PRIVATE EQUITY STAKEHOLDER PROJECT

September 18, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)
Washington, DC 20580
Via regulations.gov

RE: 2023 Draft Merger Guidelines

Dear Chair Khan and Commissioners,

The Private Equity Stakeholder Project (PESP) is a financial watchdog organization that seeks to bring transparency and accountability to the private equity industry for the benefit of impacted communities and investors.

We appreciate this opportunity to comment upon the Federal Trade Commission's (FTC) 2023 Draft Merger Guidelines (the "Guidelines").[1] PESP fully supports the Guidelines, as they would address many of the acquisition and consolidation practices that private equity firms employ that elude regulatory scrutiny.

For example, a common private equity investment strategy includes what are known as "roll-up mergers," where investment firms use an initial platform company to acquire and consolidate smaller firms in a discrete market.[2] Since the deal value of these individual acquisitions is usually much lower than the threshold requiring regulatory review, private equity firms have benefitted from loopholes that allow them to limit market competition in piecemeal fashion rather than through large transactions.[3]

Among other important facets of the Guidelines,[4] guaranteeing that (1) mergers do not entrench or extend a dominant position, (2) mergers do not further a trend toward concentration, (3) if a

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[1] *FTC and DOJ Seek Comment on Draft Merger Guidelines*, Federal Trade Commission, 19 July 2023, www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

[2] Moore, Josh. *What Is a Roll-up Strategy?*, MidStreet Mergers & Acquisitions, 26 Sept. 2022, www.midstreet.com/blog/what-is-a-roll-up-strategy.

[3] Matthews, Chris. "FTC's Khan Puts Private Equity 'on Notice' That Roll-up Strategies Could Be Illegal." *MarketWatch*, 19 July 2023, www.marketwatch.com/story/ftcs-khan-puts-private-equity-on-notice-that-roll-up-strategies-could-be-illegal-dcfd88b0.

[4] *See supra*, footnote 1.

merger is part of a series of multiple acquisitions, the agencies may examine the whole series, (4) mergers do not significantly increase concentration in highly concentrated markets, and (5) mergers do not otherwise substantially lessen competition or tend to create a monopoly, would enhance the ability of the FTC to monitor potentially elusive anti-competitive transactions, and therefore more effectively prevent them.

As the FTC finalizes the Guidelines in furtherance of the Biden Administration's priorities regarding enforcement of anti-competitive market behaviors,[5] the imminent Kroger-Albertsons merger presents an opportunity to utilize these guidelines (particularly the concerns related to increasing concentration in highly concentrated markets and lessening competition in favor of monopolies) to prevent potential market concentration by private equity. There is good reason to believe that this merger would harm competition, which could lead to increased prices and reduced quality for consumers, and/or lower wages for employees.

Kroger - Albertsons Merger
Kroger and Albertsons, which is owned by the private equity firm Cerberus Capital Management, announced their prospective merger in October 2022, which is expected to close in early 2024. A May 2023 memorandum by the Economic Policy Institute made the following determinations regarding the potential impacts of the merger:[6]

1. The merger will lower wages for 746,000 grocery store workers in over 50 metropolitan areas of the U.S. Increased concentration will suppress wages for all grocery store workers in affected cities—not only those workers currently employed by Kroger or Albertsons;

2. The total annual earnings of grocery store workers will fall by $334 million in affected metropolitan areas;

3. Because Kroger and Albertsons employ about one quarter of all grocery store employees, most of the wage losses caused by the merger will be a negative externality that falls on grocery store workers employed by other firms. On average, all grocery workers in affected markets will lose about $450 per year in wage income;

[5] "Protecting Competition through Updated Merger Guidelines." *Whitehouse.Gov*, The White House, 19 July 2023, www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines/.
[6] Zipperer, Ben. *Kroger-Albertsons Merger Will Harm Grocery Store Worker Wages: Workers Stand to Lose over $300 Million Annually*, Economic Policy Institute, 1 May 2023, www.epi.org/publication/kroger-albertsons-merger/.

4. Earnings losses will be smaller in areas with a stronger union presence or a tighter labor market. In areas with weaker worker bargaining power, workers will experience larger wage declines; and

5. The expected earnings losses are a pure windfall for the employers. In our analysis, wages fall solely because of a change in labor market power brought about by increased concentration. Quantitatively, this windfall represents a significant transfer of income from wages to profits: The decrease in wages is equivalent to 2% of Kroger and Albertsons' profits or three times the companies' CEO compensation.

The major benefactors of this merger will be private equity shareholders and C-suite executives. Cerberus, which has controlled Albertsons since 2006, is set to receive over $5 billion if the FTC approves the merger.[7] Pursuant to a filing with the Securities and Exchange Commission, Albertsons' CEO Vivek Sankaran stands to potentially receive up to $43 million, while the top 10 executives collectively could receive a staggering $146 million if they quit or are laid off following the merger.[8]

The Albertsons merger is a clear example of the destabilizing effects private equity can have on retail. After years of stripping cash from Albertsons,[9] the Cerberus-led private equity investor group will continue to profit – a cost that will be borne by workers and consumers unless the FTC moves to implement these guidelines and intervene in this transaction.

LifePoint Health - Kindred Healthcare Merger

For an example of how series of small transactions have led to market concentration, we would like to highlight the 2022 merger between LifePoint Health and Kindred Healthcare. Two of the largest hospital systems in the US are LifePoint Health and ScionHealth, which are both owned by private equity firm Apollo Global Management.

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[7] *Cerberus Capital Set for Big Payday from Kroger's $24.6bn Deal for Albertsons*, Private Equity Wire, 18 Oct. 2022, www.privateequitywire.co.uk/cerberus-capital-set-big-payday-krogers-246bn-deal-albertsons/;
Based on 151.8 million Albertsons shares owned, $34.10 per share offer price; Albertson's Schedule 4(a), SEC, 21 June, 2022, https://www.sec.gov/Archives/edgar/data/1646972/000114036122023648/ny20003207x1_def14a.htm https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx.

[8] Wilson, Bill. "Albertsons Top Execs Stand to Make up to $146M in Payouts If Merger Deal Goes Through." *Supermarket News*, 6 July 2023, www.supermarketnews.com/retail-financial/albertsons-top-execs-stand-make-146m-payouts-if-merger-deal-goes-through.

[9] SEC Form 10-K (2019), pg. 23 https://www.sec.gov/ix?doc=/Archives/edgar/data/1646972/000164697219000036/acify1810-k.htm

The companies are the result of a series of hospital acquisitions by Apollo, which in 2018 bought LifePoint and merged it with another hospital chain, RegionalCare Hospital Partners.[10] Then in December 2021 LifePoint acquired large acute care hospital chain Kindred Healthcare. As part of the transaction, LifePoint shifted some of the acquired facilities and some of its existing hospitals into a new company called ScionHealth, which is also controlled by Apollo.[11]

With LifePoint and Scion together, Apollo owns over 140 hospitals and 170 outpatient and post-acute facilities. However, this number could increase substantially; both LifePoint and Scion are growing quickly. For example, in May 2022 Scion announced that it was acquiring Texas-based Cornerstone Healthcare Group,[12] which operates 17 specialty hospitals, 8 senior living facilities, a behavioral health hospital in six states across the South.[13] In August 2022, LifePoint announced that it is acquiring psychiatric hospital chain Springstone,[14] which operates 18 behavioral health hospitals and 35 outpatient locations in nine states primarily in the South and Southwest.[15]

Although Apollo's acquisition of Kindred and subsequent creation of ScionHealth was approved by the FTC, Apollo's hospital ownership through LifePoint and Scion raises concerns about anticompetitive behavior. The two companies have separate boards of directors,[16] yet are owned by the same Apollo fund (Apollo Fund IX) and even listed together in the same row in Apollo's 2021 annual filing with the SEC.[17]

By spinning off some of Lifepoint's hospitals into Scion, Apollo Fund IX owns competing hospitals in particular geographic markets, such as Indianapolis, Austin, St. Louis, Louisville, and Dallas-Fort Worth. Apollo now has two vehicles with which it can make health system transactions in ways that could preclude antitrust scrutiny.

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[10] https://www.wsj.com/articles/lifepoint-health-agrees-to-apollo-buyout-1532347207?mod=article_inline

[11] "LifePoint Health Completes Kindred Healthcare Transaction," December 23, 2021, https://lifepointhealth.net/news/2021/12/23/lifepoint-health-completes-kindred-healthcare-transaction.

[12] ScionHealth, "ScionHealth Announces Definitive Agreement to Acquire Cornerstone Healthcare Group," May 12, 2022, https://www.prnewswire.com/news-releases/scionhealth-announces-definitive-agreement-to-acquire-cornerstone-healthcare-group-301546396.html.

[13] "Locations | Specialty Hospitals | Cornerstone Healthcare Group," Cornerstone Healthcare Group, accessed August 17, 2022, https://www.chghospitals.com/locations/.

[14] "Medical Properties Trust Announces Agreement for LifePoint Health to Acquire Majority Interest in Springstone," August 29, 2022, https://www.businesswire.com/news/home/20220828005040/en/Medical-Properties-Trust-Announces-Agreement-for-LifePoint-Health-to-Acquire-Majority-Interest-in-Springstone.

[15] "Springstone Locations | There's Hope. There's Help.," Springstone, Inc., accessed September 2, 2022, https://springstone.com/locations/.

[16] "LifePoint Health Completes Kindred Healthcare Transaction," December 23, 2021. https://lifepointhealth.net/news/2021/12/23/lifepoint-health-completes-kindred-healthcare-transaction.

[17] See pg. 15 of "Form 10-K (Filed February 25, 2022), Apollo Global Management." United States Securities and Exchange Commission, December 31, 2021. https://www.sec.gov/Archives/edgar/data/1411494/000141149422000014/apo-20211231.htm.

LifePoint's deal history, and ScionHealth's aggressive investment activity just a year after its formation, are examples of the type of merger activity that too often escapes regulatory scrutiny: a series of transactions that, when examined together, further a trend toward market concentration and lend themselves to creating and entrenching monopolies.

Conclusion

The dangers presented by private equity merger and acquisition strategies deserve investigation and scrutiny. The new guidelines will help address practices by investors that have long exploited loopholes in the current self-reporting structure. As the FTC pursues the directives of the Guidelines in its enforcement endeavors, we encourage it to create clear standards that deter would-be investors from exploiting regulatory loopholes, such as finalizing the changes to the Hart-Scott-Rodino Act (HSR) pre-merger filing form pursuant to FTC's recent proposed rule 16 CFR Parts 801 and 803; RIN 3084–AB46 (Premerger Notification; Reporting and Waiting Period Requirements). We also encourage the agency to finalize the Guidelines swiftly so that it can take effective action against current anti-competitive private equity transactions on the horizon. If you have any questions, please contact PESP Policy Director, Chris Noble, at chris.noble@pestakeholder.org.

Best,

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