecting the public from business practices in healthcare markets that undermine fair competition and harm the public. There is a "long history" of states "providing common-law and [state] statutory remedies against monopolies and unfair business practices."[14] States are powerful antitrust enforcers in their own right and can serve as force multipliers to federal enforcement efforts. States can also be critical partners in addressing the continued financialization of healthcare markets, and legislation like AB-3129 can be a valuable part of that effort.

Federal law requires that merging parties report certain large transactions to federal antitrust agencies before consummating the transaction and provides for a waiting period to allow review by the federal antitrust agencies prior to consummation.[15] Pre-merger reporting protects competition by providing law enforcement an opportunity to investigate and bring suit against problematic mergers before they lessen competition. However, when companies make a series of acquisitions that are not reported to authorities because they are individually below reporting thresholds, or make a combination of reported and unreported transactions, they can amass significant control over key product, service, or labor markets while potentially escaping pre-consummation review by antitrust enforcers. Although proposed changes to the HSR form[16] aim to improve visibility about filing parties' serial acquisitions or roll-up strategies through enhanced prior acquisition reporting, states' oversight can provide a crucial supplement to protect Americans from unlawful consolidation in healthcare markets.

By enacting pre-consummation oversight provisions that go beyond federal law, states can help identify and stop anticompetitive transactions in the healthcare sector that raise costs for patients, lower quality, and lead to worse pay and job quality for healthcare workers. I welcome and support the provisions in AB-3129 that expand California's pre-merger notification requirements by subjecting private equity related healthcare transactions to the same level of scrutiny that is currently required under California law for non-profits, and by expanding the Attorney General's authority to stop transactions that do not serve the public interest.[17] Since these provisions complement, rather than replace, federal antitrust authority, this bill could bolster enforcement as a whole.

Another way that states can address the financialization of healthcare is through re-invigorating state corporate practice of medicine (CPOM) laws, as AB-3129 seeks to do. The CPOM doctrine generally bars unlicensed lay entities from owning or controlling medical practices.[18] CPOM

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[14] Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 388 (2015) (quoting California v. ARC Am. Corp., 490 U.S. 91, 101 (1989)).

[15] In 2024, the minimum dollar jurisdictional threshold for reportable transactions is $119.5 million. Premerger Notification Office Staff, HSR Threshold Adjustments and Reportability for 2024 (Feb. 5, 2024), https://www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024.

[16] Premerger Notification Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (proposing amendments to 16 C.F.R. pts. 801, 803).

[17] *See* AB-3129, 2024 Leg. Sess., Reg. Sess. (Cal. 2024).

[18] Erin C. Fuse Brown & Mark A. Hall, Private Equity and the Corporatization of Healthcare, 76 STAN. L. REV. ___, 36 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4373557.

arose in response to concerns about the commercialization and financialization of medicine as well as concerns regarding conflicting interests between profit and patient care. Today, many states, including California, maintain a medical practice act that controls, to varying degrees, the ability of corporate lay entities to own or employ physicians and thereby control the practice of medicine.[19]

AB-3129 seeks to strengthen California's CPOM laws by prohibiting a private equity investor or hedge fund involved in any manner with a physician, psychiatric, or dental practice doing business in California, from "interfering with the professional judgment" of medical practitioners or "exercis[ing] control over" key elements of patient care, like what diagnostic tests, treatments, or referrals are appropriate.[20] I support efforts to ensure that medical practitioners can freely apply their independent professional judgment to provide quality care to their patients. Medical professionals should not be forced to subordinate their own medical judgment to corporate decision-makers' profit motives at the expense of patient health. I note that while AB-3129 pertains to private equity and hedge funds in particular, entities of all types—including non-profits—should not be permitted to interfere in the relationship between patients and their expert medical practitioners.

The ability of states to devise complementary solutions to pressing policy problems is a strength of our federal system. A renewed examination of CPOM laws like the one California is undertaking here may therefore be warranted, both to adapt these policies to today's healthcare markets and as a potential lever to temper the rapid pace of corporate takeovers in medicine.

AB-3129 also prohibits private equity funds and hedge funds from imposing "any contract . . . [that] explicitly or implicitly includ[e] any clause barring any provider in that practice from competing with that practice in the event of a termination or resignation."[21] On April 23, 2024, the FTC approved a final rule under the FTC Act banning non-compete clauses between employers and workers.[22] As the FTC explained in its findings regarding the final rule, noncompetes are pervasive in health care. One study found that 45% of physicians worked under a noncompete.[23] A study of noncompetes in physician markets found that such clauses lead to greater concentration and higher prices for consumers.[24] The Commission specifically found that noncompetes increase healthcare costs,[25] and that the rule will reduce healthcare costs by $74-$194 billion over the next decade in reduced spending on physician services.[26]

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[19] Jane M. Zhu, Hayden Rooke-Ley & Erin Fuse Brown, *A Doctrine in Name Only–Strengthening Prohibitions Against the Corporate Practice of Medicine*, 389 NEW ENGL. J. MED. 965, 965 (2023).
[20] AB-3129, 2024 Leg. Sess., Reg. Sess. (Cal. 2024) (as amended in the Sen. on June 27, 2024).
[21] *Id.*
[22] Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910), https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule.
[23] *Id.* at 38346 (*citing* Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J. HUM. RES. 1025, 1042 (2020)).
[24] *Id.* at 38398 (*citing* Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J. APPLIED ECON. 278 (2021)).
[25] *Id.* at 38447.
[26] *Id.* at 38470, 38478.

The final rule's its relation to state laws and its preservation of state authority is discussed in detail in Section VI of the final statement of basis and purpose.[27] As the Commission explains, states can continue to play a critical role in restricting the use of noncompetes. State restrictions are especially important with regard to employers or activities that are outside the FTC's jurisdiction—including, among others, certain healthcare non-profits.[28] Thus, state laws can fill gaps with respect to noncompetes that are beyond the FTC's jurisdiction.[29]

As the Commission explains in the statement of basis and purpose for the final rule, the rule does not preempt state laws that restrict noncompetes and do not conflict with it, including both broader state prohibitions and state prohibitions that are narrower in scope.[30] That is, state laws cannot authorize noncompetes that are prohibited by the rule, but states may, for example, continue to pursue enforcement actions under their laws prohibiting noncompetes even if the state law prohibits a narrower or broader subset of noncompetes than the FTC's rule.[31] In short, the FTC's rule does not negate the value of state laws that restrict noncompetes. Rather, such laws can play an important role in combatting harmful noncompetes.

Finally, AB-3129 prohibits private equity and hedge fund acquirers of healthcare facilities from barring providers in that practice from "disparaging, opining, or commenting on that practice in any manner as to any issues involving quality of care, utilization of care, ethical or professional challenges in the practice of medicine or dentistry, or revenue-increasing strategies employed by the private equity group or hedge fund."[32] Ensuring that financial investors cannot stifle medical professionals from speaking freely is critical, and I support the effort to ensure that these non-disparagement clauses are void and unenforceable.

IV. Conclusion

As Chair of the FTC, I am committed to using all available tools and authorities to protect people's access to affordable, high-quality health care. Doing so requires that we keep pace with how firms are acquiring and deploying monopoly power or undermining competition in the modern economy. Addressing continuing consolidation and increasing financialization of our healthcare system requires an all-hands-on-deck effort from federal and state policymakers and law enforcers. Thank you for your partnership in tackling these pressing issues.

Sincerely,

Lina M. Khan
Chair, Federal Trade Commission

[27] *See id*. at 38452–55*; see also id.* at 38504–05 (Relation to State Laws and Preservation of State Authority and Private Rights of Action, to be codified at 16 C.F.R. § 910.4).
[28] *See id.* at 38355–58; 38454; FTC, Noncompete Clause Rule: Business and Small Entity Compliance Guide 2, https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf.
[29] 89 Fed. Reg. at 38453–55*; see also id.* at 38449.
[30] *Id.* at 38452–54.
[31] *Id*. at 38453–55.
[32] AB-3129, 2024 Leg. Sess., Reg. Sess. (Cal. 2024) (as amended in the Sen. on June 27, 2024).