UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION Plaintiff, v. LOUISIANA CHILDREN'S MEDICAL CENTER and HCA HEALTHCARE, INC. Defendants.	CIVIL ACTION NO. 23-1305 c/w 23-311 c/w 23-1890 REF: 23-1890 SECTION I

INTERVENOR, THE STATE OF LOUISIANA'S MEMORANDUM IN OPPOSITION TO FEDERAL TRADE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On July 18, 2023, the Federal Trade Commission ("FTC") filed a Motion for Summary Judgment ("FTC's Motion") asserting that its action to enforce provisions of the Clayton Antitrust Act of 1914, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), presents a narrow legal question. The narrow question presented by the FTC's motion is whether the agency is authorized to obstruct and delay a transaction consummated between Louisiana Children's Medical Center ("LCMC") and HCA Healthcare, Inc. ("HCA") under terms and conditions imposed by the State of Louisiana ("State") pursuant to a certificate of public advantage issued by the State's Attorney General after determining that Louisiana citizens would substantially benefit from the merger of LCMC and HCA.

As is plainly evident from decades of Supreme Court precedent refining the intricacies of the state action immunity doctrine, which shields both state actors and private parties from antitrust

scrutiny, the answer is no. The FTC has made no showing that would justify a grant of injunctive relief, and the agency acknowledges that there are alternate methods of obtaining the same relief without the necessity of an injunction. The FTC's Motion should therefore be denied for the reasons set forth below.

A. The FTC Does Not Provide Any Evidence Suggesting that Congress Intended the HSR Act to Displace State Regulation

Pervasive throughout the FTC's Motion is the wholly unsupported assertion that Congress intended the HSR Act to apply to "all acquisitions … that exceed certain monetary thresholds unless a specific, enumerated exemption" applies." [Doc. 71-1] at p. 1; *see also id.* at p. 4 ("[t]he HSR Act applies to all mergers and acquisitions except as expressly prescribed by the statute or federal regulations"); *id.* at p. 6 ("all companies engaging in transactions meeting certain financial thresholds must notify the federal government before they close the transaction unless it falls within an enumerated exception"); *id.* at p. 13 ("[t]he HSR Act's text leaves no room for court-created exemptions"); *id.* at p. 15 ("notification is required for *all non-exempt transactions and entities* that meet the thresholds") (emphasis in original). The FTC's assertion that even state action is subject to the HSR Act's provisions misunderstands the nature of the doctrine. As the Supreme Court has repeatedly stated for more over 80 years, Congress did not express any intent to displace the states' regulation of their own commerce when enacting the federal antitrust laws, and any undertaking that qualifies as "state action" is therefore outside the scope of these laws.

The FTC's Motion fails to identify any "straightforward" provision of the HSR Act, or anything in the law's legislative history, that would suggest out of all of the federal antitrust laws, Congress intended only the HSR Act to restrain state action. *See Parker,* 317 U.S. at 341 ("[t]here is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history"). As with the Sherman Act, the HSR Act "makes no mention of the state as such, and gives no hint

that it was intended to restrain state action or official action directed by a state." *Id.* at 351. Thus, as the Supreme Court noted in *Parker* with respect to the Sherman Act, there is absolutely nothing in the language of the HSR Act or in its legislative history "which suggests that its purpose was to restrain a state or its officers or agents from activities directed by the legislature." *Id.* at 350-351.

What is more, the legislative history of the HSR Act directly contradicts the FTC's assertion that Congress intended the law to apply to "all companies" and "all transactions" except those falling within one of the "enumerated exemptions" set forth in 15 U.S.C. § 18a(c). The Senate Judiciary Committee Report generated in connection with the HSR Act's passage clearly and unambiguously states that ***"[m]any transactions that are literally subject to the reporting requirements are not within the intent of Section 7 [of the HSR Act]***." S. Rep. 94-803 at 68 (emphasis added). In addition, while the HSR Act delegated rulemaking authority to the FTC and US DOJ, the legislative history of the law further establishes that this delegation was not intended to allow the antitrust authorities to promulgate rules in a manner that derogates from Congressional intent, and that such rules must be accompanied by "notice and submission of views" pursuant to the Federal Administrative Procedure Act. *See* S. Rep. No. 94-803 at 67.

The HSR Act's legislative history also indicates that Congress contemplated only the promulgation of rules exempting additional "classes of persons," "businesses," or "transactions" from the HSR Act's pre-merger notification requirements, and contains no reference suggesting that rulemaking could be used to regulate State action. *Id.* at 67-68. The history does, however, reflect Congress' expectation that the FTC would strike a "proper balance" between "the needs of effective enforcement of the law ***and the need to avoid burdensome notification requirements or fruitless delays.***" S. Rep. 94-803 at 67 (emphasis added). The imposition of burdensome notification requirements and fruitless delays is the *only* goal the FTC seeks to achieve through

this action, as it has not identified any legally dubious characteristic of the COPA transaction at issue, and has not alleged that LCMC and HCA's merger is anticompetitive or that the State's ongoing supervision of the transaction is deficient in any way.

While the FTC's Motion asserts that applying *Parker's* rationale to the HSR Act would "violate basic principles of statutory construction," this is simply untrue, and the case law cited by the FTC does not indicate otherwise. *See* [Doc. 71-1] at p. 13. This can readily be seen in the FTC's citation of the following language from *Hillman v. Maretta,* 569 U.S. 483, 496 (2013) in support of its argument, which was quoted from *Andrus v. Glover Constr. Co.,* 466 U.S. 608, 616-617 (1980):

> [w]e have explained that '[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, ***in the absence of evidence of a contrary legislative intent***.'"

(emphasis added). As demonstrated above, there is indisputable evidence that the legislature did not intend the HSR Act to "leave no room" for application of the state action immunity doctrine or other exemptions not identified in 15 U.S.C. § 18a(c). Instead, the legislative history plainly indicates that Congress did <u>not</u> intend for the HSR Act's premerger notification requirements to apply to all transactions "literally" within the scope of the statute's language, and that a literal interpretation of this language would subject "many transactions" to reporting requirements that Congress never intended.

Furthermore, the FTC completely ignores two other basic principles of statutory construction that, when applied to the HSR Act, unmistakably indicate that Congress intended the state action immunity doctrine to apply to this law in the same manner as the other federal antitrust laws. First, at the time Congress enacted the HSR Act, the state action immunity doctrine had been well-established for decades, and Congress is presumed to be knowledgeable about existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 176

(1988); *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990); *see also Mack v. Yost,* 63 F.4th 211, 222 (3d Cir. 2023) ("a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts"). Second, when Congress takes no overt action to disturb a consistent judicial interpretation of a statute, this serves as an indication that Congress acquiesces in, and apparently affirms, that interpretation. *Monessen Sw. Ry. Co. v. Morgan,* 486 U.S. 330, 338, 108 S. Ct. 1837, 1844, 100 L. Ed. 2d 349 (1988); *see also Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 55, n. 18 ("the logical result of [the dissent's] reasoning would require us to overrule *Parker v. Brown* and its progeny … [a]fter over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine").

At all times since the *Parker* decision, the Supreme Court has suggested that Congress *could* subject state action to the federal antitrust laws, if it chooses to do so. *See e.g. Parker,* 317 U.S. at 350 ("[w]e may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce"). Even so, the Supreme Court has also consistently stated that it will not find Congressional intent to displace a state's ability to regulate its own commerce in the absence of an affirmative expression of such intent. *See Southern Motor Carriers,* 471 U.S. at 56 ("the [*Parker*] Court refused to find in the Sherman Act 'an unexpressed purpose to nullify a state's control over its officers and agents…'"). As Congress has never expressly stated such a purpose in the text or legislative history of any antitrust law—including the HSR Act—the state law immunity doctrine remains applicable to all federal antitrust laws.

B. The FTC's Suit Seeks an Unprecedented Expansion of the Agency's Authority

In a striking display of disingenuousness, the FTC asserts that application of the state action immunity doctrine to its claims for injunctive relief would somehow create a "new implied

exemption" to federal antitrust laws. [Doc. 71-1] at p. 6. Building upon this inherently flawed premise, the FTC's Motion also asserts that the agency is entitled to summary judgment because application of the state action immunity doctrine in an action to enforce the HSR Act is "unprecedented." *Id.* at p. 2. Though it is undoubtedly aware why "no court has exempted an entity from the HSR Act's filing requirements" on the basis of the state action immunity doctrine, the FTC fails to provide any explanation, allowing the statements in its motion to wrongfully suggest that other courts *have* considered the issue and rejected the doctrine's applicability in suits to enforce the provisions of the HSR Act. *Id.*

In truth, no court has ever addressed the applicability of the state action immunity doctrine in an action to enforce the HSR Act, because the FTC has never before sought to enforce the HSR Act's premerger notification requirements in the context of a merger undertaken pursuant to a state's COPA law or other regulatory scheme. While this basic fact appears to elude the FTC, it also appears to be plainly evident to antitrust practitioners and commentators:

> The FTC has brought **one failure to file case** where it alleged that the parties knew the transaction was subject to the HSR Act, but flouted their HSR Act obligations by failing to report and consummating their transaction without a cognizable justification or exemption (see Complaint, *FTC. v. Louisiana Children's Medical Center and HCA Healthcare, Inc.*, No. 1:23-cv-01103 (April 20, 2023)). The parties alleged that a Certificate of Public Advantage (COPA) granted to them under Louisiana state law exempted the transaction from the HSR Act. The FTC stated that no such exemption existed in the text of the HSR Act, one had not been recognized, and no interpretation of the HSR Act exempted the parties from filing where those parties received a similar certificate.

HSR Act Violations: Failure to Make an HSR Filing, Practical Law Practice Note 3-521-4631 (emphasis added).

Thus, while the FTC's representation that no court has applied the state action immunity doctrine in the context of an HSR Act enforcement action is technically correct, it is equally true that no court has rejected the doctrine's application in an action to enforce the HSR Act. As stated

in the State's Motion for Summary Judgment, other scholars have noted that the FTC and US DOJ exercise a measure of control over the kinds of antitrust cases and controversies the judiciary sees, since these agencies generally choose when to enforce the federal antitrust laws. *See Antitrust Federalism, Preemption, and Judge-Made Law,* 133 Harv. L. Rev. 2557, 2575 (2020).

Despite the FTC's suggestion otherwise, the absence of any court decision squarely addressing issues such as those presented in this case in no way indicates that other entities in situations similar to HCA and LCMC regularly file the premerger notifications contemplated in the HSR Act. The sole reason that no court has previously considered the application of the state action immunity doctrine to an FTC action to enforce the HSR Act is because the FTC has never before taken the position that parties to a COPA transaction are required to make such filings. This is evident not only from the complete lack of judicial decisions, but also from the absence of any regulation, policy statement, correspondence, or other evidence demonstrating the FTC has previously taken this position in any context or forum at any time whatsoever. This is true even though the FTC has been aware for well over a decade of the prevailing belief among attorneys and consultants specializing in hospital mergers and acquisitions that no HSR premerger notification is required for transactions subject to the state action immunity doctrine.

In its briefing to the Supreme Court in *F.T.C. v. Phoebe Putney Health Care System, Inc.,* the FTC memorialized its awareness that regulated entities understood that the conferral of state action immunity would nullify the HSR Act's pre-merger notification requirements. *See Federal Trade Commission v. Phoebe Putney Health System, Inc*., No. 11-1160, Brief for the Petitioner, 2012 WL 3613363 at *12 (U.S. 8/20/2012) ("PPHS's consultant described this purchase-and-lease mechanism as a 'proven format,' to 'avoid any antitrust Hart-Scott-Rodino Pre-Merger Notification filing,' and to engineer 'attachment of the state action immunity…'"); Joint Appendix,

2012 WL 6947832 at *149-*150 ("Phoebe will structure the acquisition of Palmyra in the same manner that Columbus Regional Healthcare System, Inc., did to avoid any Hart-Scott Rodino Pre-Merger Notification filing or any antitrust enforcement action…"). While the FTC ultimately did file suit against Phoebe Putney contesting the hospital's merger with Palmyra, the agency's enforcement action did not include any claim that the hospitals violated the HSR Act by failing to file a pre-merger notification or not observing the law's waiting period requirements.

The widespread belief in the hospital industry that opting for state regulation of a hospital merger would obviate the need to submit an HSR Act premerger notification with the FTC arose from the agency's longstanding policy to avoid enforcement actions in circumstances potentially implicating state action immunity. Long before the merger between Phoebe Putney and Palmyra, in response to correspondence from a United States Senator seeking information to evaluate a complaint from the hospital industry that the FTC's enforcement efforts related to hospital mergers had "a random quality," the FTC stated:

> The Commission staff routinely reviews hospital acquisitions that come to its attention, whether or not through a Hart-Scott-Rodino premerger filing, to determine whether the merger or acquisition may have an adverse effect on competition.
>
> …
>
> there are other legal issues that can arise in a merger investigation that may militate against bringing an enforcement action. For example, in several cases in which the Commission did not challenge a merger or acquisition, there was a serious issue of state action immunity from the federal antitrust laws. Even when state regulation did not rise to a level sufficient to immunize the transaction, state rate regulation was sometimes a factor to be considered in determining whether the merger or acquisition would have an anticompetitive effect. One or more of these factors was very important in the decision to close many of the investigations.

June 8, 1993 Letter to Senator Orrin G. Hatch Regarding Hospital Mergers at pp. 5-6, attached hereto as Exhibit A, also available at 3 Health Care and Antitrust L. Appendix D38 (2023).[1]

[1] All exhibits are attached to the Declaration of Terrence J. Donahue, Jr., submitted concurrently herewith.

While the FTC has never promulgated any regulations staking out a definitive position on HSR Act premerger notifications in transactions subject to the state action immunity doctrine, the agency issued numerous less formal policy statements, several of which were attached as exhibits to the State's Motion for Summary Judgment. [Doc. 74]. As shown in these exhibits, the statements made to Senator Hatch in 1993 were consistent with the FTC's approach to hospital merger enforcement actions, including those involving COPAs, until at least 2022. *See also* FTC Policy Perspectives on Certificates of Public Advantage (August 15, 2022) at pp. 6-8, attached hereto as Exhibit B ("COPAs shield specific hospital transactions from vigorous antitrust enforcement … [a]ntitrust authorities are better positioned to challenge anticompetitive mergers … when we do not face the litigation obstacles presented by COPAs").

In early 2021, with a new presidential administration transitioning into power, changes began to occur at the FTC. Initially, the agency indefinitely suspended early terminations of HSR premerger filing reviews citing the political transition, a heightened number of HSR filings, and the ongoing COVID-19 public health emergency. *See* February 4, 2021 Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations, attached hereto as Exhibit C. Two FTC Commissioners issued a public statement regarding the suspension, noting that the FTC had historically sought to minimize the impact of HSR review on merging entities, and stating their view that the cited justification for the suspension was unpersuasive. *Id.* at pp. 1-2. Several months later, the FTC voted to withdraw a formal policy statement regarding the enforcement of Section 5 of the FTC Act which is directed to unfair methods of competition. In response to the withdrawal of this policy, one of the commissioners who had issued the earlier statement regarding the indefinite suspension of early withdrawals issued another statement, this time excoriating the other

Commissioners, and the action they had taken:

> The Majority's decision today to rescind the Commission's bipartisan 2015 Section 5 Policy Statement reduces clarity in the application of the law and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected individuals on the FTC.
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> This policy proposal was announced just a week ago, the bare minimum notice permitted by law, diminishing the public's opportunity to give input. And the members of the public we will hear from today will speak after the vote, so that the FTC cannot consider their views.
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> …
>
> The policy statement we are rescinding was based on court decisions explaining the limits of Section 5. Will we follow those? I do not know. The public does not know. The honest businesses looking to follow the law do not know. If it's the Majority's view that the principles outlined in the Statement no longer reflect the Commission's enforcement practice, that the Commission no longer plans to abide by legal precedent, or that Section 5 is a law without limit, they should say so—and how—on the record. Here we are at a public hearing, with a chance to add transparency, but instead we are doing the opposite: removing guidance and adding uncertainty.
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> …
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> I am deeply concerned that the Commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful. And, we are undertaking it with virtually no input from the public. The need for certainty and predictability are basic tenets of good government. Today, I regret that the Commission came up short.

July 1, 2021 Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement, attached hereto as Exhibit D.

Less than a month later, the FTC withdrew another longstanding policy statement that had been in place since 1995, and which reflected the agency's practice of not routinely requiring prior approval or prior notice of future transactions in connection with consent mergers. The action drew yet another statement from Commissioner Phillips, who said "It is bad government and bad policy. I dissent." July 21, 2021 Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases, attached hereto as Exhibit E. The

statement went on to say that, for the second time in a month, the FTC had taken action that was "leaving the business community without clarity as to how we will exercise our authority." *Id.* at p. 1. The Commissioner also stated that withdrawal of the policy statement "and other things we have seen lately, suggest [the majority's] willingness to abrogate the HSR Act," and adding that "the point of the Clayton Act and the HSR Act is to deter anticompetitive mergers, not all mergers." *Id.* at pp. 1, 4.

A little more than a month later, the FTC rescinded the Vertical Merger Guidelines that it had adopted along with US DOJ in 2020, as well as an official Commentary on Vertical Merger Enforcement. Commissioners Phillips and Wilson issued another dissenting statement expressing their strong disapproval of the agency's action:

> Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware. In the past two months, the FTC has withdrawn just as many bipartisan policies. Now the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust Division and the Commentary on Vertical Merger Enforcement with the minimum notice required by law, virtually no public input, and no analysis or guidance.
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> …
>
> The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement, and to impose punitive penalties on parties proposing mergers that the Majority believes are anticompetitive. The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainty in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.
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> …
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> We lament the majority's continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct.

September 15, 2021 Dissenting Statement of Commissioners Noah Joshua Phillips and Christine

S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement at pp. 1, 5-6, attached hereto as Exhibit F.

Other FTC actions and dissenting statements similar to those discussed above continued over the course of following year, and in February 2023, US DOJ announced that it was withdrawing three separate antitrust enforcement policies that focused on health care. February 3, 2023 US DOJ Press Release, "Justice Department Withdraws Outdated Enforcement Policy Statements," attached hereto as Exhibit G. The announcement stated that the policy statements, the oldest of which had been in place for nearly thirty years, were outdated and "overly permissive on certain subjects." *Id.* Following the FTC's lead, US DOJ did not replace the withdrawn policy statements with any new statements disclosing the agency's current enforcement policies in the health care sphere, indicating instead that "a case-by-case enforcement approach will allow the Division to better evaluate mergers and conduct in healthcare markets that may harm competition." *Id.* Just last month, the FTC withdrew two of the three documents US DOJ withdrew in February, stating that it also intended to pursue enforcement by "evaluating on a case-by-case basis mergers and conduct in health care markets that affect so many Americans." July 14, 2023 Press Release, Federal Trade Commission Withdraws Healthcare Enforcement Policy Statements, attached hereto as Exhibit H.

Federal agencies must provide reasoned explanation for its actions. *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009). When an agency's policy has engendered serious reliance interests in regulated parties, it must take these interests into account and provide more detailed justification for the shift in policy than what would suffice for a new policy created on a blank slate. *Id.,* citing *Smiley v. Citibank (South Dakota), N. A*., 517 U.S. 735, 742 (1996). A

court should not defer to an agency's "convenient litigating position," a new interpretation of requirements that creates "unfair surprise" to regulated parties, or when an agency's interpretation would impose retroactive liability "for longstanding conduct that the agency had never before addressed." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2417–18 (2019).

As stated above, this Court is not faced with any regulation promulgated by the FTC whose validity is at issue. The FTC has not provided any indicia of evidence that the HSR Act's premerger notification requirements are intended to apply to state action. When a federal agency takes such a position without first offering States or other interested parties notice or opportunity for comment, the agency's views are "inherently suspect," particular when the new stance "reverses [the agency's] own longstanding position." *Wyeth v. Levine,* 555 U.S. 555, 576 (2009).

C. The State Action Immunity Doctrine Is Not Merely an Affirmative Defense Against Antitrust Liability

As anticipated by the State in its motion for summary judgment, the FTC improperly attempts to relegate the state action immunity doctrine to the status of an "affirmative defense to antitrust liability." [Doc. 71-1] at pp. 3, 17; *see also id.* at pp. 3, 4, 10, 13, 14, 15, 16, 18, 19 (referring to the "state action defense"); *id.* at p. 8 ("fact-specific defense to a merger"); *id.* at p. 11 ("an implicit common law defense"); *id.* at p. 16 ("a defense to liability for anticompetitive conduct"); *id.* at p. 17 ("[s]tate action is a defense to liability"). While the FTC is correct that the Fifth Circuit stated in *Acoustic Systems, Inc. v. Wenger Corp.* that the defendant's invocation of the state action immunity doctrine, if successful, would "provide[] only a defense against liability," the Court's statement in no way suggests that this is true in all cases. [Doc. 71-1] at p. 17; quoting *Acoustic Sys.,* 207 F.3d 287, 294 (5th Cir. 2000). Much to the contrary, both *Acoustic Systems* and *Louisiana Real Estate Appraisers Board v. United States,* 976 F.3d 597, 605 (5th Cir. 2020) explicitly reiterate the determination, initially expressed in *Surgical Care Center of Hammond,*

LLC v. Hospital Serv. Dist., 171 F.3d 231, 234 (5th Cir. 1999) (en banc) that:

> [w]hile thus a convenient shorthand, "*Parker* immunity" is more accurately a strict standard for locating the reach of the Sherman Act ***than the judicial creation of a defense to liability for its violation.***

Acoustic Sys., 207 F.3d at 292, n. 3 ("the doctrine is but a recognition of the limited reach of the Sherman Act"); *La. Real Estate Appraisers Bd.,* 976 F.3d at 605 ("*Parker* immunity concerns the boundaries of federal antitrust law set against the principles of federalism and the states' authority over their economies"). Neither *Acoustic Systems* nor *La. Real Estate Appraisers Bd.* provides any support for the FTC's assertion that the state action immunity doctrine serves only as an affirmative defense.

Contrary to the repetitive refrain of the FTC's Motion, no court has held that the state action immunity doctrine is so limited. While, in circumstances such as those considered in *Acoustic Systems,* the state action immunity doctrine may serve primarily as a defense to liability under the federal antitrust laws, the Supreme Court has indicated on numerous occasions that the doctrine "exempts" or "immunizes" conduct from "antitrust *scrutiny*". *See e.g. Ticor,* 504 U.S. at 640; *Omni,* 499 U.S. at 378,; *Patrick,* 486 U.S. at 98; *Southern Motor Carriers*, 471 U.S. at 66. Just as frequently, however, the Supreme Court has indicated that the state action immunity doctrine exempts eligible individuals from "antitrust *scrutiny*." *F.T.C. v. Phoebe Putney Health Sys., Inc.,* 568 U.S. 216, 225 (2013); *Patrick v. Burget,* 486 U.S. 94, 98 (1988); *Fisher v. City of Berkeley, Cal.,* 475 U.S. 260, 265 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985); *Quadvest, L.P. v. San Jacinto River Auth.,* 7 F.4th 337, 346 (5th Cir. 2021); *Spec's Fam. Partners, Ltd. v. Nettles*, 972 F.3d 671, 681 (5th Cir. 2020); *see also S. Motor Carriers Rate Conf., Inc. v. United States,* 471 U.S. 48, 57 (1985) (doctrine "shield[s]" parties "from the federal antitrust laws").

The FTC's Motion demonstrates that the very purpose of the agency's suit is to subject

LCMC and HCA to precisely the same "antitrust scrutiny" that the Attorney General's issuance of the COPA is intended to avoid. That the state action immunity doctrine would preclude the FTC from interfering with the transaction the Attorney General has determined will benefit the State is completely sensible and logical, as there are factors other than competition that a State may find more compelling when regulating its domestic commerce:

> *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.

Omni, 499 U.S. at 377. The FTC is attempting to do precisely what the state action immunity doctrine is intended to prevent—nullify the "value judgment" made by the Attorney General in order to impose its own judgment of what is in the State's best interest through the use of the purely economic and mathematical analyses prescribed by federal antitrust laws.

Discuss Hoover v. Ronwin – Motion to Dismiss

D. The FTC Has Not Established Its Entitlement to Injunctive Relief

Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). The elements that must be proven to obtain a permanent injunction are "nearly identical" to those of a preliminary injunction, except that a "plaintiff must show actual success on the merits rather than a mere likelihood of success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). In order to succeed, a plaintiff must establish each of the following elements: (1) actual success on the merits; (2) a substantial threat of immediate and irreparable harm for which it has no adequate remedy at law; (3) that greater injury will result from denying the injunction than from its being granted; and (4) that an injunction will not disserve the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th

Cir. 1987); *Amoco Prod.*, 480 U.S. at 546 n.12, 107 S.Ct. 1396. A trial court is vested with broad discretionary power in deciding whether to grant or deny an injunction. *See Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973).

While acknowledging that Congress intended the HSR Act to apply only to mergers of "questionable legality," the FTC does not identify any facts that could render the transaction between HCA and LCMC legally questionable. *See* [Doc. 71-1] at p. 3. Instead, the FTC's motion explicitly states that it "has no position" on whether the transaction runs afoul of the law, or whether the state action immunity doctrine immunizes the transaction from the HSR Act. [Doc. 71-1] at pp. 2-3. The FTC also asserts that applying the state action immunity doctrine in circumstances where the agency does not claim a transaction will have any anticompetitive effect or that a lack of active supervision precludes its applicability would allow "any state regulated private party" to make a "self-serving determination" that the requirements of the doctrine have been satisfied and the federal antitrust laws do not apply. [Doc. 71-1] at p. 3. Such an argument ignores the amount of time, money, and effort the State, LCMC, and HCA devoted to the COPA process, and the FTC's concerns that state actors would allow private parties to unilaterally make such "self-serving determinations" is unrealistic

For the foregoing reasons, Attorney General Jeff Landry respectfully requests that the Court dismiss FTC's claims and grant all other relief to which he is or may be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 9, 2023, a copy of the foregoing Memorandum was filed electronically with the Clerk of Court via the CM/ECF system. On July 19, 2023 a Notice of Deficiency was issued by the Court, and a revised version of the Statement of Undisputed Facts was filed the same day. Notice of the revised filing will be sent to all counsel of record by operation of the court's electronic filing system.

s/ Terrence J. Donahue, Jr.
Terrence J. Donahue, Jr.

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION Plaintiff, v. LOUISIANA CHILDREN'S MEDICAL CENTER and HCA HEALTHCARE, INC. Defendants.	CIVIL ACTION NO. 23-1305 c/w 23-311 c/w 23-890 REF: ALL CASES SECTION I

INTERVENOR STATE OF LOUISIANA'S RESPONSE TO FEDERAL TRADE COMMISSION'S STATEMENT OF UNDISPUTED FACTS

In accordance with Local Rule 56.3 and in opposition to the Motion for Summary Judgment filed by the Federal Trade Commission, Intervenor, the State of Louisiana, by and through Attorney General Jeff Landry, submits the following separate and concise statement of the material facts which present a genuine issue. The numbered statements appearing below correspond to those appearing in the Statement of Undisputed Facts in support of Petitioner Federal Trade Commission's Motion for Summary Judgment, filed July 18, 2023. [Doc. 71-2].

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.

6. Undisputed.

7. Disputed. While certain firms engaged in mergers or acquisitions are subject to federal antitrust laws, including the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") which mandates the filing of premerger notification reports for certain specified transactions, the State of Louisiana ("State") is a sovereign authority that is not subject to the provisions of the HSR Act or any other federal antitrust law, including the Sherman Act and the Clayton Act, which the HSR Act amended. Defendants LCMC and HCA are similarly not subject to the HSR Act's premerger notification requirements as they availed themselves of the State's Certificate of Public Advantage ("COPA") law and were issued a COPA by the Louisiana Attorney General. The State's COPA law serves to immunize entities to whom a COPA is issued from the provisions of both state and federal antitrust laws, including the HSR Act, and the statement that all firms engaging in mergers or acquisitions of a certain size must file premerger notification reports is inaccurate.

8. Disputed to the extent the transaction between LCMC and HCA is outside the scope of federal antitrust laws and the financial threshholds associated with premerger notification reports are therefore inapplicable to either LCMC or HCA.

9. Undisputed.

Respectfully Submitted,

JEFF LANDRY
LOUISIANA ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I certify that on August 9, 2023, a copy of the foregoing Statement of Undisputed Facts was filed electronically with the Clerk of Court via the CM/ECF system. Notice of the filing will be sent to all counsel of record by operation of the court's electronic filing system.

s/ Terrence J. Donahue, Jr.
Terrence J. Donahue, Jr.

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION Plaintiff, v. LOUISIANA CHILDREN'S MEDICAL CENTER and HCA HEALTHCARE, INC. Defendants.	CIVIL ACTION NO. 23-1305 c/w 23-311 c/w 23-890 REF: ALL CASES SECTION I

DECLARATION OF TERRENCE J. DONAHUE, JR.

I, Terrence J. Donahue, Jr., declare as follows:

1. I am a United States citizen over the age of eighteen. I make and submit this Declaaration pursuant to 28 U.S.C. § 1746.

2. If called upon as a witness, I could testify to the matters to which this Declaration refers and would be competent to do so.

3. I am an Assistant Attorney General for the Louisiana Department of Justice.

4. I submit this declaration upon personal knowledge.

5. Attached hereto as Exhibit A is a copy of a June 8, 1993 Letter to Senator Orrin G. Hatch from Donald S. Clark, Secretary of the Federal Trade Commission Regarding Hospital Mergers obtained from Westlaw at 3 Health Care and Antitrust L. Appendix D38 (2023).

6. Attached hereto as Exhibit B is an official document of the Federal Trade Commission titled "FTC Policy Perspectives on Certificates of Public Advantage" dated August 15, 2022 which was downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf#:~:text=This%20paper%20by%20Federal%20Trade%20Commission%20staff%20presents,services%2C%20and%20depress%20wage%20growth%20for%20hospital%20employees

7. Attached hereto as Exhibit C is a copy of the February 4, 2021 Statement of Federal Trade Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations which was downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf

8. Attached hereto as Exhibit D is a copy of the July 1, 2021 Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement, downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf

9. Attached hereto as Exhibit E is a July 21, 2021 Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases, downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf

10. Attached hereto as Exhibit E is a November 1, 2017 FTC Staff Notice of COPA Assessment, attached as Exhibit 5 downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files?file=attachments/press-releases/ftc-staff-seeks-empirical-research-public-comments-regarding-impact-certificates-public-advantage/copa_assessment_public_notice_11-1-17_revised_3-27-19.pdf

11. Attached hereto as Exhibit F is a copy of the September 15, 2021 Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement, downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf

12. Attached hereto as Exhibit G is a copy of the February 3, 2023 US DOJ Press Release, "Justice Department Withdraws Outdated Enforcement Policy Statements," downloaded from the Unites States Department of Justice's website at:

https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements#:~:text=The%20Justice%20Department%27s%20Antitrust%20Division%20announced%20today%20the,the%20Medicare%20Shared%20Savings%20Program%20%28Oct.%2020%2C%202011%29.

13. Attached hereto as Exhibit H is a July 14, 2023 Press Release, Federal Trade Commission Withdraws Healthcare Enforcement Policy Statements March 18, 2009 Letter to Rep. Tom Emmer, downloaded from the Federal Trade Commission's website at:

https://www.ftc.gov/system/files/ftc_gov/pdf/P859910FTCWithdrawsHealthcareEnforceStmts.pdf

I declare under penalty of perjury that the foregoing is true and correct.

Date: _August 9, 2023_ *s/ Terrence J. Donahue, Jr.*

3 Health Care and Antitrust L. Appendix D38 (2023)

Health Care and Antitrust Law July 2023 Update
John J. Miles

PART III. APPENDIXES

Appendix D38. FTC Letter to Sen. Orrin G. Hatch Regarding Hospital Mergers (June 8, 1993)

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510
Dear Senator Hatch:
In response to two questions you asked at the March 23, 1993 Antitrust Subcommittee hearings on antitrust and health care the Commission provides the following responses.

> Question 1. One of the hospital industry's arguments is that the FTC merger enforcement efforts have a random quality. Hospitals can't distinguish between mergers you challenge (or at least investigate) and those you don't. Certainly you agree that many of the mergers you don't challenge, or even investigate (through a Hart-Scott second request) are above the 1,800 market concentration index which the merger guidelines say is presumptively illegal. Indeed, any combination in markets with six or fewer hospitals creates a market concentration index above 1800. Thus, almost all mergers in all but large cities would be above the market concentration standard for presumptive illegality. Can you articulate the factors which you use in deciding not to challenge a merger that is above the market concentration standard for presumptive illegality.

Answer:

The primary statute relied upon by the Commission in achieving the goal of its merger enforcement program is Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] It prohibits mergers where, "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." This statute focuses on the future effects of a transaction. Thus, to determine whether a proposed merger would violate Section 7, and injure consumers, the Commission must determine the likely effect of the merger on competition and consumers in the post-merger market.

Consumers are injured when they are required to pay higher prices for products than they would pay without the merger.[2] A merger can lead to higher prices if the merger creates or enhances market power—the ability of a single firm, or group of firms, profitably to charge prices above a competitive price level.

It is not possible simply by observing the prices and quantities of services and the number of firms operating in an area to determine whether competition would be substantially lessened as a result of a merger. Therefore, in making a determination that competition is likely to be substantially lessened by the acquisition, the Commission must consider many factors relevant to the operation of a competitive market. The number of firms operating in an area is one such factor. However, it alone is insufficient to answer the question the Commission addresses under the mandate of Section 7 of the Clayton Act.

The analysis the Commission undertakes in reviewing a merger is complex. Thus, perhaps the best way to answer your question would be to provide a brief description of the method used by the Commission in investigating mergers, including hospital mergers. To reduce the uncertainty associated with enforcement of the antitrust laws, the Commission and the Antitrust Division of the Department of Justice [3] have published guidelines that outline their current merger enforcement policy. [4] As indicated in the statement accompanying those Guidelines, sound merger enforcement seeks to prevent anticompetitive mergers without deterring the larger universe of procompetitive or competitively neutral mergers. The Merger Guidelines describe the analytical framework and specific standards normally used in analyzing mergers. In explaining the methodology set forth in the Merger Guidelines to examine proposed mergers and acquisitions, the Commission emphasizes that the inquiry is quite fact-intensive and involves a rigorous analysis of the best evidence available to assess the competitive effects of an acquisition.

The first step of the analysis under the Merger Guidelines is to determine the relevant antitrust market(s) in which the merging firms operate. [5] The Merger Guidelines formalize the analysis of the relevant antitrust market into two parts, the analysis of the relevant product market and the analysis of the relevant geographic market.

The Merger Guidelines define the relevant product market [6] as "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (monopolist) likely would impose at least a 'small but significant and nontransitory' increase in price." Merger Guidelines § 1.11.

Under the Merger Guidelines, the Commission defines the boundaries of the relevant product market by selecting a provisional relevant product market, based on the products marketed by the companies under investigation, and examining whether there are good alternatives for consumers other than products included within the provisional product market. A product is a good alternative if, when faced with a small increase in the provisional relevant product's price, consumers would switch to the alternative product in such numbers that the price increase would not be profitable for the firm(s) selling the provisional relevant product. If the Commission finds good alternatives outside the provisional relevant product market, the provisional relevant product market is expanded to include those good alternatives. The new provisional relevant product market is then examined to see whether there are additional good alternatives for consumers other than the products included within the new provisional product market. This analytical process is continued until a relevant product market is found for which there are no good alternatives available to consumers.

Similarly, the Merger Guidelines define the relevant geographic market [7] as a geographic area "such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price." Merger Guidelines § 1.21.

Under the Merger Guidelines, the Commission defines the boundaries of the relevant geographic market in the same way that it defines the relevant product market. The Commission selects a provisional relevant geographic market based on geographic locations of the companies under investigation, and examines what would happen if a hypothetical monopolist of the relevant product imposed at least a "small but significant and nontransitory" increase in price, but the price at all other locations remained constant. The relevant geographic area must be expanded to include the location of the next set of firms producing the relevant product if, when faced with a small increase in the relevant product's price within the provisional geographic market, consumers would switch to the alternate geographic area in such numbers that a price increase would not be profitable for the firm(s) selling the relevant product in the provisional geographic market. If the Commission finds that firms from an area outside the provisional relevant geographic market can defeat such an attempted price increase, the provisional relevant geographic market is expanded until it includes all such good alternate areas for consumers in which to obtain the relevant product.

The findings of our past hospital merger investigations indicate that general acute care hospital services often comprise a relevant product market in which to analyze a merger of two or more hospitals. [8] Our past hospital merger investigations indicate that the definition of the relevant geographic market in which to analyze a hospital merger is generally specific to the particular merger under investigation. [9] Following the Merger Guidelines, the Commission defines a provisional geographic market (which starts, for example, with the two merging hospitals within a city) and asks whether, if the hospitals in the provisional geographic market raise their prices, would enough patients go to hospitals located elsewhere to make the price increase unprofitable. If the answer is affirmative, the provisional geographic market must be expanded to include hospitals in additional geographic areas.

Sometimes evidence of the probable shift of patients, given relative price increases, may be ambiguous or unclear. Other indicia, such as patient flow data, where attending physicians have hospital privileges, whether people drive to work and may have

an attending physician in a locale other than where they live, hospital admission data, perceptions of third-party health care insurers, and perceptions of competitors in the area may confirm a provisional geographic market or resolve any ambiguities related to probable shifts of patients.

After the relevant geographic and product markets are defined, the market shares of the hospitals operating in that market are determined and the market's concentration level is calculated. Concentration is generally measured by the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by summing the squares of the individual market shares of all participants. [10] The HHI reflects the distribution of market shares of all of the firms in the market. Only the hospitals within the relevant geographic market are included in the calculation of the HHI.

Under the Merger Guidelines, markets with a post-merger HHI exceeding 1800 are designated highly concentrated. [11] In deciding whether to challenge mergers in such highly concentrated markets, a reasonable starting point is the increase in the HHI caused by the merger. Mergers that produce an increase in the HHI of less than 50 "are unlikely to have adverse competitive consequences." Merger Guidelines § 1.51(c). Mergers that produce an increase in the HHI of more than 50 points in highly concentrated markets "potentially raise significant competitive concerns," Merger Guidelines § 1.51(c), and mergers that produce an increase in the HHI of over 100 points are presumed "likely to create or enhance market power or facilitate its exercise," Merger Guidelines § 1.51(c). In the latter two cases, mergers in highly concentrated markets that produce an increase in the HHI of over 50 points or over 100 points, the Commission considers the qualitative factors listed in Sections 2-5 of the Merger Guidelines in determining whether to challenge a transaction. These include the potential adverse competitive effects of mergers (Merger Guidelines § 2), entry analysis (Merger Guidelines § 3), efficiencies (Merger Guidelines § 4), and failure and exiting assets (Merger Guidelines § 5).

Market shares and concentration measured by the HHI constitute relevant information in analyzing the likely competitive effects resulting from a merger, because the smaller the number of market participants and the higher the market concentration, the more likely that the acquisition will lead to a substantial lessening of competition, all other factors being equal. If there are many hospitals in a relevant market, so that each has a small share and the market is unconcentrated, it is unlikely that the merged hospital could raise prices or decrease service or quality unilaterally because patients could turn to other hospitals. The larger the number of firms remaining in a market, the less likely that the acquisition will facilitate collusion. In unconcentrated markets, the likelihood of collusion is considered remote, and enforcement actions are not taken. As the number of independent hospitals in a relevant market decreases, and the market shares and HHI figures increase, it becomes more likely that competition will be substantially lessened by the transaction. As the market becomes more concentrated, the Commission scrutinizes the proposed merger more thoroughly.

As noted above, if concentration numbers in the relevant market lead to an inference that the acquisition could lead potentially to significant competitive problems the Commission proceeds to analyze other factors relevant to the operation of the market. The analysis seeks to determine whether the acquisition will facilitate collusive activity among the remaining hospitals in a market or allow for unilateral price increases.

The Commission carefully evaluates the role that the merging hospitals currently play in the market. This is often critical in determining what the potential competitive effect of the merger is. A merger that would eliminate a "maverick" hospital, given to stimulating competition by cutting prices or offering innovative services, may be of considerable concern to us. But a merger between two hospitals that are inefficient competitors might indicate less competitive concern than the concentration numbers otherwise suggest. If the hospitals are individually inefficient competitors, a combination may strengthen these inefficient hospitals to provide more effective competition to the existing dominant hospitals. Similarly, if an acquired hospital is a failing or weakened firm, concerns about the competitive consequences of the acquisition must be appropriately modified.

If the analysis of the relevant market and the resulting market concentration indicate potential adverse competitive effects of a transaction, the Commission analyzes entry into the relevant market as discussed in § 3 of the Merger Guidelines, to assess whether new firms will enter a market or fringe firms will expand to eliminate concerns as to any potential exercise of market power by incumbent firms. If entry likely will occur within two years, of a character and scope that is sufficient to insure the continuation of competitive pricing, the Commission is not likely to challenge a merger of incumbent firms.

The Commission considers the competitive significance of potential entry and expansion under the particular facts of each case. The Commission's experience has shown that, in many cases, timely entry into hospital markets may be relatively difficult.

State regulations governing the construction of new hospitals as well as the time it takes to plan and construct a new medical facility have been found in past investigations to make entry relatively difficult or time- consuming.

In the process of conducting an investigation into the likely effects of each individual acquisition, the Commission gathers evidence from industry members and the parties to the transaction to evaluate that acquisition's competitive effects. The Commission frequently relies on various types of evidence. The Commission pays particular attention to the customers' [12] views of their experiences in shopping for services among hospitals. Customers are often in the best position to provide useful information on the alternatives available to them should a hospital attempt to increase prices or decrease services in an anticompetitive manner. The Commission seeks to determine the rationale for opinions of customers, who may support, oppose, or express neutrality about the merger. The Commission considers the rationales offered in its assessment of the merger because this information is often extremely useful in understanding the details of the behavior of a particular market. The Commission also examines written documents provided in response to requests for information to assess premerger perceptions of the merging parties on issues such as market power, efficiencies, and entry barriers, as well as evidence suggesting that, prior to the merger, the relevant market has not behaved competitively.

Should the Commission determine that the transaction will likely lead to anticompetitive effects, either through facilitating collusive activity or the exercise of unilateral market power, where relevant, we consider whether the acquisition involves a "failing firm" [13] or whether anticipated net efficiencies are sufficient to warrant foregoing a challenge to the transaction. Efficiencies, the potential cost savings that would result from the merger or acquisition, are discussed in § 4 of the Merger Guidelines. Relevant efficiencies include economies of scale, as well as cost savings and quality improvements made possible, for example, by greater service specialization among health facilities. The manner in which the Commission considers efficiencies is explained further *infra* in response to your second question.

It should be noted however, that a decision may be made not to challenge a merger or acquisition without analyzing all the factors listed in the Merger Guidelines. If the Commission can determine as a threshold matter that there are no likely potential adverse competitive effects from an acquisition, the investigation will be stopped because once that question is answered in the negative, there is no need to consider all of the other factors in the Merger Guidelines. Thus, if the Commission concludes that a merger or acquisition in a concentrated market is unlikely to lessen competition substantially, there is no need to examine issues such as efficiencies. [14]

All of the factors mentioned here (and in the Merger Guidelines) are considered before deciding to challenge a merger or acquisition in a highly concentrated market. Thus, the fact that a hospital merger takes place in a highly concentrated market is an important consideration in the decision whether to challenge an acquisition or merger, but it is the combination of all the factors—the market concentration as well as other qualitative factors—that determines what action the Commission will take.

> Question 2. Part 1. Could you submit a document for the Committee to include in the record of this hearing that will describe with specificity the type and scope of efficiencies you would view as sufficient in order for you not to challenge a merger in a market where (after the merger) there would be 1) no other competing hospital, 2) only one other competing hospital, 3) only two other competing hospitals, 4) three other competing hospitals, 5) four other competing hospitals, and 6) five other competing hospitals.

Answer:

The Merger Guidelines state that "[s]ome mergers that the [Commission] otherwise might challenge may be reasonably necessary to achieve significant net efficiencies." Merger Guidelines § 4. As a general proposition, the more significant the competitive injury posed by a merger or acquisition, the greater assurance the Commission requires that efficiencies will offset that anticompetitive potential. Thus, the type and scope of efficiencies that would suffice will depend on the specific anticompetitive facts in each individual case, which as was discussed above, is based on more than market shares alone.

As discussed in the answer to Question 1, all factors relevant to the possible anticompetitive effects of a merger, not just the number of competitors in the relevant market, are evaluated together. As a result, efficiencies are not balanced solely against

the anticompetitive presumption created by market share. The other quantitative and qualitative factors that also influence the merger's potential anticompetitive effect will vary in significance from market to market, and therefore from investigation to investigation, and affect the type and scope of countervailing efficiencies accordingly.

The types and scope of efficiencies that the Commission considers are discussed in the Merger Guidelines § 4, which states in part:

> Cognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms. The Agency may also consider claimed efficiencies resulting from reductions in general selling, administrative, and overhead expenses, or that otherwise do not relate to specific manufacturing, servicing, or distribution operations of the merging firms, although as a practical matter, these types of efficiencies may be difficult to demonstrate. In addition, the Agency will reject claims of efficiencies if equivalent or comparable savings can reasonably be achieved by the parties through other means. The expected net efficiencies must be greater the more significant are the competitive risks identified … .

Merger Guidelines § 4.

In addition, the Commission has examined the likelihood that claimed efficiencies will be realized, that the efficiencies will be passed on to consumers as lower prices, and that the efficiencies can be achieved by means other than the proposed merger. Unsubstantiated claims of efficiencies, or claims of efficiencies that will not directly benefit consumers, are given less weight than well documented claims of efficiencies that will likely lead to lower prices or a higher quality of care. [15] Because information relating to efficiencies is often under the control of the parties to the merger, the Commission has required proponents of a merger to present evidence demonstrating any efficiencies claimed. [16]

> Question 2. Part 2. In order to see whether the hospitals' claims of randomness are correct, without identifying transactions, or hospitals, by name, could you provide a document containing a list of the total number of the hospitals that made Hart-Scott applications (and other hospital merger investigations) in markets with six or less hospitals beginning with your agency's first challenge to a hospital merger. For each transaction identify the market share you calculated for each transaction, the efficiencies you calculated (if any), the views of the employers and insurers toward the merger, and any other ameliorating facts. For each of the listed transactions please state whether there was a second request for additional information, or a challenge to the proposed transaction, or whether the hospitals discontinued the proposed transaction during the time it was pending.

Answer:

The Commission staff routinely reviews hospital acquisitions that come to its attention, whether or not through a Hart-Scott-Rodino (HSR) premerger filing, to determine whether the merger or acquisition may have an adverse effect on competition. If the staff is able to determine on first impression that the acquisition will not reduce competition (because, for example, the hospitals do not compete in the same geographic markets), the staff will not open a formal investigation. In such a case, the staff may not calculate any market shares and generally will not develop definitive market share data. Where no formal investigation is begun, however, it is very unlikely that the acquisition involved competing hospitals in a relevant market with six or fewer hospitals.

The table in the Appendix shows for each fiscal year from 1981 through 1992, the total number of health care acquisitions for which an HSR filing was made, [17] excluding all those investigated by the Department of Justice. [18] Column 3 shows the number of such acquisitions for which the Federal Trade Commission did not request "clearance" from the Department of Justice to conduct a formal investigation. When clearance was not requested, there was no Commission investigation beyond the initial

review of the Hart-Scott- Rodino filing. [19] Column 4 shows the number of transactions for which the FTC staff sought clearance from the Department of Justice for an investigation, but where the formal investigation was terminated before the issuance of second requests. [20] The Commission generally has little or no market share data for the acquisitions in columns 3 and 4, but those acquisitions would not likely involve competing hospitals in a relevant market with six or fewer hospitals.

It is not possible to present the same data as in the table for non- Hart-Scott-Rodino hospital mergers and acquisitions because these matters entail no defining events such as the filing of a Hart-Scott- Rodino premerger notification form, or the issuance of second requests. We do not know the number of non-Hart-Scott-Rodino mergers that were initially reviewed by the staff to determine if the transactions should be investigated further. However, it is possible to identify non-Hart-Scott-Rodino hospital mergers and acquisitions that the staff reviewed and elevated to formal investigations (an event roughly equivalent to the point in a Hart-Scott-Rodino merger investigation when second requests are issued). Those data are discussed further below.

The Commission issued its first hospital merger complaint in 1981, challenging a hospital chain's acquisition of a competing hospital in American Medical International, Inc., 104 F.T.C. 1 (1984) (order modified 104 F.T.C. 617 (1984) and 107 F.T.C. 310 (1986)). Not including that case, through fiscal year 1992, the Commission staff has investigated 11 hospital acquisitions for which Hart-Scott- Rodino filings were made and second requests were issued, and 15 hospital acquisitions for which no Hart-Scott-Rodino filings were made. Of these 26 investigations, the Commission issued complaints in 5 cases, settling two by consent agreements and litigating the other 3. Three of the complaints were issued with respect to mergers for which there was a Hart-Scott-Rodino filing, and these are indicated in column 6 of the table. In another non-HSR investigation, the Commission has accepted a proposed complaint and order for public comment, but has not taken any final action.

With respect to the other 20 investigations, where the Commission did not challenge the transactions, two were abandoned by the par ties early in the investigation; three others had post-acquisition market concentration below 1800; and for two others, the overall market concentration cannot be ascertained at this time. For most of the other 13 transactions that the Commission did not challenge, it is not known with certainty how many other hospitals were in the market, but in each case, the staff identified a possible geographic market in which the post-acquisition HHI would exceed 1800. In at least several of these transactions, however, there were plausible alternate product and geographic markets in which the post-acquisition market concentration was substantially below 1800.

As the Merger Guidelines note, and as discussed in response to Question 1, merger analysis is not a mechanical application of market share and concentration data but rather entails examination under a "rule of reason" standard. Application of this standard requires weighing all the facts of the particular case, as is demonstrated by the number of acquisitions where the post-merger concentration exceeded 1800 and the Commission did not challenge the acquisition. However, under a "rule of reason" analysis, it is often not possible to isolate particular facts in a given case that were determinative. Because many factors must be balanced, any particular factor may have a different impact in one investigation as compared to another.

Factors that contributed to the closing of investigations of acquisitions or mergers in putative markets where the concentration exceeded 1800 include a combination of uncertainty about the product and geographic market definitions, efficiencies, third party payor support for the acquisition or merger, and a failing or weakened financial condition of one party to the acquisition. On some occasions, there were underlying questions about whether the acquiring firm, in fact, controlled hospitals in which it had minority interests, or which it managed pursuant to a contract with independent owners.

In addition to these analytic factors, there are other considerations, such as the quantity or quality of evidence that the staff can obtain on a particular issue that will influence the decisions of the Commission concerning a particular acquisition. This consideration is likely to be more important if there is a substantial question concerning an underlying basis for challenging a merger, such as in cases where there is a substantial question about the appropriate market definition under which to analyze the merger.

Finally, there are other legal issues that can arise in a merger investigation that may militate against bringing an enforcement action. For example, in several cases in which the Commission did not challenge a merger or acquisition, there was a serious issue of state action immunity from the federal antitrust laws. [21] Even when state regulation did not rise to a level sufficient to immunize the transaction, state rate regulation was sometimes a factor to be con sidered in determining whether the merger or acquisition would have an anticompetitive effect. One or more of these factors was very important in the decision to close many of the investigations.

In responding to your questions, the Commission staff has reviewed numerous investigative files containing information that is subject to restrictions on public disclosure under the Hart-Scott- Rodino Amendments to the Clayton Act, 15 U.S.C. § 18a(h), and Sections 6(f) and 21*of* the FTC Act, 15 U.S.C. §§ 46(f) and 57b -2. Because we understand that this response is to be placed in the hearing record, we have not included any such statutorily protected information, information about the agency's deliberative process, or attorney work-product prepared in anticipation of litigation. We hope that this response will be useful in assessing the Commission's merger enforcement policy with respect to the hospital industry.

By direction of the Commission.

Donald S. Clark
Secretary

Appendix Table

FISCAL YEAR	*TOTAL HSR HEALTH CARE FILINGS*[22]	*TRANSACTION REVIEWED— NO CLEARANCE REQUESTED*	*CLEARANCE REQUESTED— NO SECOND REQUEST ISSUED*	*SECOND REQUEST ISSUED*	*COMMISSION ENFORCEMENT ACTION*
	COL. 2[23]	*COL. 3*[24]	*COL. 4*	*COL. 5*	*COL. 6*
1981	12	10	1	1	0
1982	9	7	1	1	1
1983	18	16	2	0	0
1984	28	25	2	1	0
1985	31	30	0	1	1
1986[25]	25	24	1	0	0
1987	26	25	0	1	0
1988	41	38	3	0	0
1989	33	32	1	0	0
1990	32	27	0	5	0
1991	29	27	1	1	1
1992	38	36	2	0	0

Footnotes

1 The Commission has also challenged mergers under Section 5 of the Federal Trade Commission Act, as unfair methods of competition.

2 Lowering the quality of goods while holding price constant has the same detrimental effect on consumers as increasing prices. As it is used here, the term "price increase" includes any increase in price after adjusting for any change in quality.

3 While both the Department of Justice and the Federal Trade Commission generally have jurisdiction over mergers, the two agencies have established a liaison arrangement. Pursuant to that arrangement, neither agency will undertake an antitrust investigation until it requests and is granted "clearance" from the other agency. At the time of such a clearance request the agencies decide among themselves which one will investigate the matter. Through this process, only one federal antitrust agency investigates any particular transaction.

4 The Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 ("Merger Guidelines").

5 Two merging firms do not necessarily compete in the same market(s). Although there can be exceptions, when two firms do not compete in any of the same markets, it is unlikely that their merger will have any impact on competition in the markets in which they do compete.

6 This definition, as well as the following definition of the relevant geographic market, assumes that there is no price discrimination. If firms can price discriminate, the Merger Guidelines modify the definition in ways that are not relevant to this discussion. Merger Guidelines § 1.12, 1.22.

7 This definition assumes that there is no price discrimination. Merger Guidelines § 1.22. *See* footnote 6 *supra.*

8 We do not wish to oversimplify the issue of defining the relevant product market in hospital mergers. Hospitals offer a variety of services, and in past investigations, the Commission has had to explore a number of alternate product market definitions, although no such alternative has been alleged in a Commission complaint to date.

9 The relevant geographic market does not necessarily follow political boundaries, and the Commission does not restrict the relevant geographic market to a city or county without examining the specific information gathered in an investigation.

10 For example, a market consisting of five firms with market shares of 30 percent, 25 percent, 15 percent, 15 percent and 15 percent has an HHI of 2200 ($30^2 + 25^2 + 15^2 + 15^2 + 15^2 = 2200$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Merger Guidelines § 1.5 n. 17.

11 Because your question specifically asks about highly concentrated markets, we focus our response on such markets. The Merger Guidelines note that in moderately concentrated markets, markets in which the HHI is between 1000 and 1800, "[m]ergers producing an increase in the HHI of more than 100 points … potentially raise significant competitive concerns depending on the factors set forth in Sections 2-5 of the [Merger] Guidelines." Merger Guidelines § 1.51(b). Unlike some other industries, the Commission, to date, has not challenged a hospital merger in a market that had a post-merger HHI of between 1000 and 1800.

12 The use of the term "customer" in an investigation of merging hospitals denotes employers; health care insurers, such as Blue Cross/Blue Shield; and "managed care plans", such as HMOs or PPOs, that tend

to cover large numbers of patients. Also included as a "customer" are Medicare and state or local health care divisions that cover patients. Employers, health insurers, managed care plans, Medicare, and state or local health care divisions cover large portions of customers in any given relevant geographic market, and their views of the competitive implications of a merger are examined carefully, because they serve as surrogates (although in some ways imperfect substitutes) for ordinary, individual consumers.

13 If a party to the transaction asserts that it is a "failing firm," then under § 5 of the *Merger Guidelines*, the company must demonstrate that:

> (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and (4) absent the acquisition, the assets of the failing firm would exit the relevant market.

Merger Guidelines § 5.1. Similar requirements are presented for firms asserting the assets being disposed of are a "failing division." *See* Merger Guidelines § 5.2.

14 Certain factors are evaluated only if the Commission believes that the merger will lessen competition substantially in violation of Section 7 of the Clayton Act and/or Section 5 of the FTC Act. For instance, even in some highly concentrated markets, if entry is timely, likely, and sufficient to deter or counteract any anticompetitive effects, the Commission will generally determine that enforcement action is unwarranted. However, if the Commission determines the merger will likely lead to anticompetitive effects, it will examine any efficiencies raised by the parties in support of the otherwise anticompetitive merger. If the Commission determines that the net efficiencies outweigh the likely anticompetitive effects resulting from the merger, with the cost savings passed on to consumers, this determination argues against a decision to challenge the transaction.

15 We note that, in at least two cases, courts have held that the defendants in hospital merger cases have failed to prove their claims of substantial efficiencies. See United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1291 (N.D. Ill. 1990), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990) ("the defendants have failed to clearly and convincingly demonstrate that the merger will, in fact, create a net economic benefit for the health care consumer"); Federal Trade Commission v. University Health, Inc., 938 F.2d 1206, 1233 (11th Cir. 1991) ("appellees here have not presented sufficient evidence to support their claim that the intended acquisition would generate efficiencies benefiting consumers").

16 Under the 1968 Department of Justice Merger Guidelines, efficiencies were not considered in assessing the likely anticompetitive effects of a merger. In 1982, the Department of Justice revised its Guidelines to recognize that an evaluation of efficiencies might be undertaken in merger analysis in certain circumstances. In 1984, the Department of Justice revised and reissued its Merger Guidelines, to state that if a party to an otherwise anticompetitive merger could demonstrate by "clear and convincing evidence" that efficiencies would outweigh the likely anticompetitive effects, the Department might not bring an enforcement action. The Merger Guidelines issued by the FTC and the Department of Justice in 1992 continue to recognize, that if parties can demonstrate that efficiencies in an otherwise anticompetitive transaction outweigh the likely anticompetitive effects, the agencies may forego an enforcement action.

17 We have attempted to identify and eliminate from this table those transactions in health care industries that did not involve the acquisition of a general acute care hospital. However, because little information is retained about transactions in which there was no competitive overlap between the acquiring and acquired companies, some transactions that involved companies in health care industries but not the acquisition of a general acute care hospital, may be included in the total transactions.

18 Data for total filings in 1986 are estimated because the actual data for fiscal year 1986 are unavailable. During that year, the Commission changed its merger records system, and information for that year was never put into retrievable form.

19 Before a Federal Trade Commission staff investigation commences, the staff contacts the Department of Justice, seeking "clearance", a process to assure that only one of the two agencies investigates any transaction. The staff may review publicly available information, and rely on its own industry information in determining whether to seek clearance and investigate further, but no formal investigation is undertaken without clearance. Conversely, the Department of Justice may seek clearance to conduct its own investigation.

20 As explained above, the staff may begin an investigation during the Hart-Scott-Rodino waiting period, but close the investigation without issuing second requests if the initial investigation develops facts that are dispositive of the competitive issues (for example, that the hospitals do not, in fact, compete in the same geographic market).

21 Courts have stated that the actions of private parties may be insulated from the antitrust laws under the "state action doctrine" if two conditions are met. First, the state must clearly articulate a policy to displace competition with regulation. Second, the state must actively supervise the private parties. Federal Trade Commission v. Ticor Title Inc. Co., 504 U.S. _____, 112 S. Ct. _____, 119 L. Ed 2d 410, 422 (1992) .

22 This excludes all HSR filings involving health care for which the Department of Justice received clearance from the Federal Trade Commission to undertake its own investigation.

23 We have attempted to identify and eliminate from this table those transactions in health care industries which did not involve the acquisition of a general acute care hospital. However, because little information is retained about transactions in which there was no competitive overlap between the acquiring and acquired companies, some transactions involving companies in health care industries that did not involve the acquisition of a general acute care hospital may be included in the total transactions.

24 Before a Federal Trade Commission staff investigation commences, the staff contacts the Department of Justice, seeking "clearance", a process to assure that only one of the two agencies investigates any transaction. The staff never requested clearance for the transactions listed in column 3, and no formal investigation was undertaken.

25 Data for total filings in 1986 are estimated because the actual data for fiscal year 1986 are unavailable. During that year, the Commission changed its merger records system, and information for that year was never put into retrievable form.

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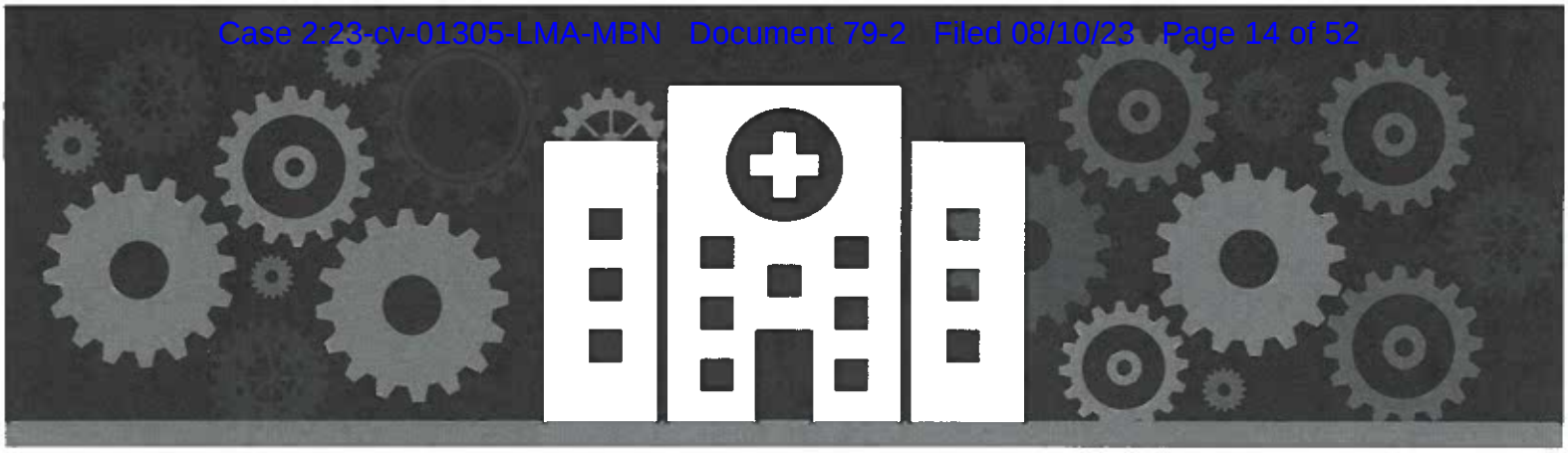

FTC Policy Perspectives on Certificates of Public Advantage

Staff Policy Paper

August 15, 2022

FEDERAL TRADE COMMISSION

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Contents

Questions may be directed to FTC staff at CopaAssessment@ftc.gov.

Introduction

This paper by Federal Trade Commission staff presents information for state lawmakers considering proposed legislation regarding Certificate of Public Advantage ("COPA") laws.[1] The FTC routinely challenges hospital mergers that would substantially lessen competition, and therefore would raise healthcare prices for patients, reduce quality of care, limit access to healthcare services, and depress wage growth for hospital employees. COPA laws attempt to immunize such hospital mergers from the antitrust laws by replacing competition with state oversight and limiting the FTC's ability to challenge them. COPAs thus allow for hospital consolidation that is likely to harm patients and employees. The existing research shows that COPAs' purported benefits are simply unproven, so there are many reasons to be skeptical of their use. Experience and research demonstrate that COPA oversight is an inadequate substitute for competition among hospitals, and a burden on the states that must conduct it. Hospital competition, on the other hand, has proven to result in lower prices and improvements in quality of care, expanded access to healthcare services, and even higher wages for some hospital employees. For these reasons, the FTC advocates against the use of COPAs to shield otherwise illegal hospital mergers.[2] Indeed, both Democratic and Republican administrations and several leading academics have raised concerns about COPAs, cautioning states not to rely on them in the absence of evidence that COPAs produce better results than market-based competition.[3]

FTC staff invites state lawmakers to work collaboratively with competition policy experts to minimize the negative effects of further anticompetitive hospital consolidation and avoid using COPAs. We also urge states that have existing COPA laws to consider repealing those laws if they do not have an active COPA in place. We welcome the opportunity to speak with any state lawmakers who wish to better understand the FTC's hospital merger review process or the COPA studies described in this paper.

What is a COPA and why do hospitals seek them?

COPA laws are enacted to replace competition among healthcare providers with regulatory oversight by state agencies. In states with COPA laws, officials allow hospitals to merge if they determine the likely benefits from a particular merger outweigh any disadvantages from reduced competition and increased consolidation. States often impose various terms and conditions on COPA recipients intended to mitigate harms from a loss of competition, including price controls and rate regulations, mechanisms for sharing cost savings and efficiencies, and commitments about certain contractual provisions between hospitals and commercial health insurers. Once granted, COPAs purport to shield provider mergers and other types of collaborations from federal antitrust enforcement under the state action doctrine.[4] State departments of health – often in consultation with state attorneys general offices – are responsible for implementing COPA regulations, evaluating COPA applications submitted by hospitals, and actively supervising any approved COPAs in perpetuity.

Hospitals that wish to merge seek COPAs when a specific merger would otherwise violate antitrust laws. Indeed, most COPAs that have been approved so far resulted in a single hospital monopoly.[5]

Mergers that lead to lower prices or better health outcomes for patients are unlikely to violate antitrust laws and thus would not require COPAs to mitigate anticompetitive harms.[6]

Why should state lawmakers be concerned about hospital consolidation?

Healthcare experts consistently find that highly concentrated healthcare markets are more likely to have higher prices for consumers (e.g., patients and employers who fund employee health plans), reduced quality of care and patient health outcomes, and reduced access to healthcare services. Most studies show that competition among health systems – not consolidation – results in the lowest prices and optimal quality benefits for patients,[7] as well as optimal wages and benefits for employees.[8]

Hospitals compete for inclusion in insurance plans, and insurers rely on that competition to negotiate better prices and higher quality of care commitments for plan members. When hospitals have substantial market power, their negotiating leverage with health insurers increases and they often are able to demand higher rates (i.e., prices), which are then passed on to consumers in the form of higher premiums, copayments, deductibles, and other out-of-pocket expenses.[9] Notably, this finding holds true with *both* for-profit and not-for-profit merging hospitals.[10] By eliminating competition among hospitals, a merger can create or exacerbate this market power. When considering a request for a COPA to permit a merger that will eliminate competition, we urge state lawmakers to consult local health insurers regarding the impact that COPA legislation could have on their ability to negotiate competitive rates or implement value-based delivery and payment models, as this could have a big impact on patients and employers. Also, employers facing higher costs may limit insurance coverage for their employees or eliminate insurance coverage altogether. Studies show that rising healthcare costs caused by hospital consolidation are often passed through to employees in the form of lower wages and less generous benefits.[11]

In addition to raising consumer prices, eliminating competition may reduce hospital incentives to maintain or improve quality and patient access to care.[12] Studies demonstrate the net effect of mergers of competing hospitals on quality is often negative, and increased competition is associated with better quality.[13] Based on the available evidence, we cannot presume that any given hospital merger is likely to improve quality or reduce costs by enough to offset a price increase.

Finally, a recent study found that mergers that significantly increase hospital concentration in local labor markets, reducing the number of hospital employers, result in slowed wage growth for workers whose employment prospects are closely linked to hospitals. This study showed that four years after such high-impact mergers occurred, nominal wages were 6.8% lower for nurses and pharmacy workers and 4.0% lower for non-medical skilled workers than they would have been without the merger.[14] State lawmakers and health departments must evaluate whether COPAs are in the best interest of the public and the impact on labor markets is highly relevant to this analysis. This type of wage depression could dissuade qualified hospital employees (already in short supply in many parts of the country) from seeking employment, which could undermine the quality of patient care and access to services.[15]

Lower income levels for hospital employees may also worsen population health in local communities where hospitals are leading employers.[16] FTC staff are not aware of any COPA that has attempted to address a merger's impact on hospital employee wages.

Competition results in better outcomes than consolidation subject to COPAs

Competition has proven to be more reliable and effective than COPAs for controlling healthcare costs while preserving quality of care, including in rural areas facing economic challenges. Competition between hospitals benefits area employers and residents. It enables health insurers to negotiate lower hospital reimbursement rates (i.e., prices) on behalf of customers, which reduces the prices that area employers and residents must pay in premiums, copayments, deductibles, and other out-of-pocket expenses. That competition also incentivizes hospitals to improve healthcare quality and the availability of services and new healthcare technologies, as the hospitals compete to attract patients to their respective systems. As a result, area employers and residents – commercially insured, those covered by Medicare and Medicaid, and the uninsured – have benefited from this competition.

Research demonstrates that COPAs have resulted in significant price increases and contributed to declines in quality of care. Sometimes these adverse effects may occur after the COPAs have expired (often at the hospitals' urging), but they may also manifest while the COPAs are in effect, due to the difficulties inherent in implementation and monitoring. In 2017, the FTC announced a policy project to assess the impact of COPAs on prices, quality, access, and innovation for health care services.[17] This project has included research of past COPAs, a public workshop highlighting practical experiences with COPAs and related policy considerations, and an ongoing study of recently approved COPAs.[18] As discussed in more detail beginning on page 7 below, key findings from specific COPA case studies are:

- **Mission Health COPA Studies**: The first study found substantial increases in commercial inpatient prices during early COPA years (at least 20%). The second study found substantial price increases during later COPA years (an average of 25%) and even greater price increases after the COPA was repealed (at least 38%). Both studies demonstrate that price regulations during the COPA were ineffective, and the second study demonstrates the risk of eventually having an unregulated monopolist.

- **Benefis Health COPA Study**: Substantial increases in commercial inpatient prices after the COPA was repealed (at least 20%), demonstrating the risk of eventually having an unregulated monopolist.

- **MaineHealth COPA Study**: Substantial increases in commercial inpatient prices at an unregulated hospital during the COPA (at least 38%), as well as after the COPA expired at both hospitals – for a total price increase of at least 50% during the COPA and post-COPA period. The study demonstrates the risk of selectively regulating hospitals within a larger system –

MaineHealth exercised its market power by raising prices at the unregulated hospital. It also demonstrates the risk of eventually having an unregulated monopolist. Perhaps more importantly, there was a measurable decline in quality at the acquired hospital after the COPA expired.

The next section describes some of the purported benefits that hospitals often claim as justification for COPAs. We are not aware of any studies showing that these purported benefits are ever actually achieved.

In addition, COPAs can be extremely difficult to implement and monitor, requiring significant state resources over many years, sometimes decades. Regulatory fatigue, staff turnover, and changes in funding priorities at state agencies can lead to less vigorous supervision over time. Also, the hospitals subject to COPAs often lobby for repeal of COPA oversight or fewer COPA conditions, citing costs and difficulties of compliance. When this happens, the practical effect is that the merged healthcare system that was previously subject to state COPA oversight is then able to exercise increased market power (in most cases, monopoly power) unconstrained by either state regulation or antitrust enforcement against merger-related harms.

"My bottom line is that COPA regulation is fraught with difficulties. Regulations can become obsolete and less effective over time. State regulators became referees to resolve competitive battles, and the political pressure is considerable. And most significantly, the end game or exit strategy can be a problem and might leave you with a concentrated, but unregulated market power."

Mark Callister, Monitor for Benefis Health COPA

Hospital arguments in favor of consolidation subject to COPAs are flawed

Hospitals offer a variety of justifications when lobbying state lawmakers to enact COPA laws, but there are many reasons for lawmakers to be skeptical. Hospitals seeking COPAs commonly claim their proposed mergers would result in cost savings and efficiencies that would allow for improvements in clinical quality outcomes. Experience and evidence demonstrate, however, that many hospital mergers do not result in significant efficiencies, despite hospital projections that they will.[19]

Hospitals seeking COPAs have also cited concerns about low reimbursement rates or future reductions in reimbursement that may occur as a result of declining admissions and healthcare reform efforts. They argue their proposed mergers would improve their financial condition and enable them to meet such challenges. In each of the last four hospital mergers the FTC investigated that received a COPA, and in our experience more broadly, hospitals seeking COPAs have had adequate financial resources to continue operating independently and to maintain quality and access to healthcare services without requiring a merger – contrary to the claims often made by the hospitals. Indeed, if a hospital is truly failing financially and the proposed merger is the only way for it to remain viable, the FTC is unlikely to challenge such a merger and the hospital does not need COPA protection against antitrust enforcement.

Hospitals often claim their proposed mergers would create jobs and ensure local access to healthcare facilities and services. In the FTC's experience, though, hospitals frequently project cost savings premised on facility consolidation, the elimination of services, and job reductions. Therefore, lawmakers should examine these claims carefully and consider how they align with post-merger plans for integration and operations, as cost savings projections may indicate that a merger would reduce employment and patient access to healthcare services in local communities.[20]

Hospitals frequently argue that proposed mergers should proceed subject to COPAs because they would create a larger combined patient base, allowing them to improve population health efforts. Merging hospitals also claim that increasing their patient base would facilitate cost-saving, value-based payment models with health insurers. However, population health initiatives can be (and usually are) pursued by the hospitals independently, so mergers are generally not necessary to gain these benefits. And recent empirical research suggests that consolidation among healthcare providers has *not* facilitated the increased use of value-based payment models. Instead, providers in concentrated markets may be better positioned to resist such initiatives.[21] Related research suggests that health systems with increased scale are not more likely to engage in or be more successful at value-based contracting.[22] Indeed, the shift to value-based initiatives is already occurring among many hospital systems and insurers nationwide, and is mandated by Centers for Medicare & Medicaid Services in some circumstances.[23]

Hospitals also claim their proposed mergers would eliminate unnecessary and duplicative costs associated with competition, sometimes referred to as "wasteful duplication," allowing them to save money by avoiding capital expenditures. But again, it is unclear whether hospitals are really interested in avoiding unnecessary or duplicative expenditures or simply want to avoid the pressures of competition. Many hospital mergers do not result in significant cost savings,[24] and some studies have found that hospital competition leads to improved patient health outcomes with more effective resource utilization, as compared to highly concentrated markets with less competition.[25] Competition can incentivize hospitals to invest in facilities, technology, and equipment that improve access and quality.[26] For example, these types of investments can result in shorter wait times, more convenient service options for physicians and patients, and the continued availability of services when a piece of equipment fails. In this regard, competition is good for patients, not unnecessary or wasteful.

Finally, hospitals argue lawmakers should not be concerned about the negative effects of their proposed merger, because the states can impose various types of regulatory conditions on COPA recipients that would mitigate the harms resulting from consolidation. Common examples include price controls and rate regulation, mechanisms for sharing cost savings and efficiencies with local residents, public reporting of quality metrics, and commitments regarding certain contractual provisions between the hospitals and commercial health insurers. But such conditions do not replicate the benefits of competition; rather, they distort competition. They are also challenging and costly to implement, requiring considerable supervision, as hospitals subject to COPAs often have strong financial incentives to evade the regulatory conditions, thus undermining their efficacy.[27]

FTC efforts to prevent harmful hospital consolidation are undermined by COPAs

The FTC is an independent, bipartisan agency with a dual mission of promoting competition and protecting consumers. Under its statutory mandate, the FTC challenges mergers and acquisitions that are likely to substantially lessen competition and harm consumers.[28] Anticompetitive mergers and conduct in healthcare markets have long been a focus of FTC law enforcement, research, and advocacy.[29] The FTC has considerable experience in evaluating mergers involving hospitals, outpatient facilities, and physician groups to determine whether they are, on balance, likely to benefit or harm consumers.[30]

At the heart of FTC investigations is how healthcare mergers impact patients, employers, and employees in local communities. FTC staff considers a wide range of factors, including the impact on prices charged to patients, wages paid to hospital employees following greater employer concentration, patient health outcomes and quality of care, patient access to healthcare services, and the potential for the merger to result in innovative healthcare delivery and payment models. We often consult physician experts with experience in both clinical and academic research settings, to help us evaluate the hospitals' quality of care and health improvement claims. Staff also speaks to local business and community members, including other healthcare providers, public and private employers, and health insurers, to understand how mergers will impact them. We examine a significant amount of public and non-public information, including business documents and data from the merging hospitals and other market participants. Staff also performs an economic analysis of hospital discharge data, as well as a financial analysis of the merging hospitals. Notably, these factors are similar to those that state health departments are required to consider when evaluating COPAs. However, the FTC has spent several decades and substantial resources to develop expertise evaluating mergers, and state health departments often have different areas of expertise.

There are certainly circumstances where a bona fide regulatory approach that has the side effect of limiting competition may be an appropriate way to implement important public policy goals. Yet, the available evidence shows COPAs do not achieve the purported policy goals of reducing healthcare costs and improving quality. Instead, COPAs shield specific hospital transactions from vigorous antitrust enforcement, to the detriment of those very goals. Antitrust authorities are better positioned to

challenge anticompetitive mergers that are likely to result in higher prices and reduced quality of care for patients when we do not face the litigation obstacles presented by COPAs. We invite state lawmakers to engage with us in addressing the problems associated with anticompetitive hospital consolidation and avoid the use of COPAs.

Case studies: COPAs do not prevent hospitals from exploiting market power

Many states have enacted COPA legislation since the 1990s. FTC staff are aware of nine states that have approved hospital mergers pursuant to such legislation: North Carolina, South Carolina, Montana, Maine, Minnesota, and most recently, West Virginia, Tennessee, Virginia, and Texas.[31] But some of these states have decided to do away with COPAs. North Carolina, Montana, and Minnesota have repealed the underlying legislation so that hospitals in these states are no longer allowed to obtain COPAs. Unfortunately, these legislative changes also eliminated state regulatory oversight of the hospital systems that were allowed to merge under COPAs. Furthermore, antitrust enforcement was no longer practical since the mergers had long been consummated. As a result, these systems can now exercise their substantial market power unconstrained by state oversight or antitrust enforcement against merger-related harms.

FTC staff has evaluated several of these COPAs, and the findings illustrate the significant challenges of trying to regulate a hospital with substantial market power in perpetuity. COPAs can be difficult to implement and monitor over time, and are often unsuccessful in mitigating merger-related price and quality harms. Furthermore, when COPA oversight is removed, which happens frequently, the risk of price and quality harms increases significantly because of the absence either of the preexisting competition or regulation. For these reasons, FTC staff recommends that state lawmakers not enact COPA laws. In states where COPA laws already exist, FTC staff recommends repealing these laws provided there is not an active COPA currently in place. If there is already an active COPA in place, states should not approve any new COPA applications.

> *"Almost all of the COPAs established prior to 2015 have expired or were repealed, leaving the affected communities with unregulated hospital monopolists, higher prices, and likely reduced quality. States considering the use of a COPA to grant antitrust immunity to merging hospitals should carefully weigh this risk of harm against the possibly short-run and limited benefits of the merger."*
>
> *Christopher Garmon & Kishan Bhatt*

Mission Health System (North Carolina)

In December 1995, Memorial Mission Hospital and St. Joseph's Hospital, the only two general acute care hospitals in Asheville, North Carolina, entered into an agreement under the state's COPA law for certain collaborative activities. In 1998, the two hospitals merged and amended their agreement with the state to approve the merger subject to certain terms and conditions – including margin, cost, and physician employment caps, as well as quality and contracting commitments. The merged hospital, renamed Mission Health System, operated under these terms for nearly 20 years. In 2015, the North Carolina legislature repealed the state's COPA law after lobbying by Mission Health, and the Mission Health COPA ended in September 2016 – leaving no competitive or regulatory constraint on Mission Health's monopoly power in Asheville. In February 2019, Mission Health was acquired by the for-profit healthcare system HCA Healthcare – despite the fact that the COPA was originally approved, in part, to prevent out-of-state for-profit healthcare systems from acquiring the local hospitals.

Empirical research on the price effects of the Mission Health COPA for inpatient hospital services from 1996 to 2008 shows that Mission Health increased its prices by at least 20% more than peer hospitals during the COPA period, suggesting that despite the margin and cost regulations, state COPA oversight did not prevent Mission Health from raising prices more than similar hospitals.[32] A second study found an average price increase of 25% through 2015, driven by large increases several years into the COPA period. It also found prices increased by another 38% after the COPA was repealed in 2015 and before Mission Health was acquired by HCA Healthcare – indicating the post-COPA price increase likely reflects the removal of the COPA oversight rather than the conversion to a for-profit hospital system.[33] In addition, an attorney from the North Carolina Attorney General's office, responsible for overseeing the Mission Health COPA for nearly 20 years, stated that he does not recommend using COPAs due to the potential for regulatory evasion during the COPA period, and the ability of hospitals to eventually be freed of COPA oversight, which leaves the community with an unregulated monopoly.[34] And a healthcare economist hired to evaluate the Mission Health COPA in 2011 discussed the difficulty of designing a regulatory scheme that prevents evasion *and* is flexible enough to allow for industry changes over the full COPA duration.[35]

Benefis Health System (Montana)

In July 1996, the Montana Department of Justice allowed Columbus Hospital and Montana Deaconess Medical Center – the only two general acute care hospitals in Great Falls, Montana – to merge pursuant to a COPA and form Benefis Health System. COPA conditions included revenue caps, quality commitments, and other cost-saving commitments. In 2007, at Benefis Health's urging, the Montana state legislature passed a bill that effectively terminated the COPA agreement, despite the Montana Attorney General's objections. As a result, Benefis Health has been able to freely exercise its market power in Great Falls with no regulatory or antitrust oversight for merger-related harms since 2009, when the legislation took effect.

Empirical research on the price effects of the Benefis Health COPA for inpatient hospital services from 1992 to 2013 shows that Benefis's prices closely tracked the prices of peer hospitals in duopoly markets during the COPA period, but then increased by at least 20% following the repeal of the COPA.

This suggests that the COPA was effective in constraining prices to the level of peer hospitals, but that the COPA removal led to higher prices consistent with the exercise of market power by an unconstrained hospital monopoly.[36] The CEO of Benefis has stated that, although he did not observe the post-COPA price increases found in this study, he does not believe COPAs adequately address the rising costs of healthcare.[37]

An attorney hired by the Montana Department of Justice to oversee the Benefis Health COPA stated:

> My bottom line is that COPA regulation is fraught with difficulties. Regulations can become obsolete and less effective over time. State regulators become referees to resolve competitive battles, and the political pressure is considerable. And most significantly, the end game or exit strategy can be a problem and might leave you with a concentrated, but unregulated market power.[38]

Also, a policy advisor for the Montana Insurance Commissioner explained that his office proposed legislation in 2019 to repeal Montana's COPA law to enhance competition in provider and insurance markets. His office viewed COPAs as a "regulatory incentive for consolidation" at a time when the research has clearly shown "that hospital consolidation leads to poor outcomes for both quality and costs." [39] He claimed that since the Benefis Health COPA expired, "their market power has played out in several different high-profile circumstances," including dramatic cost increases and most recently, "Benefis was able to be the last holdout of the Montana employee state health plans reference pricing initiative to lower health costs."[40]

Palmetto Health System (South Carolina)

In May 1997, Baptist Healthcare System and Richland Memorial Hospital, two general acute care hospitals in Columbia, South Carolina, merged to form Palmetto Health System. The South Carolina Department of Health and Environmental Control ("DHEC") approved the transaction, subject to terms and conditions of a COPA. During the initial five-year period of the COPA, Palmetto Health was subject to rate and revenue controls, as well as commitments to achieve cost savings and to provide a portion of its revenues to fund public health initiatives and community outreach programs. Several conditions were changed or eliminated in November 2003, although Palmetto Health continued to report annually to DHEC. In November 2017, Palmetto Health merged with Greenville Health System to create the largest health system in South Carolina, now known as Prisma Health System.[41]

Empirical research on the price effects of the Palmetto Health COPA for inpatient hospital services from 1992 to 2008 shows that prices at Palmetto Health did not increase more than prices at other comparable hospitals. This may be due to COPA oversight, but it may also be the result of hospital competition that remained in the area after the merger.[42] Unlike the other COPAs studied that involved mergers to monopolies, Palmetto Health continued to face competition from other hospitals serving the Columbia area, including most notably Providence Health (later acquired by LifePoint Health) and Lexington Medical Center.[43] Indeed, in its COPA application submitted to DHEC, Palmetto Health highlighted this competition as a constraint on its ability to exercise post-merger market power.

In 2020, Prisma Health persuaded DHEC to expand the original COPA to include LifePoint's hospital and emergency room assets in the greater Columbia area. This maneuver potentially would have allowed Prisma Health to acquire these facilities without facing an antitrust challenge.[44] The FTC had significant concerns about this proposed acquisition, as it would have eliminated much of the remaining hospital competition in the area. After a legal challenge from rival hospital Lexington Medical Center, a South Carolina Administrative Court held that DHEC's incorporation of the LifePoint facilities into the original COPA was "outside the scope of the COPA law's purposes."[45] Prisma and LifePoint then announced that they would no longer pursue the proposed acquisition.[46] Since then, the LifePoint assets were acquired by another health system that did not raise anticompetitive concerns. The court's decision is the first known holding that a COPA modification did not pass muster under the state action doctrine, and underscores that there are important and meaningful limitations to using COPAs to shield hospital mergers from antitrust scrutiny.

MaineHealth (Maine)

In March 2009, MaineHealth acquired Southern Maine Medical Center ("SMMC") under a COPA issued by the Maine Department of Health and Human Services. SMMC is located about 20 miles from MaineHealth's flagship general acute care hospital in Portland, Maine Medical Center ("MMC"), and the combined organization has a dominant share of patient discharges in the SMMC service area. The COPA terms required MaineHealth to limit SMMC's operating profit margin and reduce expenses, as well as expand access and maintain quality. But the COPA did not impose any conditions on the other hospitals operated by MaineHealth, including MMC. In accordance with the state COPA law, the MaineHealth COPA expired after six years in May 2015.

Empirical research on the price and quality effects of the MaineHealth COPA for inpatient hospital services from 2003 to 2018 showed varying results for the regulated SMMC hospital and the unregulated MMC hospital. During the COPA period, SMMC's prices increased by about 8% to 13% compared to peer hospitals, but this increase was not statistically significant and the conclusion is that the COPA was largely effective at constraining SMMC's prices during the COPA period. However, SMMC's prices increased by almost 50% following the expiration of the COPA in 2015. At MMC, prices increased by 38% during the COPA period, and by 62% following the expiration of the COPA (for an average of 50% during the entire post-merger period). Furthermore, SMMC's quality declined across most measures following the expiration of the COPA.[47] The study summarizes as follows:

> These results highlight the deficiencies of the MaineHealth COPA, which only placed restrictions on SMMC's price, not that of MMC or any other MaineHealth hospital. The evidence suggests that MaineHealth was able to exercise the market power gained in the SMMC acquisition (and possibly other acquisitions) through a price increase at the unregulated MMC.[48]

Recent COPAs and Developments

Ballad Health System (Tennessee/Virginia) and Cabell Huntington Hospital (West Virginia)

In January 2018, Mountain States Health Alliance and Wellmont Health System – competitors in the geographic region that straddles the border of southwestern Virginia and northeastern Tennessee – merged to form Ballad Health System under COPA approvals from the Tennessee and Virginia Departments of Health.[49] Both states imposed terms and conditions, including a price increase cap, quality of care commitments, a prohibition of certain contractual provisions, and a commitment to return cost savings to the local community. The Tennessee Department of Health has already agreed to amend these conditions on three separate occasions, on July 31, 2019, April 27, 2021, and July 1, 2022.[50] On March 31, 2020, the Tennessee Department of Health and Tennessee Attorney General's Office temporarily suspended several COPA conditions due to the COVID-19 pandemic.[51] Approximately two years later, some of these conditions were resumed on January 1, 2022, and the remaining conditions were set to resume on July 1, 2022.[52] Some concerns have been raised about recent modifications to these conditions, however, most notably Ballad Health resuming the ability to oppose certificate of need applications filed by providers seeking to enter the market.[53]

In May 2018, Cabell Huntington Hospital and St. Mary's Medical Center – both located in Huntington, West Virginia – merged after receiving a COPA approval in 2016 from the West Virginia Health Care Authority ("Authority").[54] COPA conditions include annual reporting, regulatory rate review, the prohibition of certain contracting practices, quality of care and population health commitments, and the maintenance of St. Mary's Medical Center as a free-standing general acute care hospital for a minimum of seven years. The COPA is set to terminate in 2024. Soon after the COPA was approved, the West Virginia legislature made significant changes to the Authority, including eliminating the salaried board of directors (including those who approved the COPA), a 50% reduction in funding, and large staffing reductions (including those who evaluated the COPA). In addition, the Authority's autonomy was eliminated, and it was placed under the direction of the West Virginia Department of Health and Human Resources.[55] The Authority is still responsible for continued oversight of the Cabell COPA, although with substantially fewer resources and a lack of independent authority.

In October 2019, the FTC announced that it would study the Ballad Health and Cabell Huntington COPA effects on prices, quality, access, and innovation of healthcare services, as well as the impact of hospital consolidation on employee wages. The FTC intends to collect information over several years that will help FTC staff to conduct retrospective analyses of the Ballad Health and Cabell COPAs, and we will report these findings publicly when the study is complete.[56]

During a panel discussion on early observations of the Ballad Health COPA, staff from the Tennessee Attorney General's office and the Virginia Department of Health described the lengthy process by the states to approve and monitor the COPAs.[57] A representative for Ballad Health described the COPA implementation as successful.[58] However, representatives from an independent physician group and health insurer raised concerns about the early COPA performance, including reduced access and

pricing issues relating to the rapid closure of outpatient surgical facilities, trauma centers, and NICUs, as well as difficult payer negotiations that they claim have hindered the transition to value-based contracting.[59] And a former member of the Tennessee COPA Local Advisory Council described the significant public concerns with the COPA, primarily relating to facility closures and staffing shortages.[60]

Hendrick Health System and Shannon Health System (Texas)

In October 2020, Hendrick Health System and Shannon Health System – both located in Texas – received COPA approvals from the Texas Health and Human Services Commission for their respective mergers.[61] FTC staff conducted preliminary investigations of these mergers and determined that they were likely to lessen competition substantially and lead to price increases and quality reductions for patients, as well as depressed wages for nurses.[62] In an attempt to mitigate any merger-related harms, the state imposed limited terms and conditions as part of the COPA approvals, primarily consisting of regulatory rate review and reporting requirements. Although it is too early to assess the price and quality effects of these COPAs, we will continue to monitor developments.

Conclusion

To summarize, the weight of the empirical evidence indicates that "[i]n the long run, hospital mergers shielded with COPAs often lead to higher prices and reduced quality from unconstrained provider market power."[63] Despite hospital claims that COPAs will result in lower costs and improved population health outcomes, we are not aware of any proven benefits of COPAs. For these reasons, FTC staff urges state lawmakers to avoid using COPAs to shield otherwise anticompetitive hospital mergers.

Questions may be directed to FTC staff at CopaAssessment@ftc.gov.

Endnote References

[1] This policy paper represents the views of the staff of the Federal Trade Commission. It does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to issue this policy paper.

[2] *See, e.g.*, FTC Staff Submissions Regarding the Proposed Merger and COPA Applications of Mountain States Health Alliance and Wellmont Health System, https://www.ftc.gov/enforcement/cases-proceedings/151-0115/wellmont-healthmountain-states-health; FTC Staff Comment to Texas Health and Human Services Commission Regarding Certificate of Public Advantage Applications (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf.

[3] *See. e.g.*, U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 48 (Mar. 7, 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf; U.S. DEP'T OF HEALTH & HUMAN SERVICES, U.S. DEP'T OF THE TREASURY, & U.S. DEP'T OF LABOR, REFORMING AMERICA'S HEALTHCARE SYSTEM THROUGH CHOICE AND COMPETITION 57-59 (Dec. 2018), https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf; Martin Gaynor, WHAT TO DO ABOUT HEALTH-CARE MARKETS? POLICIES TO MAKE HEALTH-CARE MARKETS WORK 22 (Brookings Institution, The Hamilton Project Policy Proposal 2020-10, Mar. 2020), https://www.brookings.edu/wp-content/uploads/2020/03/Gaynor_PP_FINAL.pdf; Liam Bendicksen & Christopher Koller, *The Risk of Repeal: Examining the Use of State-Action Immunity for Hospital Mergers*, HEALTH AFFAIRS FOREFRONT (Aug. 10, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210806.481073/full/. *See also* Executive Order on Promoting Competition in the American Economy (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (discussing the importance of hospital competition).

[4] To obtain antitrust immunity for conduct by private actors that might otherwise violate the federal antitrust laws, the state action doctrine requires both a clear articulation of the state's intent to displace competition in favor of regulation and that the state provide active supervision over the regulatory scheme or body. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015); FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1013 (2013).

[5] Of the ten COPAs that have been approved, seven of them involved mergers between the only two general acute care hospitals serving a local region. Only three COPAs involved situations where any significant competition remained in the local region post-merger, but even these mergers created hospitals with dominant market shares. *See* Case Studies section, *infra* page 7, for further discussion of previously approved COPAs.

[6] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010). Antitrust laws are not an impediment to legitimate, procompetitive collaboration that would benefit consumers. Antitrust agencies have provided extensive guidance to healthcare providers seeking ways to collaborate without running afoul of the antitrust laws. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), https://www.ftc.gov/sites/default/files/documents/reports/revised-federal-trade-commission-justice-department-policy-statements-health-care-antritrust/hlth3s.pdf; Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67026 (Fed. Trade Comm'n & U.S. Dep't of Justice Oct. 28, 2011), http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27944.pdf.

[7] *See, e.g.*, Zack Cooper, Stuart Craig, Martin Gaynor & John Van Reenen, *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, 134 Q.J. ECON. 51 (2019), https://healthcarepricingproject.org/sites/default/files/Updated_the_price_aint_right_qje.pdf; Nancy Beaulieu, Leemore Dafny, Bruce Landon, Jesse Dalton, Ifedayo Kuye & J. Michael McWilliams, *Changes in Quality of Care after Hospital Mergers*

and Acquisitions, 382 NEW ENG. J. MED. 51 (Jan. 2, 2020), https://www.nejm.org/doi/pdf/10.1056/NEJMsa1901383?articleTools=true. For surveys of the research literature, *see, e.g.*, Martin Gaynor & Robert Town, THE IMPACT OF HOSPITAL CONSOLIDATION – UPDATE (Robert Wood Johnson Found., The Synthesis Project, Policy Brief No. 9, 2012), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261; Martin Gaynor, Kate Ho & Robert Town, *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235 (2015), https://www.researchgate.net/publication/278676719_The_Industrial_Organization_of_Health-Care_Markets.

[8] *See, e.g.*, Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021), https://www.aeaweb.org/articles?id=10.1257/aer.20190690 [hereinafter Prager & Schmitt Study]; Daniel Arnold & Christopher Whaley, *Who Pays for Health Care Costs? The Effects of Health Care Prices on Wages*, (2021 working paper), https://www.ehealthecon.org/pdfs/Whaley.pdf.

[9] *See* Erin E. Trish & Bradley J. Herring, *How Do Health Insurer Market Concentration and Bargaining Power With Hospitals Affect Health Insurance Premiums?*, 42 J. HEALTH ECON. 104 (2015), http://www.sciencedirect.com/science/article/pii/S0167629615000375.

[10] *See, e.g.*, Robert Town, *The Economists' Supreme Court Amicus Brief in the Phoebe Putney Hospital Acquisition Case*, 1 HEALTH MGMT. POL'Y & INNOVATION 60 (2012), http://www.hmpi.org/pdf/HMPI-%20Town,%20Phoebe%20Putney.pdf; Gaynor, Ho & Town, *supra* note 7.

[11] *See, e.g.*, Arnold & Whaley, *supra* note 8; Katherine Baicker & Amitabh Chandra, *The Labor Market Effects of Rising Health Insurance Premiums*, 24 J. LAB. ECON. 609 (2006), https://www.hks.harvard.edu/fs/achandr/JLE_LaborMktEffectsRisingHealthInsurancePremiums_2006.pdf; Priyanka Anand, *Health Insurance Costs and Employee Compensation: Evidence from the National Compensation Survey*, 26 HEALTH ECON. 1601 (2017), https://onlinelibrary.wiley.com/doi/10.1002/hec.3452; Gaynor, Ho & Town, *supra* note 7, at 236; Gaynor & Town, *supra* note 7, at 1.

[12] *See* Gaynor, Ho & Town, *supra* note 7; Gaynor & Town, *supra* note 7; Beaulieu, Dafny, Landon, Dalton, Kuye & McWilliams, *supra* note 7, at 56; Marah Noel Short & Vivian Ho, *Weighing the Effects of Vertical Integration Versus Market Concentration on Hospital Quality*, MED. CARE RES. REV. 1-18, at 14 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1077558719828938; Patrick Romano & David Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Hospital*, 18 INT'L J. ECON. BUS. 45 (2011), http://www.tandfonline.com/doi/abs/10.1080/13571516.2011.542955.

[13] *See* Gaynor, Ho & Town, *supra* note 7, at 249; Gaynor & Town, *supra* note 7, at 4.

[14] *See* Prager & Schmitt, *supra* note 8.

[15] *See, e.g.*, David Card, *Who Set **Your** Wage?*, Annual Meeting of the American Economic Association (Jan. 2022), https://davidcard.berkeley.edu/papers/Card-presidential-address.pdf; Vicky Lovell, SOLVING THE NURSING SHORTAGE THROUGH HIGHER WAGES, Institute for Women's Policy Research (2006), http://people.umass.edu/econ340/rn_shortage_iwpr.pdf.

[16] *See* FTC COPA Workshop Transcript: Session 2 (Afternoon) at 30-31 (Jun. 18, 2019), https://www.ftc.gov/system/files/documents/public_events/1508753/session2_transcript_copa.pdf [hereinafter FTC COPA Workshop Transcript: Session 2] (statement by Christopher Garmon on the impact of the Prager & Schmitt Study as applied to COPAs). *See also* Mikael Lindahl, *Estimating the Effect of Income on Health and Mortality Using Lottery Prizes as an Exogenous Source of Variation in Income*, 40 J. HUM. RESOUR. 144 (2005), http://jhr.uwpress.org/content/XL/1/144 (finding higher income generates better health); J. Paul Leigh & Juan Du, *Effects of Minimum Wages on Population Health*, HEALTH

AFFAIRS HEALTH POLICY BRIEF (Oct. 4, 2018), https://www.healthaffairs.org/do/10.1377/hpb20180622.107025/ (suggesting higher income is correlated to improved population health).

[17] *See* FTC Staff Notice of COPA Assessment: Request for Empirical Research and Public Comments (Nov. 1, 2017), https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-seeks-empirical-research-public-comments-regarding-impact-certificates-public-advantage/copa_assessment_public_notice_11-1-17_revised_3-27-19.pdf.

[18] *See* FTC Public Workshop, *A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets* (Jun. 18, 2019), https://www.ftc.gov/news-events/events/2019/06/health-check-copas-assessing-impact-certificates-public-advantage-healthcare-markets [hereinafter FTC COPA Workshop]; FTC Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas [hereinafter FTC COPA Study].

[19] *See, e.g.*, Hannah Neprash & J. Michael McWilliams, *Provider Consolidation and Potential Efficiency Gains: A Review of Theory and Evidence*, 82 ANTITRUST L.J. 551, 553 (2019), https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publishing/antitrust_law_journal/alj-82-2/neprash-mcwilliams-alj-82-2.pdf; Anil Kaul, K.R. Prabha & Suman Katragadda, *Size Should Matter: Five Ways to Help Healthcare Systems Realize the Benefits of Scale*, PwC Strategy& (2016), http://www.strategyand.pwc.com/reports/size-should-matter. Furthermore, in some hospital merger cases courts have found that efficiency claims do not rebut a presumption of anticompetitive effects. *See e.g.*, Fed. Trade Comm'n v. ProMedica, No. 3:11 CV 47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011).

[20] *See* David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (2021 working paper), https://darnold199.github.io/jmp.pdf.

[21] *See, e.g.*, Hannah Neprash, Michael Chernew & J. Michael McWilliams, *Little Evidence Exists to Support the Expectation that Providers Would Consolidate to Enter New Payment Models*, 36 HEALTH AFFAIRS 346, 353 (2017), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2016.0840; Cooper, Craig, Gaynor & Reenen, *supra* note 7, at 104.

[22] *See, e.g.*, David Muhlestein, Robert Saunders & Mark McClellan, *Medical Accountable Care Organization Results for 2015: The Journey to Better Quality and Lower Costs Continues*, HEALTH AFFAIRS BLOG (Sept. 9, 2016), http://healthaffairs.org/blog/2016/09/09/medicare-accountable-care-organization-results-for-2015-the-journey-to-better-quality-and-lower-costs-continues/.

[23] *See* Centers for Medicare & Medicaid Services, *Value-Based Programs*, https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Value-Based-Programs/Value-Based-Programs (last accessed Aug. 4, 2022).

[24] *See, e.g.*, Neprash & McWilliams, *supra* note 19; Kaul, Prabha & Katragadda, *supra* note 19.

[25] *See* Dan P. Kessler & Mark B. McClellan, *Is Hospital Competition Socially Wasteful?*, 115 Q. J. ECON. 577 (2000), http://qje.oxfordjournals.org/content/115/2/577.full.pdf+html; Martin Gaynor, Rodrigo Moreno-Serra & Carol Propper, *Death by Market Power: Reform, Competition and Patient Outcomes in the National Health Service*, 5 AM. ECON. J.: ECON. POL'Y 134 (2013), https://www.aeaweb.org/atypon.php?doi=10.1257/pol.5.4.134.

[26] *See* David M. Cutler & Mark McClellan, *Is Technological Change in Medicine Worth It?*, 20 HEALTH AFFAIRS 11 (Sept. 2001), http://content.healthaffairs.org/content/20/5/11.full.pdf+html.

[27] *See, e.g.*, Gregory S. Vistnes, *An Economic Analysis of the Certificate of Public Advantage (COPA) Agreement Between the State of North Carolina and Mission Health* 11 (Feb. 10, 2011), http://www.mountainx.com/files/copareport.pdf; Cory S. Capps, *Revisiting the Certificate of Public Advantage Agreement Between the State of North Carolina and Mission Health*

System 32 (May 2, 2011). *See also* FTC COPA Workshop Transcript: Session 2, *supra* note 16, Erin Fuse Brown remarks at 18-20; Erin C. Fuse Brown, *Hospital Mergers and Public Accountability: Tennessee and Virginia Employ a Certificate of Public Advantage* (Milbank Memorial Fund 2018), https://www.milbank.org/publications/hospital-mergers-and-public-accountability-tennessee-and-virginia-employ-a-certificate-of-public-advantage/; Erin C. Fuse Brown, *To Oversee or Not to Oversee? Lessons from the Repeal of North Carolina's Certificate of Public Advantage Law* (Milbank Memorial Fund 2019), https://www.milbank.org/publications/to-oversee-or-not-to-oversee-lessons-from-the-repeal-of-north-carolinas-certificate-of-public-advantage-law/.

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

[29] *See, e.g.*, *Competition in the Health Care Marketplace*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care; FED. TRADE COMM'N, OVERVIEW OF FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.04.08%20Overview%20Healthcare%20%28final%29.pdf.

[30] *See* FED. TRADE COMM'N, OVERVIEW OF FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS, *supra* note 29, at Section III.

[31] Hospital systems that have been awarded COPAs include: HealthSpan Hospital System (Minnesota, 1994); Mission Health System (North Carolina, 1995); Benefis Health System (Montana, 1996); Palmetto Health System (South Carolina, 1998); MaineHealth (Maine, 2009); Cabell Huntington Hospital (West Virginia, 2016); Ballad Health System (Tennessee and Virginia, 2018); Hendrick Health System (Texas, 2020); Shannon Health System (Texas, 2020). In April 2021, a COPA law was enacted in Indiana to allow for a possible merger between Union Health and Terre Haute Regional Hospital. *See* Howard Greninger, *Talks Focus on Terre Haute Hospitals' Future: New State Law Opens Door to 'Merger' of Trauma Hospitals, Requires Certificate Approval*, TRIBUNE-STAR (Dec. 2, 2021), https://www.tribstar.com/news/indiana_news/talks-focus-on-terre-haute-hospitals-future/article_685467e6-3bba-58c7-bf1b-4966091383b1.html. And in July 2022, State University of New York Upstate Medical University and Crouse Health System announced they would seek a COPA for their proposed merger. *See* Anna Langlois, *Syracuse Hospitals Seek Antitrust Immunity*, GLOBAL COMPETITION REVIEW (Jul. 28, 2022), https://globalcompetitionreview.com/gcr-usa/article/syracuse-hospitals-seek-antitrust-immunity.

[32] Lien Tran & Rena Schwarz Presentation at FTC COPA Workshop, *The Mission Health COPA: Evidence on Price Effects from CMS HCRIS Data* (Jun. 18, 2019), https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf at 37.

[33] Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers* at 19 (Feb. 2022, paper forthcoming in J. Law Econ.).

[34] FTC COPA Workshop Transcript: Session 1 (Morning), Kip Sturgis remarks at 43 (Jun. 18, 2019), https://www.ftc.gov/system/files/documents/public_events/1508753/session1_transcript_copa.pdf [hereinafter FTC COPA Workshop Transcript: Session 1].

[35] FTC COPA Workshop Transcript: Session 1, *supra* note 34 Cory Capps remarks at 34-35. *See also* Randall R. Bovbjerg & Robert A. Berenson, URBAN INSTITUTE, CERTIFICATES OF PUBLIC ADVANTAGE: CAN THEY ADDRESS PROVIDER MARKET POWER? (2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000111-Certificates-of-Public-Advantage.pdf; Vistnes COPA Study, *supra* note 27; Capps COPA Study, *supra* note 27. In this prior research, health policy experts and economists evaluated certain aspects of the Mission Health COPA, but they were unable to reach conclusions about whether the COPA successfully constrained prices, reduced healthcare costs, or improved quality.

[36] Garmon & Bhatt, *supra* note 33, at 20.

[37] FTC COPA Workshop Transcript: Session 1, *supra* note 34, John Goodnow remarks at 40, 43-44.

[38] FTC COPA Workshop Transcript: Session 1, *supra* note 34, Mark Callister remarks at 38. Mark Callister informed us that the Benefis Health COPA was opposed by medical professionals and citizens of Great Falls, and was supported by the payers. *Id.* at 37.

[39] FTC COPA Workshop Transcript: Session 1, *supra* note 34, Kendall Cotton remarks at 40.

[40] *Id.* at 41.

[41] The Palmetto Health hospitals still operate under the COPA that was originally approved in 1997, although the degree of current active supervision by DHEC is questionable. In 2013, South Carolina cut funding for its Certificate of Need program, which encompasses the COPA program, thereby reducing the level of state monitoring.

[42] *See* Garmon & Bhatt, *supra* note 33, at 20, 42.

[43] At that time, four general acute care hospitals served the Columbia Core-Based Statistical Area in addition to Baptist Healthcare and Richland Memorial: Providence Health in Columbia (later acquired by LifePoint), Lexington Medical Center in West Columbia, Kershaw Health in Camden (later acquired by LifePoint), and Fairfield Memorial Hospital in Winnsboro (closed in 2018). *See* Garmon & Bhatt, *supra* note 33, at 42 ("Baptist and Richland together represented 55 percent of the bed capacity in the Columbia CBSA and treated 66 percent of the commercially insured inpatients.").

[44] *See* South Carolina Department of Health and Environmental Control, Final Staff Decision In Re Prisma Health Midlands COPA (Feb. 28, 2020), https://www.scdhec.gov/sites/default/files/media/document/FINAL-STAFF-DECISION-IN-RE-PRISMA-HEALTH-MIDLANDS-COPA_2-28-2020.pdf; Palmetto Health-USC Medical Group, *Prisma Health to Acquire KershawHealth and Providence Health* (Mar. 5, 2020), https://phuscmg.org/news/prisma-health-to-acquire-kershawhealth-and-provide.

[45] In the Matter of Lexington County Health Services District Inc. v. South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC, Order Denying Cross-Motions for Summary Judgment, Docket No. 20-ALJ-07-0108-CC (SC Admin. Law Court, Nov. 2, 2020).

[46] *See* Dave Muoio, *Prisma Health, LifePoint Health Call Off Sale of 3 South Carolina Hospitals*, FIERCE HEALTHCARE (Apr. 13, 2021), https://www.fiercehealthcare.com/hospitals/prisma-health-lifepoint-health-call-off-sale-three-south-carolina-hospitals.

[47] Garmon & Bhatt, *supra* note 33, at 21-22, 34.

[48] *Id.* at 21.

[49] FTC staff investigated the proposed merger of Mountain States and Wellmont for more than two years. FTC staff submitted public comments and testimony to the Virginia and Tennessee state departments of health and offices of Attorneys General recommending denial of the COPA. *See* FTC Staff Submissions Regarding the Proposed Merger and COPA Applications of Mountain States Health Alliance and Wellmont Health System, https://www.ftc.gov/enforcement/cases-proceedings/151-0115/wellmont-healthmountain-states-health.

[50] *See* Tennessee Dep't of Health, *Certificate of Public Advantage (COPA)*, https://www.tn.gov/health/health-program-areas/health-planning/certificate-of-public-advantage.html (last accessed Aug. 4, 2022).

[51] *See* Letter from Tennessee Office of the Attorney General to Ballad Health CEO (Mar. 31, 2020), 2020-03-31 Temporary Suspension-Letter -executed.pdf (tn.gov) (last accessed Aug. 4, 2022); Tennessee Dep't. of Health, List of Suspended

Provisions, https://www.tn.gov/content/dam/tn/health/documents/copa/copa-emergency-declaration-memo.pdf (last accessed Aug. 4, 2022).

[52] *See* Letter from Tennessee Office of the Attorney General to Ballad Health CEO (Dec. 3, 2021), 2021-12-03-AG-and-TDH-Reasonable-Recovery-Letter-to-Ballad.pdf (tn.gov) (last accessed Aug. 4, 2022).

[53] *See* Jeff Keeling & Ashley Sharp, *Changed Ballad COPA Restrictions Draw Docs' Criticism*, WJHL-TV (Jul. 13, 2022), https://www.wjhl.com/news/investigations/changed-ballad-copa-restrictions-draw-docs-criticism/.

[54] In November 2015, the FTC issued an administrative complaint alleging that the proposed merger of Cabell Huntington Hospital and St. Mary's Medical Center violated antitrust laws. In March 2016, while litigation was pending, West Virginia enacted COPA legislation purporting to extend antitrust immunity to certain hospital mergers under the state action doctrine. Subsequently, the West Virginia Health Care Authority approved a COPA application submitted by the hospitals. The FTC opposed the legislation and COPA application. In July 2016, the FTC dismissed its administrative complaint against the proposed merger in light of the COPA approval. *See* Statement of the Federal Trade Commission in the Matter of Cabell Huntington Hospital, Inc., Docket No. 9366 (Jul. 6, 2016), https://www.ftc.gov/system/files/documents/public_statements/969783/160706cabellcommstmt.pdf.

[55] *See* West Virginia Health Care Authority, *About HCA*, https://hca.wv.gov/About/Pages/default.aspx (last accessed Aug. 4, 2022).

[56] *See* FTC COPA Study, *supra* note 18.

[57] FTC COPA Workshop Transcript: Session 2, *supra* note 16, Janet Kleinfelter and Joseph Hilbert remarks at 3-6.

[58] FTC COPA Workshop Transcript: Session 2, *supra* note 16, Richard Cowart remarks at 8-10. *See also* Richard Cowart Submission on behalf of Ballad Health to the FTC (Aug. 2, 2019), https://www.regulations.gov/document?D=FTC-2019-0016-0174; Ballad Health Submission to the FTC (Aug. 2, 2019), https://www.regulations.gov/document?D=FTC-2019-0016-0173.

[59] FTC COPA Workshop Transcript: Session 2, *supra* note 16, Scott Fowler and John Syer remarks at 11-16.

[60] FTC COPA Workshop Transcript: Session 2, *supra* note 16, Daniel Pohlgeers remarks at 16-17. *See also* numerous submissions to the FTC from concerned citizens, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=FTC-2019-0016.

[61] *See* Texas Health and Human Services, *Certificate of Public Advantage*, https://www.hhs.texas.gov/providers/health-care-facilities-regulation/certificate-public-advantage (last accessed Aug. 4, 2022).

[62] FTC staff submitted a comment to the Texas Health and Human Services Commission recommending denial of both COPAs. *See* FTC Staff Comment to Texas Health and Human Services Commission Regarding Certificate of Public Advantage Applications (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf.

[63] Garmon & Bhatt, *supra* note 33, at 1. "Overall, COPA regulation, if properly designed, may result in hospital prices that are consistent with the pre-merger market. However, COPA-regulated hospitals have a strong incentive to evade regulation and pursue the removal of the COPA. Almost all of the COPAs established prior to 2015 have expired or were repealed, leaving the affected communities with unregulated hospital monopolists, higher prices, and likely reduced quality. States considering the use of a COPA to grant antitrust immunity to merging hospitals should carefully weigh this risk of harm against the possibly short-run and limited benefits of the merger." *Id.* at 26.

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Commission's Indefinite Suspension of Early Terminations

February 4, 2021

Today, the Federal Trade Commission and the Antitrust Division of the Department of Justice (the "Agencies") announced the suspension of early terminations ("ET") of the review of transactions notified in accordance with the Hart Scott Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). At this time, we see no rationale sufficient to justify suspending all grants of ET. In 45 years of administering the HSR Act, the Agencies have done so only when a crisis made them unable to discharge their duties. Even when HSR filings more than doubled in November 2020 compared to November 2019, the processing of ET requests continued.[1] And the number of filings has fallen approximately 70 percent since last November. Absent exigent circumstances, an indefinite suspension of the ET process—with no clarity regarding when and under what circumstances it will resume—is unwarranted. We write to express our concern.

Our understanding is that this decision to suspend grants of ET is premised on a desire to avoid inadvertently allowing potentially anticompetitive transactions to evade scrutiny during a period of political transition, a heightened number of HSR filings, and the ongoing Covid-19 emergency. But in more than four decades of HSR Act review, the Agencies have never suspended early termination because of leadership transitions or increased merger filings. We did not suspend early termination in September 2001, after the nation was attacked; or in November of that year, when filings reached 451 in a month. Nor were ETs suspended during the financial crisis of 2008. The experienced, knowledgeable career staffers who directly handle and advise on early terminations remain in place. And while the pandemic and the agency-wide move to telework in March 2020 prompted a two-week suspension of ET as we implemented an electronic filing system, that new process has been operating smoothly for the last ten months under the competent oversight of our diligent and dedicated career staff. For these reasons, we view the proffered justifications for suspending early termination as unpersuasive. We are concerned that freezing grants of ET will delay the consummation of competitively innocuous transactions. Particularly during a time of economic difficulty, impeding the transfer of assets could have knock-on effects that harm employees, small businesses, and financially imperiled firms.

The purpose of the HSR Act is to give the Agencies a chance to review transactions before they occur, so that we can block or remedy the anticompetitive ones without having to go to court and "unscramble the eggs" of a consummated merger.[2] As a general matter, investors and companies that submit HSR filings must wait 30 days to consummate. But that delay comes at a cost, which is why Congress gave the Agencies the discretion to reduce the burden by terminating review of competitively benign

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[1] Preliminary numbers as of February 1, 2021. See HSR Transactions by Month, available at https://www.ftc.gov/enforcement/premerger-notification-program.

[2] Fed. Trade Comm'n, *Guide to Antitrust Laws, available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers.

transactions early. The Agencies consistently have used this discretionary authority – in both Democrat and Republican administrations – to avoid imposing unnecessary burdens on transactions.[3]

For transactions where the Agencies do not grant ET, the HSR Act still mandates a strict timeline in which we must complete our review.[4] These statutorily imposed deadlines reflect Congress's intent to balance the need for the Agencies to scrutinize carefully transactions that may harm competition, with the need for the markets to allocate assets efficiently. Deadlines for merger review are not unique to the U.S.; competition authorities around the world also must work within them.[5]

Early termination—the program suspension announced today—is reserved for the transactions that raise *no* apparent competitive concern, for example equity purchases by index funds and small mergers and acquisitions in unconcentrated markets. By definition, transactions terminated early are those in which the agencies are not interested. And there are many. Early terminations constitute roughly half of all transactions noticed to the agencies under the HSR Act.[6]

The idea behind ET is simple: where transactions do not raise competition concerns, let the market work. Give investors and companies certainty, predictability, and the ability to make plans to invest capital, provide shareholder input, hire employees and the like. The Agencies have historically sought to minimize the impact of HSR review,[7] including at the direction of Congress.[8] They have suspended grants of ET only when they lacked the capacity to review transactions, in just two circumstances of which we are aware: government shutdowns, when the agencies are statutorily obligated not to do certain work; and for two weeks in March 2020 to establish and implement an electronic filing system in response to

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[3] *See, e.g.*, William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act* (Oct. 31, 1996), *available at* https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act; Statement of Commissioner Noah Joshua Phillips Concerning Hart-Scott-Rodino Act Premerger Notification Notice of Proposed Rulemaking and Advanced Notice of Proposed Rulemaking (Sep. 21, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1580699/p110014hsrrulesphillipsstatement_0.pdf.

[4] 15 U.S. §18a(b) and (e).

[5] *See, e.g.*, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[6] Fed. Trade Comm'n and U.S. Dep't. of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[7] *See* note 2; Molly S. Boast, Report from the Bureau of Competition, American Bar Association Antitrust Section Spring Meeting, March 29, 2001, *available at* https://www.ftc.gov/public-statements/2001/03/report-bureau-competition ("The premerger staff also has proposed a number of other rules changes, most of them ministerial, but some substantive, to streamline the premerger notification process and make it less burdensome."); Statement of the Federal Trade Commission's Bureau of Competition on Guidelines for Merger Investigations, Dec. 22, 2002, *available at* https://www.ftc.gov/system/files/documents/public_events/114015/ftc_statement_on_guidelines_for_merger_investigations_12-22-02_2.pdf ("The changes announced today are designed to streamline the FTC's merger review process, improving the efficiency and speed of our investigations while reducing the burden on the parties.").

[8] 15 U.S. §18a(e)(1)(B).

the COVID-19 emergency. There is no similar limitation here, and thus no reason to interfere with the functioning of the capital markets and the efficient allocation of resources.

Fear that one anticompetitive transaction may obtain an ET should not hold up the thousands that are competitively benign. We have the authority to enforce against consummated transactions that we later find to be anticompetitive. As several transactions have been abandoned recently in the face of enforcement, we can shift resources to the Premerger Notification Office if the office on the front line of HSR review is strained. It is not.

The Agencies can do merger review today, and we are. Last year, some in Washington called for a moratorium on mergers,[9] arguing that the Agencies couldn't possibly do their jobs adequately while working remotely. Those proposals lacked a sound basis at the time.[10] Commission staff subsequently (and quite convincingly) proved the skeptics wrong, smoothly adjusting to working remotely and pursuing investigations without a substantial slowdown. Over the course of the crisis, in fact, FTC merger enforcement has been at its highest level since the early 2000s.[11] And decades of experience demonstrate that our dedicated staff is fully capable of continuing its work through changes in political leadership and fluctuations in merger filing thresholds, including, where appropriate, granting ET.

When the Agencies have needed to suspend ETs in the past, they announced the change in advance of putting it into effect.[12] But the suspension announcement today comes more than two weeks after the most recent early termination was granted, with only one exception of which we are aware.[13] In the future, we hope major changes to agency practice that affect external stakeholders will be announced simultaneously with the action taken, if not before.

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[9] *See, e.g.,* Erik Wasson, *Warren, Ocasio-Cortez Float Long-Shot Bid to Pause M&A in Crisis*, BLOOMBERG, (Apr. 28, 2020), *available at* https://www.bloomberg.com/news/articles/2020-04-28/warren-ocasio-cortez-propose-temporary-corporate-merger-ban.

[10] Noah Joshua Phillips, *The case against banning mergers,* N.Y. TIMES, Apr. 27, 2020, *available at* https://www.nytimes.com/2020/04/27/business/dealbook/small-business-ppp-loans.html; Christine S. Wilson, *Remarks for "Merger Control in USA" Panel*, GCR Interactive: Merger Control, Oct. 21, 2020, *available at* https://www.ftc.gov/system/files/documents/public_statements/1583814/wilson_remarks_at_gcr_merger_control_2020.pdf.

[11] Since the time the FTC Bureau of Competition staff began teleworking due to the COVID-19 crisis, the agency challenged seven transactions in federal court and entered into ten consent agreements. The parties to 11 deals have abandoned the transactions, citing antitrust review.

[12] Press Release, Premerger Notification Office Implements Temporary e-Filing System, March 13, 2020, *available at* https://www.ftc.gov/news-events/press-releases/2020/03/premerger-notification-office-implements-temporary-e-filing. This suspension occasioned headlines in legal and business publications, indicating its significance for the settled expectations. *See, e.g.*, Eleanor Tyler, *Merger Review Slowing, Moving Online with Covid-19*, BLOOMBERG, March 20, 2020 ("Perhaps the biggest change that the FTC announced is that the agency will not grant early terminations during the crisis. By itself, this will make a big difference in how mergers are handled.").

[13] See https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices.

Suspending early terminations introduces inefficiency into market operation, harming consumers and other stakeholders involved in the transactions that would have consistently received ET at any point during the last 45 years. Because we do not believe a sound basis exists to incur those costs, we object.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Commissioner
Noah Joshua Phillips

EXHIBIT
D

Remarks of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the Section 5 Policy Statement

July 1, 2021

The Majority's decision today to rescind the Commission's bipartisan 2015 Section 5 Policy Statement reduces clarity in the application of the law and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected individuals on the FTC.

This policy proposal was announced just a week ago, the bare minimum notice permitted by law[1], diminishing the public's opportunity to give input. And the members of the public we will hear from today will speak after the vote, so that the FTC cannot consider their views. That is inconsistent with rhetoric we have heard about opening up the policy-making process.

On the proposal, I still do not know to what aspects of that bipartisan policy my colleagues object.

Perhaps it is the first principle, *i.e.*, that the public policy underlying the antitrust laws is the promotion of consumer welfare.[2] That has been black-letter Supreme Court law for almost my entire life.[3]

Maybe they object to the second, applying the "Rule of Reason", which means we look carefully at the facts to determine the effect of a company's conduct. That has been the law for over a century, as a unanimous Supreme Court reminded us just days ago, handing plaintiffs a victory in the *NCAA v. Alston* case.[4]

The policy statement we are rescinding was based on court decisions explaining the limits of Section 5.[5] Will we follow those?

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[1] 5 U.S.C. § 552b(e)(1)

[2] Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[3] *See* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (describing the Sherman Act as a "consumer welfare prescription").

[4] NCAA v. Alston, 594 U. S. __ (2021).

[5] *See, e.g.*, Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

I do not know. The public does not know. The honest businesses looking to follow the law do not know. If it is the Majority's view that the principles outlined in the Statement no longer reflect the Commission's enforcement practice, that the Commission no longer plans to abide by legal precedent, or that Section 5 is a law without limit, they should say so—and how—on the record.

Here we are at a public hearing, with a chance to add transparency, but instead we are doing the opposite: removing guidance and adding uncertainty.

This is not consistent with public statements my colleagues have made. Chair Khan and Commissioner Chopra previously wrote, for example, that clear rules "help deliver consistent enforcement and predictable results".[6] So why is one of their first initiatives to reduce clarity as to the Commission's interpretation of Section 5? They could offer a replacement—*that* could add clarity—but they decline to do so.

Reducing clarity in how the Commission will approach antitrust enforcement is bad enough, but it is particularly troubling in light of my colleagues' publicly-stated desire to fashion antitrust regulations.[7] Not only are they refusing to articulate limits to the Commission's ability to declare conduct illegal after investigating it, they are also refusing to articulate limits on their view of what they can regulate. Today, in effect, the majority is asserting broad authority to regulate the economy. They mean, in other words, for just a handful of people to answer major policy questions with no intelligible principle from Congress to guide us.[8]

My view is that our laws permit no such thing. But leaving that aside; if the majority believe they have that power, I believe it is incumbent upon them to explain its limits.

I am deeply concerned that the Commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful. And, we are undertaking it with virtually no input from the public. The need for certainty and predictability are basic tenets of good government. Today, I regret that the Commission came up short.

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[6] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 Univ. of Chicago L. Rev. 357, 368 (2020).

[7] *See, e.g., id.*, *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 7 (statement of Acting FTC Chairwoman Rebecca Kelly Slaughter).

[8] *Cf.* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, N., dissenting); Paul v. United States, 140 S. Ct. 342. (2019) (Kavanaugh, B., statement respecting denial of cert.).

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EXHIBIT
E

Dissenting Statement of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases

July 21, 2021

Over two decades ago, a bipartisan Commission announced we would no longer require prior approval for or prior notice of future transactions as a routine matter in merger consents.[1] Today, a partisan majority will rescind that policy, with the minimum notice required by law, virtually no public input, and no analysis or guidance.

It is bad government and bad policy. I dissent.

The remarks issued by Commissioner Wilson ably recount the expensive and pointless litigation and unfair outcomes for businesses that led the Commission to adopt the policy in 1995.[2] And I share the concerns she raises about exacerbating enforcement disparities with the Department of Justice and—once again, for the second time in a month—leaving the business community without clarity as to how we will exercise our authority.

The Majority's Decision Will Weaken Enforcement by Making Consents More Difficult

Congress enacted the Hart-Scott-Rodino Act of 1976 ("HSR Act") to protect the public from anticompetitive mergers and acquisitions before they occur.[3] Giving regulators an early look at transactions and the time to resolve them before asking skeptical courts to unwind them—and businesses the ability to plan in advance—HSR is a "win-win" for regulators and businesses. In the hopes, presumably, of taxing mergers generally, today the majority elects to tax those parties that attempt to resolve matters with the agency. That, and other things we have seen lately, suggest their willingness to abrogate the HSR Act.[4] That is a mistake.

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[1] Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995) [hereinafter "1995 Policy"].

[2] Commissioner Christine S. Wilson, Oral Remarks at the Open Commission Meeting on July 21, 2021, at 8 (July 21, 2021).

[3] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[4] *See e.g.*, FTC Press Release, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

Mergers and acquisitions are a constant feature of American markets, one way that they evolve over time. The Commission reviews transactions for their impact upon competition; and, judged from that perspective, the overwhelming bulk noticed to the agencies are not problematic,[5] and go unchallenged. Some we block.[6] Others, consistent with the congressional design of the HSR Act, we resolve through consents, for example by compelling the divestiture of the part of the company that raises the competitive concern.

For six decades before the HSR Act, the Commission challenged mergers and acquisitions that proved to be anticompetitive after the fact. It sought divestitures, but courts were often leery of "unscrambling the eggs".[7] The Commission adopted a policy of (when it could) requiring parties to give prior notice and get Commission approval for future acquisitions in the market covered by the consent order.[8] The HSR Act achieved economy-wide much of what the Commission had been trying to get on an *ad hoc* basis (prior notice and a fighting chance to prevent anticompetitive effects), but in the years following its passage the agency continued its policy of imposing special restrictions on firms that sought to resolve competitive concerns before merging. It fought a long, expensive, unfair, and ultimately pointless battle to make sure that Coca-Cola could not merge without government permission, while Pepsi was free to do so.[9] That embarrassing episode, and the recognition that the pre-merger notification regime under the HSR Act substantially accomplished prior notice and immeasurably strengthened merger enforcement, led the Commission in 1995 to give companies legal clarity and reduce burdens on those that enter into merger consents.

Today, the majority chooses to impose a decade-long M&A tax on anyone who enters into a merger consent.[10] While the agency has once again repealed a policy without offering guidance as to what will replace it, this will deter consents. Meaning, companies will be less likely to work with the Commission to resolve competitive concerns—contrary to the express purpose of the HSR Act, and leading to less efficient merger enforcement. As consent negotiations become more

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[5] By way of example, approximately 97% of HSR reportable transactions in FY 2019 proceeded without a Second Request. Fed. Trade Comm'n and U.S. Dep't. of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[6] In FY 2020, for example, the Commission brought a record-setting 27 merger enforcement actions, the highest number in a single year since 2001. *See* FED. TRADE COMM'N, ANNUAL PERFORMANCE REPORT FOR FISCAL YEAR 2020 AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2021 AND 2022 46 (2021), https://www.ftc.gov/system/files/documents/reports/fy-2021-22-performance-plan-fy-2020-performance-report/fy22-app-apr.pdf.

[7] *See e.g.*, William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act* (Oct. 31, 1996), *available at* https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.

[8] Twelve years before Congress passed the HSR Act and established the premerger notification program, the Commission discussed the appropriateness of limiting future acquisitions by a respondent found to have attempted an unlawful acquisition in the past. *See* Ekco Products Co., 65 F.T.C. 1163, 1201 (1964) (The ALJ noted there is "no legal requirement that the Commission be notified of corporate mergers or acquisitions either before or after consummation. Annual Report of the Federal Trade Commission for the fiscal year ended January 30, 1957, p. 22.").

[9] Coke is better, obvi; but the government should treat them the same. *See* The Coca-Cola Co., 117 F.T.C. 795 (June 13, 1994), Commissioners Azcuenaga & Starek recused; order modified, 119 F.T.C. 724 (May 17, 1995); appeal dismissed per stipulation, Coca-Cola Enters. v. FTC, No. 94-1595 and consolidated case Nos. 94-1596, 95-1086, 95-1087, 1995 U.S. App. LEXIS 15183 (D.C. Cir. May 18, 1995).

[10] *See* 1995 Policy (prior approval provisions in consent orders "usually [have] a duration of 10 years.").

difficult, we will have to go to court more—wasting precious taxpayer dollars, and accomplishing less.[11]

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

A blanket policy of routinely requiring prior approval will impose significant costs on companies that enter into merger consents. The government would be competitively handicapping those companies for an undetermined duration,[12] preventing them from competing on a level playing field against rivals. (For example, making Coke unable to do what Pepsi can.) A company under an FTC order may have to bid higher—for instance, diverting resources from research and development, incurring debt, or lowering salaries—to compensate the seller for the uncertainty and the longer lead time required to obtain prior approval. Companies under an FTC order may not even be considered in a bidding process for a company considering a sale. There will be less competition, for companies.[13]

Such costs are defensible under certain circumstances.[14] The point of a consent is to protect the competition that existed before a transaction takes place and permit the non-problematic aspects of the deal to proceed. Parties to consents should not be able to buy back divested assets,[15] or re-attempt the same transaction under similar market conditions. Our current policy protects against this, saving the Commission resources, in time and money, of re-litigating issues in the same market. The Commission retains discretion to include prior approval or prior notice provisions where we determine there is credible risk that the companies may engage in another

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[11] The Commission routinely cites HSR filings as a justification for additional funding from Congress. Acting Chairwoman Rebecca Kelly Slaughter, *Opening Statement Before the House Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee* (Mar. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1588336/p180101_opening_statement_of_ftc_acting_chairwoman_slaughter.pdf. Where we are deliberately making the HSR process less efficient, Congress should take notice.

[12] The majority has yet to announce the scope and content of their new policy, including the length of prior approval provisions.

[13] Scholars have long recognized the positive competitive effects of the competition for companies, the "market for corporate control". Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); *see also* Blanaid Clarke, *The Market for Corporate Control: New Insights from the Financial Crisis in Ireland*, 36 SEATTLE U.L. REV. 577, 578 ("Like much of Manne's work, *Mergers and the Market for Corporate Control* has been described quite correctly as 'groundbreaking,' 'revolutionary,' and 'pioneering.' Roberta Romano argued that the article marked the 'intellectual origin of what would become the new paradigm for corporate law.'" (quoting Daniel Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5 (1978); Fred S. McChesney, *Manne, Mergers and the Market for Corporate Control*, 50 CASE W. RES. L. REV. 245, 246 (1999); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 343 (2005)).

[14] Special Committee to Study the Role of the Federal Trade Commission, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 92 (1989) ("A firm-specific order must be justified as removing harm, restoring competition, or preventing likely recidivism; it should last only as long as necessary to prevent the likely resumption of the illegal practices…Orders in excess of five years can be justified only when there is a significant chance that the firm would otherwise engage in illegal activity not subject to the Hart-Scott-Rodino reporting requirements.") (internal citations omitted).

[15] This is the limited context for which the Department of Justice Antitrust Division requires prior approval. *See* Dept. of Justice Antitrust Division, *Merger Remedies Manual*, at 31 (Sept. 2020).

anticompetitive transaction in the same market or fly under the HSR Act radar.[16] We exercise that discretion today and include such provisions, as necessary.

Because the point of the Clayton Act and the HSR Act is to deter anticompetitive mergers, not all mergers. What the majority wants to do today is impose costs on *all* companies that enter into consents. By definition, those are companies seeking to remediate problems with their merger. This is precisely what Congress intended with the passage of the HSR Act. Yes, we might deter some bad deals. Between the HSR Act and the current policy, however, we already have processes in place that alert us to those deals and enable us to stop or remediate them.[17] But attempting to flip the burden of proof for all deals will also deter procompetitive and competitively neutral transactions. Like our (allegedly temporary) suspension of early termination, it amounts to a gratuitous tax on normal market operations. Ultimately, American consumers will have to pick up the cost.

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Our agency has nearly half a century of experience enforcing the HSR Act. We should draw upon that experience to stop the bad mergers and, yes, let the good ones through. Failure to do so will hinder normal market operations and weaken our enforcement efforts, both to the detriment of the American public.

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[16] 1995 Policy.

[17] Over the past 10 years, the DOJ and FTC have prevailed in almost 80% of litigated merger challenges. *See* Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 54-56 (2021).

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Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement

September 15, 2021

Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware. In the past two months, the FTC has withdrawn just as many bipartisan policies.[1] Now, the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust Division ("2020 Guidelines") and the Commentary on Vertical Merger Enforcement ("Commentary"),[2] with the minimum notice required by law, virtually no public input, and no analysis or guidance.

Sowing confusion regarding the legality of vertical mergers is particularly troublesome at this time, given American businesses' ongoing attempts to shore up supply chain vulnerabilities exposed during the COVID-19 pandemic. Today's action, together with other recent attacks on the Hart-Scott-Rodino merger review process,[3] threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.

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[1] Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf; Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf; Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Oral Remarks Regarding Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[2] U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (hereinafter "VMGs") (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf; Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement (Dec. 20, 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Statement Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf; Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade

We believe that American consumers, businesses, and taxpayers deserve better. For these reasons, we dissent.

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

Section 7 of the Clayton Act, the main U.S. law governing mergers, bars transactions where "the effect may be substantially to lessen competition".[4] Vertical mergers are *not* mergers of competitors. Rather, they combine firms that are in a buyer-seller relationship.[5] Suppose a company that specializes in manufacturing only smartphones merges with a company that specializes in manufacturing only smartphone chips, some of which it was selling to the smartphone manufacturer. That is a vertical merger. It does not directly eliminate competition, as the companies were not competing (or about to compete) with each other before they merged.

Vertical integration is a common "make or buy" phenomenon similar to choices that consumers make daily—it's one way that companies grow. When considering what to have for dinner, a consumer may choose to outsource food preparation by eating at a restaurant or getting take-out; alternatively, he may rely on groceries in his refrigerator and pantry to make dinner himself. When discovering a leak in her home, a consumer can outsource the repairs by hiring a plumber; alternatively, a handy consumer may fix the leak herself.

One immediate and positive effect of a vertical merger is that transactions (*e.g.*, chip sales) that were occurring at arm's length in the market now take place within the merged firm. As a consequence, the merged firm is no longer paying a markup on the product it is now supplying to itself (*e.g.*, smartphone chips), a phenomenon that economists call the "elimination of double marginalization".[6] The merged firm benefits from a lower manufacturing cost for each unit it produces (*e.g.*, each smartphone), allowing it to compete more aggressively by lowering its price and selling more units, and leaving consumers better off. Vertical mergers can also increase efficiency and competitiveness in other ways, like saving the substantial time and money that often go into finding reliable trading partners, negotiating terms of sale, coordinating R&D and product design, and writing contracts that cover multiple contingencies but can never capture them all. Take Disney's 2006 acquisition of Pixar. Prior to the merger, Disney was partially financing and distributing Pixar's films; but once combined, Pixar revitalized Disney's animation department,

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Comm'n, Statement Regarding the Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[4] 15 U.S.C. § 18.

[5] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Closing Remarks at FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Hearings on Competition and Consumer Protection in the 21st Century (hereinafter "Vertical Merger Hearing") at 360, https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf.

[6] As the 2020 VMGs correctly point out, "[t]he elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms". VMGs at 11. *See also* Roger D. Blair, Christine S. Wilson, et. al, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff & Thinking Holistically About Efficiencies*, 27 Geo. Mason L. Rev. 761 (2020).

while Disney used its resources to expand Pixar's production, resulting in several beloved movies.[7] If you or your children watched a Pixar film on Disney+ during the pandemic, you benefited directly from a vertical integration.

Not all vertical mergers are benign. Some may harm competition and consumers. The 2020 Guidelines describe how such harm can occur and the framework that the FTC and DOJ have developed, over decades of experience, to analyze both the anti- and procompetitive effects of vertical mergers.[8] Contrary to decades of established case law, the Majority claim that the 2020 Guidelines "contravene the text of the statute" by recognizing the "procompetitive effects, or efficiencies, of vertical mergers."[9] The Majority commits two flaws in its analysis. First, they conflate procompetitive effects of a merger with merger efficiencies.[10] Second, they ignore the burden shifting framework adopted by the circuit courts recognizing that procompetitive effects may render a competition-eliminating merger procompetitive on the whole.[11] Similarly, a successful efficiency defense, *i.e.*, that the proposed merger's efficiencies would likely offset the merger's potential harm to consumers, is sufficient to save a merger. That said, Guidelines have long counseled skepticism, which is routinely applied. But the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers.[12] As such,

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[7] Brooks Barnes, *Disney and Pixar: The Power of the Prenup*, NY TIMES (June 1, 2008), https://www.nytimes.com/2008/06/01/business/media/01pixar.html

[8] Indeed, staff's careful application of that framework to the evidence in the Illumina/Grail investigation led us to support challenging that vertical merger.

[9] Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021).

[10] VMGs at 11 ("The elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization.").

[11] *See* Otto Bock HealthCare North America, Inc., 2019 WL 5957363, at *33-35 (F.T.C. Nov. 1, 2019) (opinion authored by Comm'r Rohit Chopra); United States v. AT&T, Inc., 310 F. Supp. 3d 161 (D.D.C. 2018); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014); FTC v. H.J. Heinz Co., 246 F.3d 708, 720-22 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222–24 (11th Cir. 1991).

[12] *See* Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases"); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018); Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); Cooper, Froeb, O'Brien, & Vita, supra note 20, at 658 ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen and Michael Vita, Is There New Thinking on Vertical

they require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them.

The Majority Discards Transparency in Favor of Uncertainty

The 2020 Guidelines marked an important development in U.S. merger enforcement and provided needed transparency into the agencies' evaluation of vertical (and other non-horizontal) mergers. They are well founded, based on accepted economic principles, reflect precedent from courts and the agencies, and were the result of robust public comment.

The 2020 Guidelines incorporate the federal antitrust agencies' accumulated knowledge from nearly four decades of experience investigating and challenging anticompetitive non-horizontal mergers, as well as economic analysis on the potential harms and benefits of these types of mergers. By laying out the analytic framework the agencies use to evaluate non-horizontal mergers, the 2020 Guidelines are a useful guidepost for businesses that seek to ensure their conduct is lawful.

The 2020 Guidelines also benefitted from well-informed, substantial, and valuable public input in response to the draft Vertical Merger Guidelines released for comment on January 10, 2020,[13] the FTC's Competition and Consumer Protection Hearings for the 21st Century,[14] and a public workshop the FTC and Department of Justice hosted on March 11, 2020.[15] The Majority discards the 2020 Guidelines today with *zero* public input.

While the 2020 Guidelines reflect the agencies' current enforcement practices and policy, the Commentary provides a historical description of the Commission's analysis in non-horizontal merger cases. This document promotes agency transparency and facilitates the predictability, credibility, and integrity of the Commission's merger review process. Withdrawing the 2020 Guidelines and Commentary leaves the business community without clarity as to how we will carry out vertical merger enforcement. Our colleagues have yet to articulate *any* new proposals or guidance for a new approach to vertical merger enforcement. We do not know whether the Majority intends to issue new guidance. We can only hope that they propose a path forward and will take into account and grapple with sound law and the economics in doing so.

Mergers? A Comment, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases").

[13] *See* 74 Public Comments submitted regarding Draft Vertical Merger Guidelines, https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines.

[14] Vertical Merger Hearing.

[15] Fed. Trade Comm'n and Dep't of Just. Workshop on Draft Vertical Merger Guidelines (March 11, 2020), https://www.justice.gov/atr/public-workshops-draft-vertical-merger-guidelines#information.

The Majority's decision to foster uncertainty at this time is particularly pernicious. The COVID-19 pandemic exposed supply chain vulnerabilities in many sectors of the American economy.[16] Impacted businesses are now attempting to adapt.[17] Some of these businesses seek to bring in-house supply chain functions upstream or downstream from their operations – in other words, they seek to engage in vertical mergers. Other impacted businesses may enter into new contracting arrangements. The uncertainty imposed on businesses – by today's action regarding vertical mergers and recent Commission actions regarding contracting[18] – threatens to slow unnecessarily the American economy's recovery by denying law-abiding businesses the guidance they need to know what actions are permissible as they try to respond to supply shortages.

The Majority's decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC's merger enforcement program.[19] More recently the concerns have led members of Congress to discuss transferring the FTC's competition authority to DOJ.[20] Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear.

The Majority Prefers Unchecked Regulatory Power Over Guidance

The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement,[21] and to impose punitive penalties on parties proposing

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[16] *See* Juliana Kaplan & Grace Kay, *Can't find chicken wings, diapers, or a new car? Here's a list of all the shortages hitting the reopening economy*, Insider (May 25, 2021), https://www.businessinsider.com/why-supply-shortages-economy-inventory-chips-lumber-cars-toilet-paper-2021-5.

[17] *See, e.g.*, Julia Horowitz, *How the pandemic turned humble shipping containers into the hottest items on the planet*, CNN.com (Sept. 8, 2021), https://www.cnn.com/2021/09/08/business/shipping-containers/index.html; Costas Paris, *Shipping Options Dry Up as Businesses Try to Rebuild from Pandemic*, Wall Street Journal (Sept. 12, 2021), https://www.wsj.com/articles/shipping-options-dry-up-as-businesses-try-to-rebuild-from-pandemic-11631439002?st=8wumh3fsb5i4qvp&reflink=article_email_share (describing that WalMart and Home Depot are chartering own ships to move imports from Asia).

[18] Phillips & Wilson *supra* note 1; FTC Press Release, *FTC Extends Deadline for Comments on Workshop Addressing Non-Compete Clauses in Employment Contracts* (Jan. 28, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-extends-deadline-comments-workshop-addressing-non-compete.

[19] *See* SMARTER Act, S. 4876, 116th Cong. (2020).

[20] *See* One Agency Act, S. 633, 117th Cong. § 4 (2021). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[21] *See* Exec Order No. 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021); Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf.

mergers that the Majority believes are anticompetitive.[22] The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.

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We lament the majority's continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct.

[22] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to Brian Deese, Director, Nat'l Econ. Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf; Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

PRESS RELEASE

Justice Department Withdraws Outdated Enforcement Policy Statements

Friday, February 3, 2023

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The Withdrawal Best Serves the Interests of Healthcare Competition

The Justice Department's Antitrust Division announced today the withdrawal of three outdated antitrust policy statements related to enforcement in healthcare markets: *Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sept. 15, 1993); *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1, 1996); and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011).

After careful review and consideration, the division has determined that the withdrawal of the three statements is the best course of action for promoting competition and transparency. Over the past three decades since this guidance was first released, the healthcare landscape has changed significantly. As a result, the statements are overly permissive on certain subjects, such as information sharing, and no longer serve their intended purposes of providing encompassing guidance to the public on relevant healthcare competition issues in today's environment. Withdrawal therefore best serves the interest of transparency with respect to the Antitrust Division's enforcement policy in healthcare markets. Recent enforcement actions and competition advocacy in healthcare provide guidance to the public, and a case-by-case enforcement approach will allow the Division to better evaluate mergers and conduct in healthcare markets that may harm competition.

"The healthcare industry has changed a lot since 1993, and the withdrawal of that era's out of date guidance is long overdue," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "The Antitrust Division will continue to work to ensure that its enforcement efforts reflect modern market realities."

Guidance documents are non-binding and do not create legal rights or obligations. Antitrust enforcement and competition advocacy in healthcare remain important parts of the division's mission, and the division will continue to vigorously enforce the antitrust laws in the healthcare industry.

Updated February 3, 2023

Federal Trade Commission Withdraws Healthcare Enforcement Policy Statements

The Federal Trade Commission announced today the withdrawal of certain antitrust statements related to enforcement in healthcare markets: *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1, 1996); and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011) [hereafter "the Statements"].[1]

The Commission has determined that the withdrawal of the Statements is the best course of action for promoting fair competition. Much of the Statements are outdated, reflecting market realities that are no longer extant. Moreover, the Statements may be overly permissive on certain subjects, such as information sharing. In particular, companies have sometimes used the safety zone for information exchanges in contexts and industries that were never contemplated by the agencies, including to share competitively sensitive wage and benefit information with other employers.[2]

Rather than continue to rely on such outdated guidance, the Commission will rely on general principles of antitrust enforcement and competition policy for all markets, including markets related to the provision of healthcare products and services. Given the profound changes in these markets over the last thirty years, the statements no longer serve their intended purpose of providing accurate guidance to market participants. Rather, the Commission's extensive record of enforcement actions, policy statements, and competition advocacy in healthcare provide more up-to-date guidance to the public. We will continue our enforcement by evaluating on a case-by-case basis mergers and conduct in healthcare markets that affect so many Americans.[3]

Guidance documents are non-binding and do not create legal rights or obligations. Antitrust enforcement and competition advocacy in healthcare remain important parts of the FTC mission, and the Commission will continue to vigorously enforce the antitrust laws in the healthcare industry.

[1] The U.S. Department of Justice previously announced its withdrawal of the Statements on February 3, 2023.
[2] Doha Mekki, Principal Deputy Assistant Attorney General, Dep't of Justice, Antitrust Div., Remarks at GCR Live: Law Leaders Global 2023 III. 1. (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0.
[3] The FTC maintains a working relationship with the Center for Medicare Studies (CMS) with respect to CMS' review of Accountable Care Organization ("ACO") applications as well as discussion of new ACO program ideas and other regulatory reforms involving the Medicare and Medicaid programs that CMS is considering. These consultations help CMS ensure that its plans and regulations will not have unintended consequences that could harm competition or inadvertently cause healthcare providers who participate in those programs to run afoul of the antitrust laws. Withdrawal of the Statements here does not in any way affect this ongoing relationship, which the Commission intends to continue.