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Via www.regulations.gov

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Re: Request for Information on Consolidation in Health Care[1]

Dear Assistant Attorney General Kanter, Chair Khan, and Secretary Becerra,

The National Consumer Law Center (on behalf of its low-income clients) submits the following comments[2] in response to the Request for Information on Consolidation in Health Care issued by the Department of Justice (DOJ), Department of Health and Human Services (HHS), and the Federal Trade Commission (FTC). We appreciate that the DOJ, HHS, and FTC are engaging in an extensive examination of the issues raised by health care consolidation.

We join coalition comments authored by Americans for Financial Reform, Community Catalyst, and Private Equity Stakeholder Project. Additionally, we write separately here to highlight three issues related to private equity and health care:

1. Private equity in carceral healthcare systems;
2. Private equity in long-term and nursing home care; and
3. Private equity ownership of emergency department staffing companies and access to hospital financial assistance.

I. Private Equity in Carceral Healthcare Systems

[1] Department of Justice, Department of Health and Human Services, and the Federal Trade Commission Request for Information on Consolidation in Health Care, Docket No. FTC-2024-0022, *available at:* https://www.regulations.gov/document/FTC-2024-0022-0001.
[2] These comments were written by Anna Anderson, Jenifer Bosco, and April Kuehnhoff. Abby Shafroth of NCLC provided editorial oversight.

The DOJ should cease contracting with private equity companies for healthcare, food, commissary, and other services necessary to maintaining health in correctional facilities.

Prisons and jails are big business for private equity investors. Every year, nearly 4,000 private corporations make approximately $80 billion on contracts with prison and jail systems.[3] Despite moving away from privately managed federal prisons, the federal government still relies on private equity-backed contractors to provide a myriad of essential services, including healthcare, food, and commissaries,[4] in federal prisons and detention centers. Corporate profiteering in this space results in exorbitant markups on necessary commissary items, such as medicine and hygiene products, and lower quality of care for nutrition and medical services. Incarcerated people are captive consumers; they have no other option but to rely on these exploitative companies.[5]

Prisons rarely provide adequate levels of free hygiene products, and many incarcerated people face out-of-pocket costs for medications and medical devices, such as eyeglasses, knee braces, and prosthetic limbs. Even a few aspirins or allergy pills can be extremely costly to incarcerated people, where markups on food, hygiene, and medical products sold by private equity-backed commissaries can be as high as 600%.[6] Furthermore, when private equity companies manage both the prison cafeteria and commissary, they are incentivized to boost commissary revenues by reducing the amount and quality of food available in the cafeteria— pushing individuals to purchase food products at inflated prices to supplement their diet.[7]

While these products are often necessary to maintain health, their cost can put them out of reach. Private equity companies managing prison commissary systems have made record profits on commissary sales despite rising costs from inflation.[8] These

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[3] Color of Change & Worth Rises, *Policy Blueprint For Ending Carceral Profiteering* (Dec. 27, 2022).
[4] A "commissary" is a retail outlet found in many correctional facilities where incarcerated people can buy necessary hygiene products and over-the-counter medications; purchase basic supplies like paper, batteries, and small appliances; and supplement the low-quality, too-small, and possibly spoiled or rotten food served in the cafeteria. *See* Ariel Nelson & Stephen Raher, *Captive Consumers: How government agencies and private companies trap and profit off incarcerated people and their loved ones*, Inquest (Mar. 19, 2022).
[5] The Department of Justice recently recognized this problem in the context of prison phone communications in its comments to the Federal Communication Commission's rulemaking entitled "Incarcerated People's Communications Services, Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services." *See* US DOJ, Ex parte submission of the DOJ, Comments (Apr. 29, 2024).
[6] Elizabeth Weill-Greenberg, Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, The Appeal (Apr. 17, 2024).
[7] Private Equity Stakeholder Project, *HIG Capital's Prison Food and Commissary Store Racket* (Oct. 2019).
[8] Alexandra Arriaga, The Marshall Project, *Why Inflation Hikes Are Even Worse Behind Bars* (May 2, 2023).

exploitative fees and markups limit access to these necessary items and lead to significant financial hardships being imposed on low-income individuals, and the families and communities that often financially support them.[9]

Private equity firms in the carceral healthcare space focus on maximizing profits and have no financial incentive to spend more to ensure that incarcerated individuals receive high quality of care. Hundreds of lawsuits, complaints, and news stories have documented how these companies' financial motives have led to devastating consequences for justice-impacted individuals, including horrific deaths.[10] For example, the largest prison health contractor in the country is Wellpath. Wellpath is owned by a private equity company and provides medical services to jails and prisons in at least 34 states.[11] Wellpath has faced numerous accusations regarding improper denials of care, excessive delays in providing care, failure to provide adequate staffing in prison healthcare systems, acting in a negligent manner by failing to follow physicians' orders and treatment plans, and more.[12] Corizon Health, another private-equity-backed prison healthcare contractor that operates across the country, has also been accused numerous times of failing to provide and adequately oversee medical care, leading to worsening health outcomes, avoidable deaths, and even sexual assaults perpetrated by its medical providers.[13]

These firms also appear to be looking to increase their hold on these consumers even after they are released from incarceration. Recent reporting has shown that private equity firms are beginning to invest in specialty nursing homes to house newly released incarcerated people who need long-term care but cannot secure placement in other facilities due to their criminal records.[14] As discussed in more detail in the section below,

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[9] U.S. Department of Justice, Office of Access to Justice, *Access to Justice Spotlight: Fines and Fees* (Nov. 1 2023).
[10] Beth Schwartzapfel and Jimmy Jenkins, The Marshall Project, *Arizona Privatized Prison Health Care to Save Money. But at What Cost?* (Oct. 31, 2021); Color of Change & Worth Rises, *Policy Blueprint For Ending Carceral Profiteering* (Dec. 27, 2022); Nicole Einbinder and Dakin Campbell, *Hidden Investors Took Over Corizon Health, A Leading Prison Healthcare Company. Then They Deployed the Texas Two-Step*, Business Insider (Aug. 21, 2023).
[11] Letter from Senators Warren, Durbin, et al. to Wellpath at 1, Dec. 18, 2023, https://www.warren.senate.gov/imo/media/doc/2023.12.18%20Wellpath%20letter1.pdf.
[12] Letter from Senators Warren, Durbin, et al. to Wellpath at 1, Dec. 18, 2023, https://www.warren.senate.gov/imo/media/doc/2023.12.18%20Wellpath%20letter1.pdf; Michael Fenne, Private Equity Stakeholder Project, *Prison Healthcare Companies, But Care Issues Continue* (Nov. 2022).
[13] Nicole Einbinder and Dakin Campbell, *Hidden Investors Took Over Corizon Health, A Leading Prison Healthcare Company. Then They Deployed the Texas Two-Step*, Business Insider (Aug. 21, 2023); Samantha Max, *Women Held at Rikers Say They Were Sexually Assaulted During Routine Medical Exams*, Gothamist (Apr. 24, 2024).
[14] Nicole Einbinder and Dakin Campbell, *Hidden Investors Took Over Corizon Health, A Leading Prison Healthcare Company. Then They Deployed the Texas Two-Step*, Business Insider (Aug. 21, 2023); Hope Corrigan, *Why Elderly Incarcerated People Struggle to Find Care After Prison*, The Appeal (Jul. 18, 2022).

private equity's increasing role in the nursing home and long-term care industry is leading to worse outcomes for patients and families. As a result, these prison-to-nursing home pipelines are just another concerning example of the lucrative opportunities private equity companies are seizing on to further exploit justice-involved individuals in need of critical care.

Holding these companies accountable for their actions is getting more difficult. Private equity investors use bankruptcy law to attempt to evade liability and routinely rebrand prison healthcare companies to shield past failures from the public without enacting any meaningful changes in practices.[15] Corizon Health, for example, is currently attempting to declare bankruptcy only as to its liability-holding shell company while shielding its assets and revenue and rebranding its operations as YesCare to limit its liability for claims filed by justice-impacted individuals, hospitals, and prison administrators.[16] Even when governments want to cancel contracts with these companies, they are often unable to do so without being forced to select another equally problematic company to replace them.[17]

While the original goal of contracting with these companies may have been to save public money, increasing evidence indicates that privatization of prison and jail healthcare systems leads to increased costs for governments while also resulting in declining health outcomes for people who are incarcerated.[18]

Federal and state governments should investigate and reconsider the role of private equity in correctional facilities. At the very least, the DOJ should eliminate the use of private equity-backed contractors for critical services, such as healthcare, food, and commissary, in the federal correctional system and should provide incentives for state prisons and jails to eliminate private equity from their correctional systems as well.

II. Private Equity in Long-Term & Nursing Home Care

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[15] Marsha McLeod, *The Private Option*, The Atlantic (Sep. 12, 2019); *Hidden Investors Took Over Corizon Health, A Leading Prison Healthcare Company. Then They Deployed the Texas Two-Step*, Business Insider (Aug. 21, 2023); Michael Fenne, Private Equity Stakeholder Project, *Prison Healthcare Companies, But Care Issues Continue* (Nov. 2022).

[16] Nicole Einbinder and Dakin Campbell, *Hidden Investors Took Over Corizon Health, A Leading Prison Healthcare Company. Then They Deployed the Texas Two-Step*, Business Insider (Aug. 21, 2023).

[17] Marsha McLeod, *The Private Option*, The Atlantic (Sep. 12, 2019); *Hidden Investors Took Over Corizon Health, A Leading Prison Healthcare Company. Then They Deployed the Texas Two-Step*, Business Insider (Aug. 21, 2023); Michael Fenne, Private Equity Stakeholder Project, *Prison Healthcare Companies, But Care Issues Continue* (Nov. 2022).

[18] Beth Schwartzapfel and Jimmy Jenkins, The Marshall Project, *Arizona Privatized Prison Health Care to Save Money. But at What Cost?* (Oct. 31, 2021); The Pew Charitable Trusts, *Prison Health Care: Costs and Quality. How and Why States Strive for High-performing Systems* (Oct. 18, 2017).

HHS and FTC should use investigative, enforcement, and regulatory authority to address problems with admission agreements, billing practices, and collection activities of private-equity-owned nursing homes, long-term care, and assisted living facilities.

Private equity firms are increasingly investing in nursing homes, long-term care, and assisted living facilities, and investments in these areas are expected to grow to $240 billion by 2025.[19] In addition to problematic care outcomes, the entry of private equity investors is helping to drive an aggressive profit orientation that includes shockingly abusive collection tactics and billing practices. Collection activity in the long-term care industry is not just aimed at the residents, it is often against family members or other caregivers who help the residents get admitted to these facilities.[20]

Families and caregivers bear tremendous stress as they struggle to care for ailing loved ones. Family members rarely pay close attention to the fine print of nursing home admission agreements that create the obligations of "responsible parties" and make the residents and their families responsible for applying for Medicare or Medicaid nursing home benefits.[21] These unseen contractual terms lead to nursing homes and other facilities later suing families and friends for the residents' bills—bills that can exceed $100,000.[22] Families are pressured into paying the debts out of their own pockets to avoid the loss of the residents' desperately needed care.

In 2022, HHS, through the Centers for Medicare and Medicaid Services (CMS), and the Consumer Financial Protection Bureau (CFPB) issued a joint letter to the nursing home industry affirming that the requirement of third-party guarantees of payment as a condition of admission to a nursing home was a violation of the Nursing Home Reform Act.[23] The letter also found that attempts to collect nursing home debts from third parties and caregivers may also violate the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.[24] Despite these findings, illegal collection actions in the nursing home industry are continuing.

HHS and the FTC should use their investigative, enforcement, and regulatory powers to tackle the growing problem of private equity in the nursing home, long-term care, and

[19] Atul Gupta, Sabrina T. Howell, Constantine Yannelis, Abhinav Gupta, National Bureau of Economic Research, *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes*, (Feb. 2021, revised Aug. 2023).
[20] Consumer Financial Protection Bureau, *Issue Spotlight: Nursing Home Debt Collection* (Sep. 8, 2022).
[21] Anna Anderson, Eric Carlson, National Consumer Law Center, Justice in Aging, FAQs: Can a Nursing Home Force a Resident's Family and Friends to Pay the Bill? (Sep. 27, 2023).
[22] Noam N. Levy, *Nursing Homes Are Suing the Friends and Family of Residents to Collect Debts*, KFF Health News (July 28, 2022).
[23] CMS & CFPB Joint Letter to Nursing Facilities and Debt Collectors (Sep. 8, 2022).
[24] *Id.*

assisted living industry. Using investigative, enforcement, and regulatory powers, HHS and the FTC should focus on:

(1) improper billing practices by nursing homes, long-term care, and assisted living facilities owned or managed by private equity companies;

(2) illegal, unfair, and deceptive admission agreements and contracts for services in nursing homes, long-term care, and assisted living facilities owned or managed by private equity companies; and

(3) unfair collection actions against residents and third parties by nursing home, long-term care, and assisted living facilities owned or managed by private equity firms.

HHS and the FTC should also work with other government agencies, including the CFPB, to take enforcement action against entities that violate the Nursing Home Reform Act and other consumer protections, such as the Fair Debt Collection Practices and Fair Credit Reporting Act. Finally, HHS and the FTC should also make recommendations to Congress for legislative action to address private equity issues in nursing homes, long-term care, and assisted living facilities.

III. Private Equity Ownership of Emergency Department Staffing Companies and Access to Hospital Financial Assistance

The FTC should investigate unfair and deceptive practices by non-profit hospitals that attempt to evade their obligations to provide financial assistance for eligible low-income patients by outsourcing the functioning of emergency and other departments to private equity-backed companies.

In response to Question 5 of the RFI ("Other Impacts: Have there been other impacts from health care market transactions that you would like to report to the agencies?"), we note that private equity-backed companies such as Envision Healthcare and TeamHealth have essentially operated many hospital emergency rooms throughout the country for several years, including emergency departments located in non-profit hospitals.

Non-profit hospitals must comply with Internal Revenue Service (IRS) rules pursuant to 26 CFR 1.501(r) in order to keep their tax-exempt status. These rules require that nonprofit hospitals provide financial assistance to low-income patients. Yet hospitals that contract with emergency department staffing companies frequently exempt their outsourced emergency departments and other departments such as anesthesiology from their hospitals' financial assistance policies.[25] As a result, low-income patients who would otherwise be eligible for financial assistance at their local non-profit hospital would be denied any financial assistance for an emergency room visit and may later receive significant medical bills for their emergency healthcare.

The National Consumer Law Center and Justice Catalyst previously raised this issue with the IRS.[26] To the best of our knowledge, the exemption of private equity-backed emergency services from financial assistance policies has continued, and continues to exacerbate medical debt burdens on low-income households.

Thank you for seeking information about this important topic. For more information about these comments or to discuss this issue, please contact April Kuehnhoff at akuehnhoff@nclc.org.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)

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[25] See, e.g., Memorial Hermann, Financial Assistance Program, "Providers Not Covered by Financial Assistance Program, at https://www.memorialhermann.org/patients-visitors/patient-services/financial-care/financial-assistance-program (viewed May 24, 2024); Orlando Health, Financial Assistance Program, at https://www.orlandohealth.com/patients-and-visitors/patient-financial-resources/pay-your-bill/financial-assistance (viewed May 24, 2024) ("Participating Physicians – All Orlando Health employed physicians must follow Orlando Health's Financial Assistance Policy (FAP). Contracted, Community/Private providers are not required to participate in Orlando Health's financial assistance program.").

[26] Justice Catalyst and National Consumer Law Center, Letter to the IRS (May 8, 2020).