



## ALERTS

### The Antitrust Investigator Will See You Now: What Healthcare And Pharma Should Expect In A World Of Enhanced Antitrust Scrutiny

March 8, 2024

#### Highlights

Healthcare entities should expect heightened government scrutiny of mergers, acquisitions, and business behaviors that could be construed as restricting competition in healthcare and pharma

The FTC, DOJ, and HHS have advanced a “whole-of-government approach,” including data sharing, cooperative enforcement, and enhanced antitrust training

Businesses should take note of practices that are likely to trigger investigatory and enforcement actions

According to media reports, the Department of Justice (DOJ) has opened an antitrust investigation into UnitedHealth Group, which is the owner of the United States’ largest health insurer, UnitedHealthcare. The focus of the inquiry appears to be the relationship between the UnitedHealthcare insurance plan and one of its health services divisions, Optum, and the potential impact on rivals and consumers.

While tech giants have grabbed most of the headlines when it comes to

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enhanced antitrust scrutiny, this new matter is the DOJ's second antitrust investigation into UnitedHealth Group in recent years, giving teeth to the administration's claim that it has an aggressive antitrust policy in the healthcare sector.

In another example of increased antitrust scrutiny, the Federal Trade Commission (FTC) [recently announced](#) a new initiative in partnership with the DOJ and Department of Health and Human Services (HHS) to address what they consider to be the effects of anticompetitive behavior in the healthcare and pharmaceutical spaces. According to the government, these new efforts are aimed at lowering consumer costs and will include "partnering on new initiatives which include a joint Request for Information to seek input on how private-equity and other corporations' control of health care is impacting Americans."

Although interagency cooperation is the focus of the recent push to ramp up antitrust investigations and enforcement, each agency will still spearhead its own regulatory activity.

## Federal Trade Commission

FTC Chair Lina Khan has made it clear that her agency will devote more resources to enforcement in the healthcare industry, and emphasized that "safeguarding fair competition and rooting out unlawful business practices in health care markets is a top priority for the FTC." In furtherance of these priorities, the commission has recently taken the following actions:

- Orange Book Policy: The FTC challenged more than 100 patents held by pharmaceutical companies that they claim are inaccurately or improperly listed in the FDA's Orange Book. The commission also released a [policy statement](#) explaining its renewed focus on Orange Book infractions.
- Proposed Non-compete Rule: The FTC [presented a new rule](#) that would place a ban on non-compete clauses in employee contracts.

## U.S. Department of Justice

Jonathan Kanter, Assistant Attorney General of the DOJ's Antitrust Division, highlighted the division's emphasis on the healthcare space when he said, "we are committed to weeding out anticompetitive practices and market consolidation that hinder Americans' access to quality care at affordable rates, or deprive health care workers of fair wages and opportunity." The following are just a few examples of how the DOJ has implemented this renewed focus:

- Criminal Penalties: Recently, the DOJ's Antitrust Division [successfully secured a deferred prosecution agreement](#) against Teva Pharmaceuticals, obtaining the largest monetary penalty ever (over \$200 million) against a purely domestic producer that was allegedly operating an antitrust cartel.
- Blocked Mergers: The Antitrust Division [filed a suit](#) to stop Aon plc's \$30 billion proposal to acquire Willis Towers Watson, two of the three largest brokers of health insurance and retirement benefits consulting. The companies later ceased their pursuit of the merger.



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## U.S. Department of Health and Human Services

HHS Secretary Xavier Becerra made his agency's priorities clear when he recently stated that "the Biden-Harris Administration remains laser-focused on increasing access to high-quality, affordable health care for all Americans, like by making hearing aids available for sale over the counter and lowering prescription drug costs through the Inflation Reduction Act." The department's initiatives have included:

- **Ownership Transparency:** For the first time, HHS, via the Centers for Medicare & Medicaid Services, made ownership data available on federal qualified health centers and rural health clinics on [data.cms.gov](https://data.cms.gov). HHS hopes the release of this data will help catalyze enforcement actions by identifying common ownership.
- **Medicare Advantage Marketing:** HHS also [announced new efforts](#) to crack down on what it considers "predatory marketing" that seeks to steer patients towards Medicare Advantage plans that "may not best meet their needs."

### Takeaways

In light of the government's renewed focus on increased competition, expanded enforcement actions, access to quality care, more affordable services and products, and transparency of ownership in the healthcare and pharmaceutical industries, legal and compliance departments should consider being proactive about conducting thorough reviews of current practices. This is particularly true for mergers and acquisitions, competitive strategies, and pricing decisions, which are the business activities most likely to conflict with these recently energized regulatory bodies. Even healthcare providers with stellar compliance programs should expect to receive more frequent and targeted requests for information from enforcement authorities about their business partners, payors, and marketing practices.

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