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Axinn Associates at the Antitrust Spring Meeting

The Future of Healthcare Mergers

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The Spring Meeting is the largest gathering of competition, consumer protection, and data privacy professionals globally, with lawyers, academics, economists, enforcers, journalists, and students from around the world. During the Spring Meeting, Axinn associates attended thought leadership panels to capture key insights.

Panelists on the "Future of Healthcare Mergers" panel, including representatives from the Federal Trade Commission (FTC) and California Attorney General's (AG) Antitrust Law Section, highlighted key merger control developments in the healthcare industry. Much of the discussion centered around the increased importance of commercial realities and systematic

evidence, especially in furtherance of less concrete arguments such as quality improvements, as well as the increasingly important role of private equity stakeholders. Key takeaways from this panel are below.

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2023 Merger Guidelines applauded for embracing healthcare realities. Panelists from both the FTC and California AG applauded the 2023 Merger Guidelines - which in February FTC Chair Andrew Ferguson unambiguously stated are here to stay - for closely reflecting the commercial realities in healthcare. FTC Acting Deputy Director Rohan Pai highlighted the new Guideline 2 (analytical framework for evaluating head-to-head competition between firms) and FTC's complaints as helpful guidance documents for FTC's view on healthcare mergers. California DOJ Supervising Deputy Attorney General Emilio Varanini, while enthusiastic about the 2023 Guidelines, also signaled a willingness to divert from the federal guidelines if commercial realities call for a different approach, particularly related to ensuring critical patient access to rural hospitals.

Courts are receptive to the "failing firm" defense in hospital mergers. Despite the FTC's successful track record of healthcare merger challenges, it suffered a loss in *FTC v. Novant*, the first healthcare merger challenge under the 2023 Merger Guidelines, which posed an interesting question about how imminent a hospital closure needs to be to succeed on a "failing firm" defense. The panel considered whether a "failing-firm" argument rooted in bolstering an underperforming health system and improving the quality and accessibility of care would find greater appeal in district or state courts than with the agencies, as conventional tribunals would likely include factfinders with an ear to the desires of the local community. Pai voiced his concern that the courts may not appreciate the long-term negative effects mergers might have on both pricing and access to healthcare. Further, the FTC is also interested in examining the sales process itself — whether potential buyers determined the assets unattractive —– to assess the credibility of a "failing firm" defense.

Parties need to provide concrete proof of improved quality in hospital mergers. It is often difficult to quantify merger-specific quality-of-care improvements in a proposed hospital merger. However, parties to a transaction should seek to have their claims of quality improvements backed by robust data-driven analysis, given the FTC can be skeptical of the merging parties' claim of merger-specific procompetitive benefits. In particular, Pai noted that where parties have engaged in multiple prior acquisitions, a lack of quality improvements in these past transactions diminishes the credibility of such commitments in present cases.

The same standards apply to private equity buyers as to non-PE buyers. In January 2025, FTC Chairman Andrew Ferguson issued a concurring statement in its settlement with Welsh Carson in FTC's litigation against U.S. Anesthesia Partners ("USAP"). (Welsh Carson is the private equity firm that controls USAP.) In the concurring statement, Chairman Ferguson stated that "[t]here is [] no reason for the Commission to single out private equity for special treatment." Pai confirmed the FTC's reluctance to treat PE buyers differently than more traditional buyers, commenting that all buyers are profit-maximizing.

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