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Turnabout and Fair Play: The Changing Antitrust Enforcement Landscape

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TURNABOUT AND FAIR PLAY: THE CHANGING ANTITRUST ENFORCEMENT LANDSCAPE

ROBERT W. MCCANN

I. INTRODUCTION: AND NOW FOR SOMETHING COMPLETELY DIFFERENT?

The question of reforming the antitrust laws – of whether those laws as interpreted and enforced in the recent past can handle the competitive dynamics of a 21st Century economy – has been debated for at least the past decade – and has been a consistent *cause célèbre* of political progressives in particular. And so, the election of President Biden, in combination with the ascendance of a vocal progressive minority in Congress and the Democratic Party's control (at least on paper) of both the House and the Senate, brought renewed anticipation of changes in antitrust policy, particularly toward large technology companies. Of course, the technology sector is not the only subject that is prominent in the discussions of enhanced regulation of market conduct – health care and hospitals are routinely mentioned in the same breath.

And, indeed, a commitment to changing the antitrust landscape surfaced quickly in Washington – in a "whole of government" Executive Order on competition from the President, in a makeover of the Federal Trade Commission (FTC), and in a rapid-fire series of announced changes in the FTC's merger enforcement policy. All the while, interest in legislative reform has persisted among progressive Members of Congress.

This article first describes the current environment for antitrust reform through the ongoing policy actions and debates in Congress and in the Executive Branch, and particularly at the FTC. The new directions being taken in merger review and enforcement comprise the centerpiece of this writing, which then concludes with an examination of the FTC's intended expansion of enforcement against "unfair methods of competition" under Section 5 of the Federal Trade Commission Act, and the implications for health care.

II. SETTING THE CONTEXT: LEGISLATIVE PROPOSALS TO REFORM THE ANTITRUST LAWS

The idea that a legislative solution can improve competition in the United States predates the Biden Administration. The previous (116th) Congress saw a noteworthy proposal to deter monopolistic conduct by authorizing the Department of Justice (DOJ) and the FTC to seek substantial civil monetary penalties (up to 30 percent of a violator's revenue) for Sherman Act Section 2 (monopolization)

violations.[1] This proposal addressed concerns that some corporations (notably large technology corporations) are so large that the prospect of treble damages and/or an injunction in a civil suit, as provided under existing law, is not a sufficient deterrent to anticompetitive conduct.

That bill, containing no proposals to modify or enlarge the substantive legal standards for monopolization, was a modest forerunner of the comprehensive reform proposal introduced early in the first session of the 117th Congress. The "Competition and Antitrust Law Enforcement Reform Act" (CALERA),[2] sponsored by Sen. Amy Klobuchar (D-MN) (who also sponsored the 2019 proposal), would significantly alter both the substance of antitrust law and the process of enforcement. It is an instructive window into the issues that inspire the calls for more stringent antitrust laws and more aggressive enforcement of them.

The premises of the bill comprise twenty-five separate Congressional findings concerning the state of competition and antitrust enforcement in the United States, including that:

> … court decisions and enforcement policies have limited the vitality of the Clayton Act to prevent harmful consolidation by— (A) discounting previously accepted presumptions that certain acquisitions are anticompetitive; (B) focusing inordinately on the effect of an acquisition on price in the short term, to the exclusion of other potential anticompetitive effects; (C) underestimating the dangers that horizontal, vertical, and conglomerate mergers will lower quality, reduce choice, impede innovation, exclude competitors, increase entry barriers, or create buyer power, including monopsony power; and (D) requiring the government to prove harmful effects of a proposed merger to a near certainty …

CALERA would alter the legal standards under the Clayton Act so as to greatly reduce the Agencies' burden in proving a violation of federal antitrust law.[3] It would do so in part by enshrining in the statute (and requiring the courts to follow) specific definitions of anticompetitive conduct. With regard to mergers and acquisitions, CALERA would:

- Amend the operative language of Section 7 of the Clayton Act to prohibit mergers that "create an appreciable risk of materially lessening competition" (replacing the current standard of "where the effect of the acquisition may be to substantially lessen competition").

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[1] Monopolization Deterrence Act of 2019, S. 2237, 116th Cong., 1st Sess. (July 23, 2019). Prior debates over antitrust reform are further discussed in Robert W. McCann, *Certainty and (or) Change*, HEALTH LAW HANDBOOK 2020 EDITION (Alice G. Gosfield, ed. 2020) at 538-40.

[2] S. 225, 117th Cong., 1st Sess. (Feb. 4, 2021).

[3] From time to time, this article will refer to the FTC as "the Commission" and to the FTC and DOJ together as the "Agencies."

- Define an "appreciable risk of materially lessening competition" specifically to mean (1) a significant increase in market concentration; (2) a market share in excess of 50 percent in any relevant market, either pre- or post-merger, if there is a "reasonable probability" of competition between the parties absent the merger; (3) elimination (by merger or acquisition) of a market-disrupting firm (*e.g.*, an actual or potential innovator); (4) otherwise enabling or enhancing the exercise of market power by means of a merger.

- Provide further (in a provision unquestionably directed at the technology sector) that in any acquisition meeting certain size thresholds by a company with a market capitalization of $100 billion or more, the merging parties (not the FTC or DOJ) would bear the burden of proof – specifically, to establish by a preponderance of evidence that their transaction would not create an appreciable risk of lessening competition by "more than a de minimis amount."

With respect to non-merger conduct, CALERA would add a new substantive prohibition to the Clayton Act, barring conduct, concerted or unilateral, that "materially disadvantages" a competitor or "tends to foreclose the ability or incentive" of a competitor to compete. The new provision would define an appreciable risk of harm to exist if the actor (or group of actors) engaging in the challenged conduct has a market share in excess of 50 percent or otherwise has significant market power, unless the actor(s) can show by a preponderance of the evidence that the conduct at issue is procompetitive or does not in fact present an appreciable risk of harm. CALERA would re-define the concept of "exclusionary conduct" with at least a partial shift of focus to competitor disadvantages (rather than harm to competition). In this respect, CALERA also would address the principal conduct issue at the heart of the 2020 *Vertical Merger Guidelines*,[4] discussed below, which were withdrawn by the FTC in 2021.

It is improbable that CALERA will become law in the current Congress. As of this writing, the bill is sitting in the Senate Judiciary Committee and has garnered no Republican co-sponsors. Nonetheless it is an important guide to the direction of the continuing political debate over antitrust enforcement, and – because Congress is not rushing to take up the subject – the proposed legislation in part set the stage for action by the Executive Branch. Indeed, its concepts echo throughout the recent actions of the Executive Branch and the FTC.

[4] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (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 (hereinafter "*Vertical Merger Guidelines*").

III. EXECUTIVE ACTIONS TO INVIGORATE ANTITRUST ENFORCEMENT

The Biden Administration signaled its intention to strengthen and expand antitrust enforcement within its first 90 days with the nomination of Lina Kahn, a Columbia University law professor, to fill a vacant seat on the Commission.[5] A noted critic of the prevailing "Chicago School" of antitrust economics and its insinuation into federal antitrust enforcement, Ms. Kahn is the author of an influential law review article that put her in the vanguard of the movement to rein in the consolidation of technology-driven markets by companies such as Amazon, Apple, Google, and Facebook.[6] Immediately upon her confirmation by the Senate, the President appointed Ms. Kahn to be the Chair of the Commission, leaving no doubt as to the direction the Administration wished the FTC to take.[7]

Shortly after Ms. Kahn's confirmation, the President issued an Executive Order calling for a whole-of-government initiative to address competition problems in American markets, with the announced objective of remedying high prices for consumers, suppressed wages for workers, and the stifling of innovation.[8] It specifically reflects the view that consolidation within critical industries has allowed large firms to transform their economic power into political power.[9] The Order directs or

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[5] FTC Commissioners are selected by the President for seven-year terms, subject to confirmation by the Senate. By law, no more than three Commissioners may represent any one political party. The President selects the Chair of the Commission. Fed. Trade Comm'n Act, 15 U.S.C. § 41. In October, 2021, Commissioner Rohit Chopra (a Democrat) resigned to become the Director of the Consumer Financial Protection Bureau, creating a 2-2 party split among the Commissioners. President Biden will fill that vacancy (unfilled as of this writing), presumably with someone who is philosophically aligned with the Chair.

[6] Lina M. Kahn, *Amazon's Antitrust Paradox,* 126 YALE L. J. 710 (2017). The title of the article is a play on the title of Judge Robert Bork's influential 1978 book, *The Antitrust Paradox: A Policy at War with Itself,* which is considered a seminal exposition of the Chicago School approach to antitrust law. The Chicago School approach and the criticisms of that philosophy by Ms. Kahn and others are discussed in Robert W. McCann, *Thinking Big: Market Power in Consolidating Health Care Markets*, HEALTH LAW HANDBOOK 2019 EDITION (Alice G. Gosfield, ed. 2019).

[7] The President also appointed like-minded individuals to related posts. Timothy Wu, like Kahn a former law professor at Columbia and a harsh critic of large technology companies, is the White House Competition and Technology Counsel and, to head the Antitrust Division of the Justice Department, the President selected (and the Senate confirmed) Jonathan Kantor, an antitrust attorney with significant trial experience and who most recently specialized in representing companies in disputes with major technology firms.

[8] Executive Order 14036 of July 9, 2021, Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 14, 2021).

[9] There is no question that Congress in 1890 saw the passage of the Sherman Act in political and social terms. The importance of the Act was described on the floor of Congress in words such as: keeping markets free from "autocrats of trade" and eliminating monopolies that were "a menace to republican institutions." 21 CONG. REC. 2457 (statement of Sen. Sherman), 3146 (statement of Sen. Hoar) (1890). Indeed, in his Executive Order, President Bident reached back for judicial support from an earlier era expressing a similar view – to the Supreme Court's decision in *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (the Sherman Act ''rests on the premise

encourages a broad array of federal agencies (not just the FTC and DOJ) to adopt rules to remedy perceived deficiencies in competition within an array of economic sectors. This position represents a significant shift away from the economic/political philosophy that for a half-century has maintained that regulatory intervention in markets is disfavored and, if undertaken, should be limited in scope.

Health care, specifically including hospitals, is one of the sectors called out for scrutiny and intervention. The Order declares that hospital mergers have "left many areas, particularly rural communities, with inadequate or more expensive health care." A fact sheet issued in conjunction with the Order further criticizes "unchecked" hospital mergers and cites to studies showing that the prices charged by hospitals in consolidated markets are higher than those charged by hospitals in competitive markets.[10]

The Order calls for a re-assessment of both the horizontal and vertical merger guidelines adopted by the FTC and DOJ. It reaffirms the government's authority to challenge consummated mergers if they have harmed competition. And, consistent with its broader social welfare focus, the Order directs federal agencies to address competitive issues arising from mergers and other business conduct in labor markets, among other areas.

The FTC let no grass grow under its feet in taking up the invitation from the President (and some Members of Congress) to adopt a more aggressive and confrontational posture toward business combinations and dominant firms.[11] In a span of less than four months, the FTC made eight changes to its enforcement policies (each discussed in more detail in the sections that follow) that are expected to materially affect the review of mergers and other transactions in the health care industry:

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that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, *while at the same time providing an environment conducive to the preservation of our democratic political and social institutions*.'') *Id.* at 4 (emphasis added).

[10] EXEC. OFF. OF THE PRESIDENT, FACT SHEET: EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[11] To the extent the focus of this article is directed more to Federal Trade Commission, it reflects the fact that, as between the FTC and the DOJ, the FTC exercises principal jurisdiction over health care provider mergers. (The DOJ typically is primary in reviewing combinations in the health insurance industry.) Also, to date, the FTC has been much more aggressive in proposing changes to the enforcement paradigm than the DOJ.

- Withdrawing the 2020 *Vertical Merger Guidelines*.[12]
- Suspending "early terminations" under the Hart-Scott-Rodino (HSR) Act,[13] a mechanism that allowed transactions presenting no competitive problems to close more expeditiously.[14]
- Expanding the use of compulsory process (subpoenas and civil investigative demands) in monopolization investigations.[15]
- Reinstating (with enhancements) a prior approval requirement for companies with previous merger settlements or violations, which the FTC had abandoned in 1995.[16]
- Expanding the scope of merger investigations to include labor market effects, cross-market effects, and the involvement of investment firms.[17]
- Changing the HSR "Second Request" review process in a manner that will increase compliance burdens for the merging parties.[18]
- Adopting a position that mergers will remain under active review after the expiration of the statutory waiting period under the HSR Act if the Agency believes that it has had insufficient time to review the transaction.[19]
- Withdrawal of the Commission's 2015 enforcement guidance regarding Section 5 of the Federal Trade Commission Act (FTC Act).[20]

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[12] Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary, (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[13] Hart Scott Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a (hereinafter "HSR Act"). The HSR Act requires parties to mergers and acquisitions that exceed certain size thresholds to report those transactions in advance to the FTC and DOJ, and observe a 30-day waiting period before closing. The Agencies may extend the initial 30-day period by issuing a "Second Request" for additional information. *See* n. 41, *infra*.

[14] Holly Vedova, Dir., Bureau of Competition, *Adjusting Merger Review to Deal with the Surge in Merger Filings*, Fed. Trade Comm'n (Aug. 3, 2021, 12:28 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[15] Press Release, Fed. Trade Comm'n, FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload (Sept. 14, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas.

[16] Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (Jul. 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter; Press Release, Fed. Trade Comm'n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

[17] Holly Vedova, Dir., Bureau of Competition, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, Fed. Trade Comm'n (Sept. 28, 2021, 8:08 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[18] *Id.*

[19] *Id.*; *see also* FED. TRADE COMM'N, SAMPLE PRE-CONSUMMATION WARNING LETTER (Aug. 3, 2021) attached thereto.

The FTC (in conjunction with the DOJ) also announced that, as directed in the President's Executive Order, the Agencies would undertake a "rigorous" review and strengthening of the *Horizontal Merger Guidelines* published in 2010.[21] In a joint statement emphasizing that merger enforcement has become too lax, the FTC Chair and Acting Assistant Attorney General said, "We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive."[22]

In Section IV that follows, the implications of the Commission's actions for hospital and health care mergers are discussed. The Section 5 enforcement issues – less visible but also of potentially significant impact on health care transactions – are addressed in a Section V below.

IV. The New Normal of Merger Review

The FTC's announced changes to its merger review policies and practices brought a significant ideological rift among the Commissioners to the fore, with most changes being approved by a 3-2 vote along the lines of the Commissioners' political affiliations and accompanied by strong written dissents. The objectives underlying the changes seem obvious. The first is to slow-walk the review process going forward to the extent legally permissible. The second is to inject more risk and uncertainty into the process for parties proposing mergers and acquisitions, including transactions that would have been considered to present moderate or even low risk of competitive harm in prior years.[23] These policies

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[20] Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited its Enforcement Ability Under the FTC Act (Jul. 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

[21] Fed. Trade Comm'n & U.S. Dept. of Justice, Horizontal Merger Guidelines (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (hereinafter "*Horizontal Merger Guidelines"*).

[22] Press Release, Fed. Trade Comm'n, Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

[23] Notably, as of this writing, the Department of Justice has not joined or concurred in all of the actions taken by the FTC. The DOJ has concurred in the suspension of early HSR terminations and, as noted, the DOJ has stated that it will collaborate with the FTC in the review of the *Horizontal Merger Guidelines*. The DOJ has not followed suit on any of the other actions described, and notably has not formally concurred in the withdrawal of the *Vertical Merger Guidelines*. In a statement issued at the time of the FTC's withdrawal, the Acting Assistant Attorney General for Antitrust indicated that the *Vertical Merger Guidelines* "remain in place" at the Justice Department, and that the DOJ would "work closely" with the FTC "to update them as appropriate," noting that as yet the Agencies had not had the benefit of public comments on the final version of the 2020 document. Press

serve the FTC Chair's overall goal of addressing "rampant consolidation and the dominance that it has enabled across markets" and "deter[ring] unlawful transactions."[24] It can be expected that each of these actions will inform the announced plans to review and revise the 2020 *Vertical Merger Guidelines* and the 2010 Horizontal Merger Guidelines.

A. *Rescission of the Vertical Merger Guidelines*

The competitive issues arising in the context of non-horizontal business combinations are important to the health care industry, and the 2020 *Vertical Merger Guidelines* represented the first effort of the Agencies to provide comprehensive guidance on enforcement in more than 35 years.[25] Thus, the Commission's decision to withdraw those Guidelines just one year later injects a great deal of uncertainty into the vertical integration strategies of health care organizations.[26]

Vertical relationships abound in health care, primarily in the form of integration between health systems and physicians. The quest for success in accountable care and population health management places a premium on economic alignment among providers and control over clinical efficiency. In particular hospitals and health systems continue to acquire physician practices on the premise that ownership and employment provide the most effective alignment to reduce medical variation, improve outcomes, and successfully deal with performance-based payment reforms. Recent figures indicate that about half of U.S. physicians are employed by hospitals and hospital-based systems.[27] Market considerations also have increased alignments between hospital systems and post-acute providers.

Release, U.S. Dept. of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[24] Fed. Trade Comm'n, Memorandum from FTC Chair Lina Kahn to Commission Staff and Commissioners (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (hereinafter "Kahn Memo").

[25] For a more detailed discussion of vertical competition issues in health care and the 2020 *Vertical Merger Guidelines*, *see* Robert W. McCann, *The New Vertical Merger Guidelines and Health Care Integration*, in Alice G. Gosfield, ed., 2021 HEALTH LAW HANDBOOK (Alice G. Gosfield, ed. 2021).

[26] The *Vertical Merger Guidelines* (for now) remain the policy of the DOJ,

[27] A 2021 study prepared by Avelere Health for the Physician Advocacy Institute reported that nearly 70 percent of U.S. physicians are employed, 49 percent by hospitals and health systems, and the remainder by insurance companies, private equity firms, and other corporate entities. Significant recent increases in those numbers are attributed in the report to the COVID-19 pandemic. PHYSICIAN ADVOCACY INSTITUTE, COVID-19'S IMPACT ON ACQUISITIONS OF PHYSICIAN PRACTICES AND PHYSICIAN EMPLOYMENT 2019-2020 (June 2021), http://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/Revised-6-8-21_PAI-Physician-Employment-Study-2021-FINAL.pdf?ver=K6dyoekRSC_c59U8QD1V-A%3d%3d.

Presently, the majority of hospital-post-acute relationships are networking (contractual) arrangements rather than common ownership.[28] However, common ownership of hospitals and post-acute providers through corporate investment has been trending upward.[29]

Vertical relationships create competitive issues if they permit a firm to foreclose competitors from the market or to increase a competitor's costs of doing business. In health care, this concern may arise, for example, if a health system, by vertically integrating into physician services, acquires the ability to control the flow of patients (or at least certain categories of patients) to a competitor hospital in the same market. If the vertically integrated system has market power in the hospital services market, it also, simultaneously, may be able to disadvantage physicians who compete with its own physician group, *e.g.*, by restricting or denying privileges, discriminating in the assignment of operating room time, *etc.* Thus, a hospital in this position theoretically could exercise market power to effectuate either horizontal or vertical foreclosure, or both. These theories of competitive harm have been raised (although not specifically litigated) in a number of recent federal and state challenges to health care mergers and acquisitions.[30]

The promulgation of the 2020 *Vertical Merger Guidelines* was controversial. Public comment was divided on the merits of the document when released in draft form, particularly on the question of whether and how to assess the potential efficiencies of a vertical combination – a subject discussed further below. The Commission's vote to approve was 3-2, marking the first time an FTC guidance document had been issued with less than unanimous support of the Commissioners. The dissenting votes came from the two Democratic Commissioners, who argued that the new *Vertical Merger*

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[28] Andre Maksimow & Dawn Samaris, "Optimizing a Health System's Post-Acute Care Network," *HFM Early Edition* (May, 2018), https://www.hfma.org/topics/hfm/2018/may/60603.html.

[29] Annabelle C. Fowler, et al., *Corporate Investors Increased Common Ownership in Hospitals and the Post-Acute Care and Hospice Sectors*, 36 HEALTH AFFAIRS 1547 (Sept. 2017).

[30] *Fed. Trade Comm'n v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019); Mem. of Decision, Findings of Fact, Conclusions of Law, and Order, *Fed. Trade Comm'n v. Sanford Health*, No. 1:17-cv-133 (D.N.D. Dec. 15, 2017) at ¶ 149, https://www.ftc.gov/system/files/documents/cases/1710019_sanfordpiorder.pdf; Compl., *In the Matter of United Health Group Inc., et al.*, No. C-4677 (F.T.C. June 19, 2019), https://www.ftc.gov/system/files/documents/cases/181_0057_c4677_united_davita_complaint.pdf; Press Release, Office of the Attorney General of Colorado, Antitrust Challenge and Settlement to the UnitedHealth Group and DaVita Merger Will Safeguard Competition, Cost, and Quality of Healthcare for Seniors in the Colorado Springs Area (June 19, 2019), https://coag.gov/press-releases/06-19-19/ (an unfiled version of the Colorado complaint may be found at https://coag.gov/app/uploads/2019/06/2019-06-19-08-00-13-United-DaVita-Complaint-final.pdf); *Fed. Trade Comm'n v. St. Luke's Health Sys., Ltd.*, 2014 WL 525540 (D. Idaho Jan. 24, 2014) *aff'd sub nom St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015)

Guidelines did not go far enough to support and encourage interdiction of anticompetitive transactions.[31]

Both dissenting Commissioners specifically called out health care as an industry in which vertical integration has been, in their view, harmful to consumers. In the words of Commissioner Slaughter, "Even those who disagree on the substance of the Guidelines must share the view that how they are implemented will be critically important. This is not merely an academic or theoretical exercise. Vertical-merger enforcement will be relevant across the economy, especially in health care, agriculture, digital, and telecommunications markets …" [32]

The change in composition of the Commission in 2021 flipped the playing field. In September, 2021, the Commission formally voted to withdraw the 2020 *Vertical Merger Guidelines*. The vote, again, was 3-2 with Chair Kahn joining the 2020 dissenting Commissioners in the majority. The majority issued an extensive statement of its reasoning, which primarily faulted the 2020 *Guidelines* for incorporating a framework for considering merger efficiencies in the enforcement calculus.[33]

The majority's reasoning reveals much about the current Commission's view of merger enforcement – both vertical and horizontal. In the majority's view, because the efficiencies are not specifically countenanced by the language of Section 7 of the Clayton Act, efficiencies can never "save" a

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[31] Fed. Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter In re FTC-DOJ Vertical Merger Guidelines*,* Comm'n File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf (hereinafter "Slaughter Dissent"); Fed. Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of Vertical Merger Guidelines, Comm'n File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

[32] Slaughter Dissent at 8.

[33] "In particular, the 2020 [Vertical Merger Guidelines'] flawed discussion of the purported procompetitive benefits (*i.e.*, efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization ('EDM'), could be difficult to correct if relied on by the courts," Fed. Trade Comm'n, Statement of Chair Lina M. Kahn, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Commission File No. P810034 (Sept. 15, 2021) at 2 (footnote omitted), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf (hereinafter "Majority VMG Statement"). "EDM" refers to the economic argument that a vertically integrated firm, by internalizing (thus eliminating) the profit component of the price charged by the upstream supplier to the downstream seller (*i.e.*, an integrated firm will not extract a profit from itself for internally produced inputs), has a basis and incentive to reduce the ultimate price charged by the downstream firm to consumers of its output. Some economists consider EDM to be a merger efficiency; some do not. *See* McCann, *The New Vertical Merger Guidelines*, n. 25, *supra*, at 616-17.

merger that lessens competition.[34] The majority asserts that courts have been led to err in this regard by earlier versions of the *Horizontal Merger Guidelines*, which suggested that efficiencies could offset a merger's potential lessening of competition.[35] They state that efficiencies are only relevant "insofar as they shed light on the level of post-merger competition, which must be considered across many dimensions – price, quality, innovation, variety, service, and more."[36] The Majority VMG Statement goes on to explain that the Commission will place greater reliance on the presumption that a combination sustaining or creating market concentration is likely to result in anticompetitive effects.[37]

This turn of events has great significance for vertical integration in health care. In an environment promoting value-based care, the improvement of clinical efficiency, both to control utilization and to improve quality, has become a critical objective for many provider organizations. Vertical integration continues to be seen as a tool to address the adverse effects of moral hazard and information asymmetry (which cause health care markets to allocate resources inefficiently), and to respond effectively to regulatory mandates. However, research on vertical integration in health care has produced mixed evidence as to whether vertical integration improves market performance.[38] The Majority VMG Statement indicates, that the Commissioners are not sanguine about the benefits of vertical integration in health care specifically.

> Studies of mergers between hospitals and physician groups – which have led to significant concentration in many areas – suggest these vertical mergers have not achieved theorized efficiencies. Instead, they find that vertical consolidation has increased physician costs, hospital prices, and per capita medical spending, with larger effects in more concentrated markets. Nor have these cost increases been associated with improved medical care.[39]

Agency guidance documents, such as the *Vertical Merger Guidelines*, are intended to provide a measure of transparency into the Agencies' process for making enforcement decisions. With respect to vertical mergers, the FTC has chosen to go dark for the moment, except to the extent their overall

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[34] Majority VMG Statement at 3.

[35] *Id.*

[36] *Id.* at 4.

[37] *Id.* at 4-5.

[38] Numerous studies, pro and con, are cited and discussed in McCann, *The New Vertical Merger Guidelines*, n. 25, *supra*, at 627-32.

[39] Majority VMG Statement at 5, citing Thomas L. Greaney, *The New Health Care Merger Wave: Does the "Vertical, Good" Maxim Apply?* 46 J. L. MED. & ETHICS 918 (2018).

skepticism is illuminated by the Majority VMG Statement.[40] Providers embarking on further vertical integration must deal with the uncertainty of this situation and pay more attention to structural market issues than seemed necessary in the recent past.

B. Slow Walking the HSR and Second Request Processes

The Commission's decisions to (1) suspend the early termination option under the HSR Act; (2) adopt a public position reserving the right to keep investigations open after the end of the HSR waiting period; and (3) increase the procedural burden of HSR "Second Requests" signal a more difficult time ahead for parties undertaking reportable mergers.

Suspension of Early Terminations Under the HSR Act. As noted, the HSR Act requires 30 days' prior notification to the FTC and DOJ of mergers and acquisitions that exceed certain size thresholds. The Act was passed in 1976 to address the one-time prevalence of "midnight mergers" – combinations negotiated and closed in secret so as to minimize the risk of an antitrust investigation. The Act was thus designed to give the Agencies a bit of a head start in reviewing proposed transactions. The HSR Act applies without regard to whether a transaction is likely to reduce competition in a relevant market, and each year thousands of HSR notifications are filed for transactions that are competitively benign.[41]

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[40] The two dissenting Commissioners made exactly this point in unmistakable terms. "The uncertainty imposed on businesses … threatens to slow unnecessarily the American economy's recovery by denying law-abiding businesses the guidance they need to know what actions are permissible … 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." Fed. Trade Comm'n, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Recission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf.

[41] In the most recent reported year (federal fiscal year (FFY) 2020), the Agencies received HSR filings for 1,580 transactions. Only forty-eight of those transactions (3 percent) resulted in investigations in which a Second Request was issued. (A Second Request is a request by the reviewing Agency for additional documents and information from the merging parties that extends the initial 30-day waiting period pending compliance with the request and is indicative the Agency's assessment that the proposed transaction presents material competitive issues.) FED. TRADE COMM'N & U.S. DEPT. OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2020 (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

Prior to 2021, parties could request "early termination" of the 30-day waiting period, which was granted (or not) at the discretion of the reviewing Agency.[42] However, in what the Agency described as a reaction to "the unprecedent volume of HSR filings," the FTC, "with support from the Antitrust Division" of DOJ, announced the suspension of early termination grants.[43] Although described as a "temporary" move, the suspension remains in effect as of this writing, more than a year later.

The effect of the suspension falls on competitively benign transactions that the Agencies, by definition, have no interest in investigating. Although the announcement was tied to a stated intent to review the procedures by which early termination has been granted in the past, there is no evidence that the early termination program routinely (or even occasionally) allowed anticompetitive transactions to slip through the cracks. In a statement objecting to the suspension, Commissioners Phillips and Wilson noted that the Agencies have experienced similar periods of high filing volumes in the past without the need to pause early termination.[44] The statement characterizes the Commission's actions as a retrenchment from the Agencies' historical goal of minimizing the burden of HSR review – and that would seem to be a logical conclusion in light of the Commission's subsequent action to increase the level of risk and uncertainty for mergers that complete the statutory waiting period.

Open Investigations and Issuance of Pre-Closing Warning Letters. Upon the expiration of the statutory 30-day waiting period under the HSR Act, the filing parties may lawfully close their transaction *unless* the reviewing Agency has extended the waiting period by the formal issuance of a Second Request.[45] The Agencies, of course, retain the ability to challenge a transaction at any time, pre- or post-closing, and it has been always understood that the expiration of the waiting period is not an "approval" of the transaction, but rather an indication that the reviewing Agency has no present intention to challenge it. Accordingly, it has been assumed that meaningful risk of an enforcement action attends a decision to close a merger or acquisition after the waiting period expires. Indeed,

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[42] Of the 1,580 transactions reported in FFY 2020, early termination was requested in 1,133 instances (72 percent), and 861 of those requests (76 percent) were granted. *Id.* In other words, early termination was granted to approximately half of all reported transactions in 2020.

[43] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021). Unofficial figures posted on the FTC's website show 3,644 HSR transactions in FFY 2021, which is a 131% increase over FFY 2020.

[44] Fed. Trade Comm'n, Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Termination (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[45] *See* n. 41, *supra*.

instances in which an Agency has brought a post-consummation challenge to an HSR-reportable transaction are rare.

It is no longer clear that the historical confidence in the HSR process can be assumed. Citing again the "tidal wave" of merger filings in 2021, the FTC staff announced a new practice of issuing "close-at-your-own risk" warning letters to the parties in transactions where the agency expects to maintain an open investigation beyond the 30-day HSR waiting period, but without issuing a Second Request. The form of warning letter published by the Commission carries a distinct tone of foreboding for the recipient parties:

> Please be advised that if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk. Any inaction by the Commission before the expiration of the [HSR] waiting period should not be construed as a determination regarding the lawfulness of the transaction. Indeed, no such determination could be made unless and until the Commission completes its investigation. The parties cannot stop the investigation or avoid an enforcement action by consummating. To the contrary, and in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions— before or after their consummation—that threaten to reduce competition and harm consumers, workers, and honest businesses.[46]

One can read the warning letter, if not as a threat, as an implicit invitation to not close the transaction, and in that respect, as a *de facto* extension of the HSR waiting period beyond that granted to the Commission by law. Plainly, given that the Commission always has the right to bring a post-consummation challenge, it is seeking to give merging parties a message that the risk of challenge has increased. The letter otherwise would serve no purpose.[47]

It nonetheless has been suggested that the FTC's announcement concerning warning letters is simply posturing. And at some level, it is hard to imagine the FTC using its limited resources to challenge a transaction that it elects not to fully investigate after an HSR filing. The test will be whether it brings a post-closing case to demonstrate its intent. In the meantime, merger counsel are re-assessing their typical closing conditions to take into account the potential issuance of a warning letter prior to the end of the waiting period. Given the expense of litigation (even if successful), parties may not be willing to be forced into closing.

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[46] FED. TRADE COMM'N, SAMPLE PRE-CONSUMMATION WARNING LETTER, n. 19, *supra*.

[47] In a Twitter post, Commissioner Wilson referred to the policy as a "Sword of Damocles" under which those who faithfully comply with the HSR Act will be trapped. Christine S. Wilson (@CSWilsonFTC), Twitter (Aug 5, 2021 9:00 a.m.).

Thus, it may no longer be sufficient to condition the requirement to close on the expiration of the HSR waiting period. But if the parties agree to hold the deal open in the event a warning letter is received, what is the end point? Some deals have specified an additional time certain (*e.g.*, 30 days provided no further communication is received from the FTC), while others have required an affirmative indication from the Agency in such a case that its investigation has closed. Some, however, have taken the opposite approach, specifically stating that receipt of a post-waiting period warning letter does not excuse or extend the obligation to close, at least in the absence of any other indication of an active post-HSR investigation.[48]

Broadening the Burden of Second Requests. As another response to the surge in HSR filings, the FTC also announced changes to its Second Request practices, expanding the substantive scope of Second Requests, and eliminating options that tended to lessen the administrative burdens on the merging parties and to shorten the duration of the Second Request period.[49] First, consistent with FTC's overall enlargement of the scope of merger review, Second Requests may extend to information relating to a proposed merger's effect on labor markets, its potential cross-market effects of a transaction, and the involvement of investment firms. (The first two issues are discussed substantively in Part D of this Section.)

Procedurally, on the front end of the Second Request process, the Agency will no longer negotiate the scope of the Second Request with the parties until after the parties have produced certain "foundational" information – the identify and business responsibilities of employees and agents who are responsible for relevant lines of business or for negotiating, analyzing, or recommending the transaction, as well as information regarding the manner in which the company maintains relevant data. Because the FTC's Second Requests almost inevitably follow a one-size-fits-all template, tailoring the scope of a Second Request to the parties and the particular transaction reduces the time and resources required to respond. The FTC's new approach is likely to make that negotiation more protracted.

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[48] *See* Practical Law Antitrust, *FTC Warning Letters Prompt Modified Hart-Scott-Rodino Closing Condition*, Westlaw (Jan. 7, 2022), https://today.westlaw.com/Document/I8bb16221367a11ecbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[49] Vedova, *Making the Second Request Process Both More Streamlined and More Vigorous During This Unprecedented Merger Wave*, n. 17, *supra*. Notwithstanding the title of this blog post, there is no indication that any of the announced changes will be rolled back if and when the "merger wave" subsides.

Relatedly, the FTC's Second Requests will now require a company to provide information about how it intends to use e-discovery tools before it applies those tools to identify responsive materials. Although parties have been required to provide such information in the past, it now appears that the FTC will be more rigid about the documentation and validation of the tools that a party proposes to use.

On the back end of the process, the FTC has announced that partial privilege logs, a practice that has been an option for at least the past five years, will no longer be accepted. (A privilege log identifies documents that are being withheld from production based on a claim of legal privilege.) Privilege logs are time- and resource-intensive to create, and the partial log option helped expedite many Second Request productions. The FTC stated that discontinuation of the option was necessary to ensure that relevant information is being withheld only on a well-grounded claim of privilege, but in reality, the manner in which most privilege logs were truncated made it unlikely that material non-privileged information was not being disclosed to the Agencies.

C. Reinstatement and Enhancement of Prior Approval Requirements

Tennyson famously wrote, "'Tis better to have loved and lost, / Than never to have loved at all." The FTC begs to differ. The Commission wants parties proposing a merger to think twice about their romance and its effect on their future love life.

Until 25 years ago, the FTC routinely required parties who resolved merger complaints through a consent decree, settlement, or enforcement action to agree to a condition under which they would be required to notify the Commission of, and obtain the prior approval of the Commission for, all future acquisitions in the same market for a period of 10 years. This practice (which pre-dated the HSR Act) was premised on the assumption that anyone proposing a merger that the FTC challenged should not be trusted to avoid anticompetitive conduct in the future. It mattered not whether the parties acted out of bad design or the best of intentions in proposing the challenged transaction. The intended deterrent effect of this policy was well-recognized.[50]

In a 1995 policy statement, the Commission severely curtailed this practice, requiring prior notice and approval of mergers only in "extraordinary circumstances," such as a credible risk that a company would attempt the challenged merger again or that the company would engage in

[50] Fed. Trade Comm'n, Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745, 39746 (Aug. 3, 1995) (Dissenting Statement of Commissioner Mary L. Azcuenaga). The subject statement is referred to hereinafter as the "1995 Statement."

anticompetitive acquisitions below the HSR reporting threshold.[51] This change of course was well-received by the antitrust bar, particularly given that the HSR Act required prior notice to the Agencies of all economically large mergers and acquisitions.

In July of 2021, the Commission withdrew the 1995 Statement, and in October, adopted a new prior approval policy that is more stringent than the pre-1995 policy. Under the new policy, the FTC will "routinely requir[e] merging parties subject to a Commission order to obtain prior approval from the Commission before closing *any* future transaction affecting each relevant market for which a violation was alleged" for a period of ***a minimum of*** 10 years.[52] Further, the Commission may now require prior approvals ***beyond*** the relevant markets that are the subject of the settlement or action, depending on such factors as the level of market concentration, the degree to which a party has market power, evidence of anticompetitive market behavior, and a party's history of acquisitiveness.[53] Finally – in a significant addition to the pre-1995 practice – the Commission in its discretion may require prior approval in situations where the parties abandon their transaction during an FTC investigation or after a complaint has issued, although the Commission's statement indicates that the earlier the parties make the decision to abandon the transaction (and, specifically, prior to certifying compliance with a Second Request), the less likely it is that the Commission will pursue a prior approval order.[54]

The 2021 Prior Approval Statement indicates that the policy serves several Commission interests, including preventing facially anticompetitive deals from being proposed ("Too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures.") and – in a recurring theme – preserving limited Commission resources ("… the Commission should not have to incur additional costs by either (1) re-reviewing the same transaction on numerous occasions or (2) reviewing a similar transaction by one of the merging parties in the same market").[55]

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[51] *Id*. at 39745-46.

[52] Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021) at 1 (emphasis in original), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf (hereinafter "2021 Prior Approval Statement").

[53] *Id.* at 2-3

[54] *Id.* at 2.

[55] *Id.* at 1.

But here again, the Commission's design appears to be one of raising the stakes for parties engaged in all but the most obviously benign transactions. The prior approval requirement does so in three related respects. First, a contractual prior approval requirement, even for HSR-reportable transactions, frees the Commission from the decisional deadlines (*i.e.*, the statutory waiting periods) of the HSR Act. The investigation of a transaction can extend as long as the Commission desires (or until the parties throw in the towel). Second, instead of the Commission bearing the burden to show that a transaction has probable anticompetitive effects, the burden is shifted to the merging parties to prove the absence of such effects, and to do so to whatever degree of certainty the Commission requires. And in that regard, finally, the Commission's grant or denial of its approval is not reviewable by any court.

The new prior approval policy, like all recent policy shifts by the Commission, was adopted by a 3-2 party-line vote. In a lengthy dissent, Commissioners Wilson and Phillips pulled no punches, calling the Commission's action, "another daft attempt by a partisan majority of commissioners to use bureaucratic red tape to weight down all transactions – not just potentially anticompetitive ones – and to chill M&A activity in the United States."[56] The dissenting Commissioners argued that an open "market for corporate control" (*i.e.*, competition to acquire companies) has long been recognized as having positive competitive effects, and that the new prior approval policy constitutes a "gratuitous tax on M&A activity."[57]

Commissioners Wilson and Phillips also note that the policy is just as likely to increase the burden on Commission resources as to reduce it. They argue that the prospect of a prior approval requirement will make parties more likely to litigate, rather than settle, cases with the Commission. Similarly, parties abandoning a transaction will have no incentive to enter into a prior approval agreement voluntarily, which will require the FTC to seek a court order against the parties.[58]

It is difficult to say to what extent the prior approval policy will change corporate behavior. The number of transactions for which a Second Request is issued each year is small, and on that basis, one might argue that the impact of the policy will be minimal. On the other hand, the majority of the

[56] Federal Trade Comm'n, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (FTC Oct. 29, 2021) at 2, https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[57] *Id.* at 1, 4.

[58] *Id.* at 7-8.

Commission appears to be wagering on the deterrent effect of the policy – *i.e.*, the potential cost to a company's future business plans if it bets "wrong" on a current transaction – to keep deals out of the market in the first place.

D. Broadening the Scope of Investigations

Following the lead of the President's Executive Order, the FTC announced both substantive and procedural expansion of its merger investigation authority. Of particular relevance to hospital and health system combinations, investigations will now seek information on and evaluate a merger's impact on the labor force, as well as its potential for "cross-market" effects. And more generally, the FTC has given itself more leeway to open investigations and use compulsory process to obtain information and testimony.

Expanded Use of Compulsory Process. Historically, the use of compulsory process (civil investigative demands and subpoenas) to obtain documents, information, and testimony required authorization by a vote of the full Commission. The current Commission, by 3-2 vote, has authorized the Chair, or a single Commissioner designated by the Chair, to authorize such requests in seven designated areas, including specifically health care and hospitals, as well as previously consummated mergers and acquisitions, for a period of 10 years.[59]

Although this may seem a small step, it in fact eliminates the opportunity and requirement for debate among the Commissioners regarding the merits of pursuing any given investigation. It gives the Chair plenary authority to direct the investigative work of the FTC staff. And, candidly, given the

[59] Press Release, Fed. Trade Comm'n, FTC Authorizes Investigations into Key Enforcement Priorities, (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities; Fed. Trade Comm'n, Resolution Directing Use of Compulsory Process Regarding Acts or Practices Affecting Health Care Markets, File No. P210100 (July 1, 2021), https://www.ftc.gov/system/files/documents/foia_requests/p210100_omnibus_resolution_healthcare_markets.pdf; Fed. Trade Comm'n, Resolution Directing Use of Compulsory Process Regarding Consummated Merger and Acquisition Investigations, File No. P210100 (July 1, 2021), https://www.ftc.gov/system/files/documents/foia_requests/p210100_omnibus_resolution_consummated_mergers.pdf. The other five areas for which identical authorization was given are (1) acts or practices related to the Covid-19 public health emergency; (2) acts or practices affecting labor or small business operators; (3) proposed mergers, acquisitions, and transactions subject to premerger notification; (4) persons, partnerships, and corporations subject to prior Commission orders; and (5) technology platforms

Congressionally mandated bipartisan composition of the Commission, it opens the door to pursue a broader political agenda through the work of the FTC.[60]

Consideration of Merger Effects in Labor Markets. There is no clearer indication of the Biden Administration's intent (and that of the current Commission majority) to remake antitrust enforcement as a tool to improve *social* welfare than the inclusion of labor market effects as a priority consideration in merger investigations and antitrust enforcement generally. Over the past forty-plus years, the focus of antitrust enforcement has landed on a *consumer* welfare standard – a market view attributed to Chicago School economists, holding that a market's structure is created by the interplay of independent market forces and the requirements of production – in other words, that markets with rational economic actors seeking to profit-maximize will seek to align in the most efficient structure for the particular market. In this view, market power is only a problem if it leads to higher prices or reduced output or quality (*i.e.*, a loss of consumer welfare).[61] The politically progressive view of antitrust law finds this idea wanting, instead viewing antitrust law as a means to ensure that large institutions play by a set of rules that protects society's interests, not just in consumer prices, but also in product choices, innovation, employment, and even the environment.[62]

As noted, President Biden's Executive Order on Promoting Competition in the American Economy urged the FTC and DOJ to consider the effects of corporate combinations on labor markets. It emphasizes the need for the Agencies to be cognizant of mergers that may lead to labor monopsonies, or that may allow small group of dominant employers to control employment within an industry. The Order advises the Agencies to consider how mergers might hinder workers' mobility and their power to negotiate for better wages and benefits. The FTC Chair reflected this view in a memorandum outlining priorities for the Agency, stating "we need to take a holistic approach to identifying harms, recognizing

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[60] Notably, the seven resolutions were brought to the Commission as a package and were not debated on their individual merits. *See* Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding Open Commission Meeting on July 1, 2021 (July 1, 2021) at 9-10, https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.

[61] *See, e.g.*, Richard Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925, 932 (1979).

[62] This is the central argument of FTC Chair Kahn's 2017 *Yale Law Journal* article, which focuses on Amazon's emergence as a horizontally- and vertically-integrated commercial behemoth that has escaped antitrust scrutiny. Kahn, *Amazon's Antitrust Paradox, supra,* n. 6. She argues that Amazon has used its size and broad economic presence to thwart actual and potential competition to the detriment of socially desirable objectives but has escaped antitrust condemnation under Chicago School antitrust rules by continuing to offer low prices to consumers.

that antitrust and consumer protection violations harm workers and independent businesses as well as consumers."[63]

It bears noting, even if obvious, that hospitals and health care organizations are large employers – often the largest employers in their communities, and labor constitutes more than 40 percent of hospital operating costs.[64] Mergers are often disruptive in local labor markets as the merging organizations take steps to achieve economies of scale and other synergies, which often results in displacement of workers. There can be no doubt that health care mergers will be a laboratory for the current FTC to explore labor market effects.

The types of issues and questions merging providers are likely to face are illustrated by the testimony of one organized labor representative at a joint DOJ-FTC workshop in late 2021 on competition in labor markets:[65]

- "… healthcare has also experienced dramatic, horizontal and vertical consolidation as well as the integration of providers with insurers. And this means that the wages, benefits and working conditions of an ever-growing number of people are set by an ever-shrinking number of corporate entities. About a third of all states in the country have a single hospital system as its largest private sector employer. There's an impressive body of research that warns us that hospital consolidation integration [sic] don't bring benefits to consumers or payers. We're also discovering that consolidation isn't great for caregivers or caregiving."
- "So for physicians and others who can only sell their skill to a single buyer, or at best a small number of buyers, the most harmful and perverse effect of monopsony power may well be the inability to work at the highest standards of your profession. Now at the other end of the occupational hierarchy are hospital service workers, workers who hold so-called low skill jobs of cooking, cleaning, transporting record keeping, assisting patients with non-medical activities."
- "… it's important to examine all the dimensions of consolidation … often a merger, it appears to be horizontal. This hospital's going to merge with this hospital, but what's

[63] Kahn Memo at 1. Reports surfaced around the same time indicating that the FTC was already issuing Second Requests that included requests for information on labor and environmental matters. Bryan Koenig, *'Nontraditional Questions' Appearing in FTC Merger Probes*, Law360 (Sept. 24, 2021), https://www.law360.com/articles/1425218.

[64] *See, e.g.*, Ge Bai & Hossien Zare, *Hospital Cost Structure and the Implications on Cost Management During COVID-19*, 35 J. GEN. INTERN. MED. 2807 (2020) (finding that, on average, labor represents 42% of the operating costs of short-term acute care hospitals).

[65] Transcript of FTC-DOJ Workshop, "Making Competition Work: Promoting Competition in Labor Markets." (December 6, 2021) at 28-30, 43, (Comments of Lisa Frank, Executive Vice President, SEIU Healthcare Pennsylvania), https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf.

> happening also kind of under the hood is a rationalization where this hospital is going to be kind of like downgraded to here's where your broken leg goes, and this hospital's going to be upgraded to this is where your neurosurgery happens. And then there's a pipeline between those two things. So, both of those hospitals are no longer going to have need for neurosurgery. … And then you throw the financing where you can tear [sic] and steer patients on top of that. You got to understand that because it can look very innocent and has looked innocent, but it really changes what workers are able to do and what their mobility looks like. A noncompete clause that says you can't work in Pittsburgh when every other hospital around you has eliminated your specialty also means you can't work in those markets."

It will be difficult, probably impossible, for the FTC or DOJ to build a case against a merger in the near term solely on the basis of social welfare consequences (*e.g.*, a rise in unemployment). The consumer welfare standard is entrenched in several decades of judicial opinions (and even the Agencies' past briefs and guidelines), and an abrupt change in course would be viewed skeptically by the courts. And bear in mind that in many markets, at least in the near term, consolidation may help ***solve*** staffing shortages, rather than lead to displacement of workers.

That said, there clearly are ways to insinuate labor issues into existing antitrust theories, as the above-quoted testimony illustrates. For example, issues arising with respect to physician employment by merging hospitals can present the exact foreclosure issues that are the basis of competitive concern in vertical mergers. More broadly, combinations of providers-as-employers may raise monopsony issues that can be challenged under the antitrust laws.[66] Indeed, the President's Executive Order calls for greater enforcement in the area of monopsony in the same breath as it mentions labor and health care markets.

Historically, the Agencies have brought relatively few monopsony merger cases outside of agriculture, and few directed at labor markets.[67] Although one can think of monopsony as simply the flip side of monopoly, the incentives facing a monopolist and a monopsonist are not completely identical, and – to the extent courts measure competitive harm as consumer welfare – tracing the line from an input monopsony to consumer output or price effects can be difficult. (This is often true in

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[66] *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007) (the "kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.") *Weyerhaeuser* was not a merger case, but rather involved a claim that Weyerhaeuser engaged in predatory bidding in order to drive competitors from the market and thus acquire monopsony power.

[67] The DOJ's 2016 challenge to the proposed Anthem-Cigna merger included monopsony claims related to the purchase of health care services. *U.S. v. Anthem*, 855 F.3d 345 (D.C. Cir. 2017). However, the court did not rule on those claims.

health care markets.)[68] Notably, however, the Department of Justice filed a complaint in late 2021 challenging a merger in the book publishing industry on monopsony grounds, alleging that the merger will suppress prices paid and output in a type of labor market – specifically, the market for book publishing rights (*i.e.*, the output of authors).[69] The DOJ's complaint does not allege downstream harm to consumers who purchase books, but rather focuses only on competitive effects in the upstream purchasing market, which cause direct harm only to authors.[70] In this respect, the lawsuit may clarify the issues for applying the Clayton Act to labor monopsony effects in mergers.

Consideration of Merger Effects in "Cross-Market" Mergers. The question of cross-market effects in health care mergers has garnered enhanced interest from antitrust regulators over the last half-decade. The cross-market effects theory posits that mergers between firms (*e.g.*, hospitals) in entirely separate geographic markets nonetheless may create market power resulting in higher prices charged to health plans and, indirectly, to consumers. To date, no federal merger challenge has explicitly relied on cross-market effects for its theory of liability, although the issue has exhibited life in a few state antitrust investigations.[71] With the new Commission majority and a pledge to revamp the *Horizontal Merger Guidelines*, antitrust regulators have an opportunity to advance this theory into the mainstream.

Interest has existed among economists for some time as to whether the formation (typically by acquisition) of multihospital systems created bargaining leverage that in turn resulted in higher prices to payors and consumers. A number of studies published in the early 2000's purported to show exactly that. But those studies typically examined price differences at a single point in time and did not account

[68] A full discussion of monopsony issues is well beyond the scope of this article. For a review of historical judicial views of monopsony and discussion of the application of monopsony theory to health care markets, *see*, Robert W. McCann, *Field of Dreams: Dominant Health Plans and the Search for a "Level Playing Field,"* HEALTH LAW HANDBOOK, 2007 EDITION (Alice G. Gosfield, ed. 2007) and sources cited therein.

[69] Compl., *United States v. Bertelsmann SE & Co. KGaA, et al.*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021).

[70] Of course, one can argue that book readers ultimately, but indirectly, may be harmed if suppression of advances and royalties paid to authors results in a reduction of literary output.

[71] For example, in 2021 the California Attorney General sought to impose conditions on the affiliation of Huntington Hospital with Cedars-Sinai Health System, based on an expert report concluding that, although the parties were ***not*** significant direct competitors, their affiliation created a risk of price increases created by cross-market effects. The parties vigorously disputed the report's methodology and conclusions, referring to the cross-market effects theory as "untested, understudied, and purely academic." The Attorney General and the parties eventually reached a negotiated settlement under which Cedars-Sinai agreed not to engage in all-or-nothing contracting with health plans or to penalize any health plan that elected to contract with fewer than all system hospitals. Joint Stipulation and Order, *Pasadena Hosp. Ass'n v. Cal. Dept. of Justice*, No. 21STCP00978 (Cal. Super. Ct. July 19, 2021).

for external and internal factors (*e.g.*, case mix, quality, input prices, market concentration) that could influence costs and prices. Accordingly, the research did not prove (or disprove) that increased leverage was a merger phenomenon.[72] But regardless of whether the findings of those studies were credible, many multihospital systems span broad geographic areas. Their formation often escaped antitrust scrutiny because the formative mergers did not create excessive concentration in any single geographic service area.

Research published more recently has attempted to define and measure price effects of cross-market mergers with greater methodological rigor, using more relevant data, and to develop a theory of the source of such effects.[73] These studies conclude that hospitals acquired in out-of-market mergers had statistically significant post-merger increases in reimbursement rates, as high as 17 percent in one of the studies.[74]

The studies posit several reasons for the observed results. The most common hypothesis attributes higher prices to the existence of common health plan customers (*e.g.*, employers) in a hospital system's several markets. The argument is that an employer with employees in two markets will select only one health plan (or a limited number of plans) to offer to its employees in both markets and will select whichever plan produces the best combination of attractiveness (to the employees) and price (to the employer). A hospital system operating in both markets can exert leverage against health

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[72] For a more in-depth discussion of past and present research in this area and the evolution of the cross-market effects theory, *see* Robert W. McCann W. & Kenneth M. Vorrasi, *Cross Market Effects in Hospital Mergers: A Collision of Economic and Legal Theory*, HEALTH LAW HANDBOOK 2018 EDITION (Alice G. Gosfield, ed. 2018).

[73] The principal studies to date are: LEEMORE DAFNY, ET AL., THE PRICE EFFECTS OF CROSS-MARKET MERGERS: THEORY AND EVIDENCE FROM THE HOSPITAL INDUSTRY (June 27, 2017), http://www.people.fas.harvard.edu/~robinlee/papers/PriceEffects.pdf. (originally published by the National Bureau of Economic Research as Working Paper No. w22106 (2016)); Matthew S. Lewis & Kevin E. Pflum, *Hospital Systems and Bargaining Power: Evidence from Out-of-Market Acquisitions*, 48 RAND J. Econ. 579 (2017); Matthew S. Lewis & Kevin E. Pflum, *Diagnosing Hospital System Bargaining Power in Managed Care Networks*, 7 Am. J. Econ. Pol'y 243 (2015); Gregory S. Vistnes & Yianis Sarafidis, *Cross-Market Mergers: A Holistic Approach*, 79 Antitrust L.J. 253, 255-57 (2013).

[74] The studies do not uniformly find ***all*** cross-market mergers to generate adverse price effects. Dafny, et al., for example (n. 73, *supra*) find evidence of merger-related price effects (in the range of 7-10 percent) in combinations of hospitals that are located 30-90 minutes apart in separate markets within the same state, but ***not*** in out-of-state acquisitions, mergers in which both hospitals are large to begin with, or mergers in which the hospitals are located more than 90 minutes apart.

plans that wish to contract with the employer by threatening to create a "hole" in the plans' networks if all system hospitals are not contracted at a favorable rate.[75]

There is a dearth of empirical research directly supporting this "common customer" theory and, although it has some surface logic, there is an inconsistency in that logic insofar as it ignores the implications of health plans' ability to substitute hospitals in local geographic markets ***prior to*** a cross-market merger.[76] That is, the cross-market effects theory holds that the existence of substitutes for the merging hospitals within each of their *respective* markets is irrelevant to the cross-market effect, *i.e.*, because the merger "bundles" the merging hospitals. However, if a health plan could replace the individual hospitals in its network in each market *pre-merger* (that is, if there were pre-merger alternatives to each of the merging hospitals), it stands to reason that it could replace them post-merger as well. In that situation, the merged hospitals would not acquire any additional market power.[77]

Nonetheless, by embracing the cross-market effects theory, the Agencies are signaling that future enforcement policies – presumably to be reflected in revised *Merger Guidelines* (both horizontal and vertical) – will be defined not by reductions in competition within defined markets but by predicted effects on price or output. In this regard, the Agencies will face challenges.

First, the Commission must effectively walk back the longstanding positions expressed in the *Horizontal Merger Guidelines.* The *Guidelines* emphasize the concept of substitutability as the basis for predicting competitive harm from a merger or other business combination. "A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the

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[75] Other, more benign, hypotheses offered to explain observed cross-market effects include: (i) large systems have the means to acquire greater financial expertise and better information resources; (ii) multi-hospital systems bring value to employers and health plans by reducing transaction costs and (potentially) increasing quality, which increases bargaining power; and (iii) as systems grow, they adopt different (more "business-like") pricing philosophies that reflect their (actual or perceived) reputation as a larger, higher-quality organization.

[76] *See* DAVID A. ARGUE, & LONA FOWDUR, AN EXAMINATION OF NEW THEORIES ON PRICE EFFECTS OF CROSS-MARKET HOSPITAL MERGERS, https://www.aha.org/position-paper/2021-05-10-examination-new-theories-price-effects-cross-market-hospital-mergers.

[77] Said differently, if one views the existence of cross-market merger price effects as evidence of a reduction in competition for inclusion in health plan networks, can such a reduction occur if the merging hospitals, by definition, did not compete with each other to be included in networks before the merger?

products offered by the merging firms."[78] Indeed, the *Guidelines* direct that the "evaluation of *competitive alternatives* available to customers is *always necessary*."[79]

In the *Guidelines* framework, only those mergers that "enhance market power" "should not be permitted."[80] Accordingly, the *Guidelines* examine "how the Agencies analyze mergers between *rival* firms that may enhance their market power as sellers."[81] One of the two principal ways a merger can do so is by "eliminating competition between the merging parties."[82] But under the *Guidelines*, firms in different geographic (or product) markets are presumed, by definition, not to be substitutes for each other.[83]

Because a cross-market merger does not eliminate any *pre-merger* competition that existed between the two parties, there is no creation or enhancement of market power through the merger under the longstanding framework of the *Guidelines*. The Agencies will be pressed to explain how a such a bedrock principle can properly be ignored in some cases, define the parameters for ignoring that principle, and provide credible support for those parameters.

More significantly, to pursue enforcement under cross-market effects theories, the Commission must persuade the courts to a wholly different view of the Clayton Act from the view that the courts have held for decades. A cross-market effects theory of competitive harm presently has no support under established judicial interpretations of Section 7. To prevail on a new theory, the Agencies will need to convince the courts to fundamentally break with precedent, and to accept arguments from the

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[78] *Horizontal Merger Guidelines* § 6.1.

[79] *Id.* § 4 (emphasis added).

[80] *Horizontal Merger Guidelines* § 1 ("The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power.").

[81] *Id.* § 1 (emphasis added).

[82] *Id.* § 1; *see also id*. § 6. The other principal theory of competitive harm under the *Guidelines* is coordinated effects. *See id.* §§ 1, 7.

[83] *See also* Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 530a (3d and 4th ed. 2010-2017) ("A properly defined market excludes other potential suppliers (1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant's customers a suitably proximate (in both product and geographic terms) alternative.").

Agencies that are inconsistent with arguments the Agencies have been making to the courts for decades (including reliance on their own *Horizontal Merger Guidelines*[84]).

Section 7 of the Clayton Act makes it unlawful to "acquire ... the assets of another person ... where in any line of commerce ... in any section of the country, the effect of such acquisition may be substantially to lessen competition...."[85] This language is understood by the courts to proscribe mergers that lessen competition in relevant product and geographic markets. The government must establish that a merger is likely to "substantially … lessen competition or tend to create a monopoly *in … a market for a particular product in a particular geographic area*."[86] The U.S. Supreme Court has long held that determining the relevant product and geographic markets "is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."[87] In the manner reflected in the existing *Guidelines*, the Court has described the relevant geographic market as the "area of effective competition."[88] This interpretation does not encompass firms that do not compete because they are in separate markets.

The Agencies will need to convince the courts that this massive body of judicial precedent, under which merging hospitals that operate in separate geographic areas, by definition, cannot be substitutes for one another, must be ignored on order to invalidate a cross-market merger. One must presume that it will be no small task.

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[84] Although the *Horizontal Merger Guidelines* are not legally binding on the courts, the courts often discuss and rely on the *Guidelines* as an analytical tool to aid their merger analysis. *See, e.g.*, *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001) ("Although the Merger Guidelines are not binding, courts often have adopted standards set forth in [them] in analyzing antitrust issues."); *Fed. Trade Comm'n v. Cardinal Health*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998) ("While the Guidelines are not binding, they constitute the agencies' informed judgment on the area of their expertise."). And concomitantly, because the FTC and DOJ frequently rely on their own *Guidelines* in litigation, courts have criticized the agencies for *not* following their own guidance or taking positions contrary to them. *See, e.g.*, *United States v. Syufy Enterprises*, 903 F.2d 659, 664-66 & n.11 (9th Cir. 1990) (criticizing the agency for ignoring its test for market entry under the *Horizontal Merger Guidelines*); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983, 985, 992 n.13 (D.C. Cir. 1990) (noting that DOJ's position was "devoid of support" in the *Horizontal Merger Guidelines* and that DOJ also "ignored its own admonition" in them).

[85] 15 U.S.C. § 18.

[86] *Baker Hughes*, 908 F.2d at 982-83 n.1 (emphasis added). Although the *Horizontal Merger Guidelines* posit (at § 4) that the Agencies' analysis of a proposed merger "need not start with market definition," no court has ever dispensed with the need to define a relevant market, and the *Guidelines* ultimately state that the "evaluation of competitive alternatives available to customers is *always necessary* at some point in the analysis." *Id.* § 4 (emphasis added).

[87] *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974) (*quoting United States v. E. I. Du Pont De Nemours & Co.*, 353 U.S. 586, 593 (1957)).

[88] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963). The relevant geographic market is "where ... the effect of the merger on competition will be direct and immediate." *Id.* at 357.

E. Revision of the 2010 Horizontal Merger Guidelines

In early 2021, the FTC and DOJ jointly announced a "public inquiry" into the "modernization" of the *Horizontal Merger Guidelines*,[89] as presaged by the President's Executive Order and the changes to the FTC's merger review process. The Agencies released a formal Request for Information (RFI), soliciting responses to ninety-one specific questions regarding the scope and efficacy of the current Guidelines.[90] In making the announcement, FTC Chair Kahn highlighted three general areas of particular interest: First, whether the current Guidelines are sufficiently attentive to mergers that, rather than creating a monopoly, set the stage for a future monopolization. Second, whether the Guidelines should pay greater attention to labor market effects, including the question of whether merger efficiencies that are created by workforce reduction should be recognized as beneficial efficiencies. And third, whether the Guidelines' analysis should consider qualitative evidence that may be indicative of market power.[91]

Read as a whole, the questions raised in the RFI suggest the possibility of deeply significant changes in the Agencies' interpretation of the law, and which would have immense impact on hospital and health care mergers. These include:

- Whether relevant markets can be defined solely by reference to competition between the merging parties. This is consistent with the Commission's arguments in recent hospital merger cases that a relevant market may be limited to patients for whom the merging hospitals are each other's principal alternatives, regardless of the proximity of other providers.[92]
- Whether there are situations in which market definition can be dispensed with entirely. Inclusion of this approach in the Guidelines would be a critical step toward prosecuting hospital merger challenges based on cross-market effects.

[89] Press Release, Fed. Trade Comm'n Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers, (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers

[90] U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (Jan. 18, 2022) https://www.regulations.gov/docket/FTC-2022-0003/document.

[91] Fed. Trade Comm'n, Remarks of Chair Lina M. Kahn Regarding the Request for Information on Merger Enforcement, Docket No. FTC-2022-003 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf..

[92] *See, e.g.*, *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016) (holding, *inter alia*, that the trial court erred by crediting evidence that the merging hospitals obtained over 40 percent of their patients from outside the FTC's alleged market, when 91% of patients residing in that market obtained care from the merging hospitals).

- Whether potential harm to competitors should be a consideration in merger enforcement. The principle that the antitrust laws are designed to protect competition, not competitors, has been embedded in the law for the better part of 40 years,[93] but the Commission majority has been clear that it believes there is a need to protect smaller rivals and market disrupters from the effects of mergers between major market participants.[94]

- Whether there should be a presumption of competitive harm if one of the merging parties has market power. This would be an issue in a preponderance of hospital mergers, as market share combined with barriers to entry confers a presumption of "market power" on many hospitals.[95]

- Whether current merger enforcement is overly reliant on economic evidence (e.g., predicted price effects), and whether mergers (or at least some mergers) may be judged unlawful without evidence of predicted adverse price effects, *e.g.*, if the Agencies conclude that a merger is likely to have detrimental effects on quality or innovation.

- Whether efficiency claims may be ignored in a specific case if there is evidence that similar mergers generally fail to achieve efficiencies. This is an issue that plagues hospital mergers – the evidence on hospital merger efficiencies is quite mixed and the FTC has consistently dismissed evidence of efficiencies.[96] Further, as discussed above, the FTC is now asking whether efficiencies resulting from reductions in workforce should be cognizable at all, viewing those reductions as a type of merger-induced harm.

Commissioners Wilson and Phillips, in the minority on many of the actions discussed in this article, supported the issuance of the RFI, but issued a separate statement to note (among other things) that the existing *Horizontal Merger Guidelines* were built on a consensus view on the enforcement framework developed over time by the FTC and DOJ, and have been found to be persuasive by the

[93] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

[94] Kahn Memo at 1-2 ("[W]e need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. Focusing on power asymmetries and the unlawful practices those imbalances enable will help to ensure that our efforts are geared toward tackling the most significant harms across markets …")

[95] Market power is usually and more formally defined as the ability of a firm to raise its prices above competitive levels. *Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2, 27 n. 46 (1984). There are many factors in an assessment of market power, but market shares in the neighborhood of 35 to 40 percent often have been equated with market power. *See, e.g.,* ROBERT H. LANDE, MARKET POWER WITHOUT A LARGE MARKET SHARE: THE ROLE OF IMPERFECT INFORMATION AND OTHER "CONSUMER PROTECTION" MARKET FAILURES (2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/03/27/222102.pdf; Thomas G. Krattenmaker, *et al.*, *Market Power and Monopoly Power In Antitrust Law*, 76 GEO. L.J. 241 (1987).

[96] *See, e.g.*, Plaintiffs' Pre-Hearing Mem., *Fed. Trade Comm'n et al. v. Thomas Jefferson Univ.*, *et al.*, No. 2:20-cv-1113 (E.D. Pa. Sept. 2, 2020) at 21–22 (" … 72% of Defendants' claimed efficiencies are either not verifiable …, or are not merger-specific …, or are neither verifiable nor merger-specific. . . . [E]ven fully crediting 100% of Defendants' claimed efficiencies despite contrary precedent and evidence, the claimed cost savings still come up short of the amount necessary to offset the predicted anticompetitive harm to consumers from Defendants' merger.").

courts and to be useful guidance for businesses.[97] They note that much of the legal authority cited in the RFI is dated, ignoring the antitrust jurisprudence that has evolved since the 1970's.[98] They urge the leadership of the Agencies to proceed with caution, given that revision of the Guidelines is "a serious undertaking that could have a dramatic impact on the economy."[99]

V. The Pit and the Pendulum: Reinvigoration of Section 5 of the FTC Act

The FTC and the DOJ have differing, albeit relatively congruent, authority to enforce the antitrust laws. The two Agencies share authority to challenge mergers under Section 7 of the Clayton Act. Enforcement of the Sherman Act is the province of DOJ. The FTC's antitrust enforcement authority arises under the FTC Act, Section 5 of which declares unlawful "unfair methods of competition" and authorizes the FTC to "prevent persons, partnerships, or corporations" from "using unfair methods of competition in or affecting commerce."[100] This grant of authority is understood to be at least coextensive with the body of federal antitrust laws, including the Sherman Act.[101] However, a long-standing legal debate – now rekindled by the current Commission – exists as to whether the FTC's authority to prevent "unfair methods of competition" enables it to prosecute conduct that would *not* violate the Sherman Act or the Clayton Act—*i.e.*, "standalone" violations of Section 5.

The use of Section 5 for broader enforcement purposes has ebbed and flowed over time, but the current FTC is moving purposefully to cut a broader swath under the statute. As part of its early actions under Chair Kahn, the Commission withdrew its Section 5 enforcement policy statement, which had been in effect since 2015.[102] The 2015 Section 5 Statement said simply that, with respect to acts or

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[97] Fed. Trade Comm'n, Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf ("Phillips & Wilson RFI Statement").

[98] This observation to a great degree defines the ideological split among the Commissioners. The Chair's well-known criticism of the Chicago School is implicitly an argument that older (pre-1980's) judicial decisions, which took a structural view of markets and competition, were correct, and more recent decisions focusing instead on consumer welfare (price and output effects), are mistaken. *See* Kahn, *Amazon's Antitrust Paradox* at 743 ("Focusing antitrust exclusively on consumer welfare is a mistake").

[99] Phillips & Wilson RFI Statement at 3.

[100] 15 U.S.C.A. § 41(a).

[101] See, *e.g.*, *Fed. Trade Comm'n v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

[102] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug, 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (hereinafter "2015 Section 5 Statement").

practices that may fall outside the scope of the Clayton or Sherman Acts, the Commission "will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare," that the act or practice "will be evaluated under a framework similar to the rule of reason,"[103] and that the Commission will not employ Section 5 in situations that could be redressed under the Sherman Act or Clayton Act.

The 2015 Statement has been understood to mean that the Commission would align its enforcement actions under Section 5 with Sherman Act and Clayton Act jurisprudence and would not pursue a doctrine of "unfairness" based on separate competition principles. In explaining the decision to withdraw it, the current Commission stated that the 2015 policy "contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence." The Commission stated its intent to "restore the agency to [its] critical mission … [*viz*.] to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute."[104] This action renewed a debate that has spanned decades.

A brief history of Section 5 enforcement. The FTC Act was passed (in 1914) in consequence of Congress's fear that the Sherman Act would be undermined by the courts' adoption of the Rule of Reason standard, as well as a general Congressional distrust of the economic and social views perceived to be held by the federal judges of that period.[105] Thus, Congress intentionally used the broad "unfair methods" language to define the FTC's authority. The Supreme Court has recognized on several occasions that Section 5 is broader in scope than the Sherman Act. For example, in *Brown Shoe*, the Court held that Section 5 provided authority to enjoin incipient violations of the Sherman Act and Clayton Act—conduct not technically in restraint of trade (the operative term of the Sherman Act) but

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[103] The "Rule of Reason" is a framework for case-by-case analysis of anticompetitive conduct based on specific information about the relevant business, its condition before and after the challenged restraint was imposed, and the restraint's history, nature, and effect. It also considers whether procompetitive attributes of the conduct justify the otherwise anticompetitive effects. *State Oil v. Khan,* 522 U. S. 3, 10 (1997); *United States v. Brown University,* 5 F.3d 658, 668-69 (3rd Cir. 1993).

[104] Fed. Trade Comm'n, 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) at 1, https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf ("2021 Section 5 Statement").

[105] *See* Fed. Trade Comm'n, "Tales from the Crypt," Remarks of Commissioner Leibowitz, Section 5 Workshop (Oct. 17, 2008), http://ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf; William Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L. J. 930–32 (2010).

presenting a risk of that result.[106] In *Sperry & Hutchinson*, the Court went somewhat farther, stating that, in measuring a practice against the "elusive" standard of fairness, the FTC may consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[107]

Notwithstanding this broad dictum, lower courts historically have been less excited about having the FTC arbitrate public values. In a series of cases during the 1980s, the federal appeals courts overturned Commission decisions under Section 5 that purported to depart from Sherman Act jurisprudence.[108] Accordingly, starting with its 1984 decision in *General Foods*, the Commission began to pull back its enforcement scope under Section 5, stating: "While Section 5 may empower the Commission to pursue those activities that offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed."[109]

A subsequent Supreme Court decision cast a further shadow on the idea that "unfairness" can be redressed under the antitrust laws. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court stated that: "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; *those laws do not create a federal law of unfair competition* or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'"[110]

During the 2000's, however, the FTC used standalone Section 5 authority to obtain settlements in challenges to conduct that almost certainly would not have been reached by the Sherman Act and in

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[106] *Fed. Trade Comm'n v. Brown Shoe Co.*, 384 U.S. 316 (1966). The conduct at issue in this case was exclusive dealing arrangements, terminable at will, between Brown Shoe and about one percent of the country's shoe retailers. In all likelihood, those arrangements would not be considered unlawful today, but the Supreme Court upheld the FTC's position that the contracts infringed Section 5 regardless of whether they violated the Sherman Act. (This decision should not be confused with the earlier merger case, *United States v. Brown Shoe Co.*, 370 U.S. 294 (1962).)

[107] *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

[108] *See, e.g.*, *Official Airline Guides, Inc. v. Fed Trade Comm'n*, 630 F.2d 920 (2d Cir. 1980) (rejecting Section 5 challenge to arbitrary but unilateral refusal to deal); *Boise Cascade Corp. v. Fed. Trade Comm'n*, 637 F.2d 573 (9th Cir. 1980) (overturning finding of unfairness where Commission failed to show evidence of actual collusion in challenge to parallel pricing); *E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n*, 729 F.2d 128, (2d Cir. 1984) (unfairness standard does not prohibit otherwise legal and unilaterally adopted price signaling by competitors).

[109] *In re General Foods Corp.*, Trade Reg. Rep. (CCH) Transfer Binder ¶ 22,142 at 22,987 (F.T.C. 1984).

[110] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (emphasis added; citation omitted).

fact (in some cases) was quite similar to conduct held to be legal by the courts of appeals.[111] These actions were directed particularly toward single firm conduct that was perceived to be injurious to rivals but did not rise to the level of monopolization or attempted monopolization under Section 2 of the Sherman Act, a philosophy consistent with then-current beliefs that the courts had all but neutered Section 2. Thus, an FTC Commissioner suggested at that time that the Commission's enforcement of Section 5 need not raise the types of "intellectual" concerns that "have propelled Section 2 doctrine in progressively more permissive directions." He argued that, "Compared to the typical federal court, the FTC offers a superior platform for elaborating competition policy, and particularly for policy toward dominant firms."[112]

The Pendulum Swings; Implications of Withdrawing the 2015 Statement. Standalone Section 5 enforcement ceased to be an issue following the adoption of the 2015 Section 5 Statement.[113] With the withdrawal of that document and the issuance of the 2021 Section 5 Statement, the pendulum has swung again. The 2021 Statement reviews at length the legislative history of the Clayton Act on which the Commission bases its mandate to reinvigorate Section 5 and argues the shortcomings of tying Section 5 to Sherman Act Rule of Reason jurisprudence.[114] What the Commission has not done, to date, is to enunciate the standards that *will* guide Section 5 enforcement in the future. Rather, the 2021

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[111] The following actions are illustrative. *In re Negotiated Data Solutions LLC*, No. C-4324 (F.T.C. *compl. filed* Sept. 22, 2008) (challenging N-Data's enforcement of certain patents against makers of equipment employing a proprietary Ethernet standard); *In re Intel Corporation*, No. 9341 (F.T.C. *compl. filed* Dec. 16, 2009) (alleging that Intel engaged in unfair methods of competition by, among other things, using market share-based discounts and bundled discounts); *In re U-Haul International, Inc.*, No. C-4294 (F.T.C. *compl. filed* July 14, 2010) (challenging unilateral statements and actions characterized as invitations for competitors to collude on price). In *N-Data*, the FTC acknowledged that the challenged conduct did not rise to the level of a Sherman Act violation. Federal Trade Comm'n, Statement of the Federal Trade Commission, *In re Negotiated Data Solutions LLC*, No. 0510094 (Jan. 23, 2008). In *Intel*, there was acknowledgement that the Commission was pursuing conduct that arguably resulted in a restraint on consumer choice but did not demonstrably result in reduced output or higher prices. Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In the Matter of Intel Corporation*, No. 9341 (Dec. 16, 2009)); In *U-Haul,* the Commission asserted, "It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision." Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re U-Haul International, Inc. and AMERCO*, File No. 081 0157 (June 9, 2010). All of these matters were settled by consent order; thus, the Commission's views of its Section 5 authority were not tested by judicial review.

[112] Kovacic & Winerman, n. 105, *supra*, at 937–39. For a discussion of the decline in Section 2 enforcement, see McCann, *Thinking Big* n. 6, *supra*, at 471-75 *and* Kovacic & Winerman, *supra,* at 933–39.

[113] Post-2015, the Commission brought only one action alleging a standalone Section 5 violation, and that claim was not the principal focus of the ensuing litigation. *See* Complaint, *FTC v. Qualcomm, Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

[114] 2021 Section 5 Statement at 2-6.

Section 5 Statement states that the Commission "will consider whether to issue new guidance or to propose rules that will clarify the types of practices that warrant scrutiny" under Section 5.[115]

There are significant questions raised by the Commission's intended departure from the 2015 Section 5 Statement and the Rule of Reason. First, the 2021 Statement, both in its specific references to rulemaking and in its rejection of the Rule of Reason, augurs movement away from case-by-case decision-making in favor of generalized conduct rules. The health care industry is all-too familiar with regulation of its business practices, and in particular can attest that regulatory schemes tend to entrench the status quo, rather than encourage new business methods.[116] If the "new guidance" is to reach conduct that would be lawful under existing judicial interpretations of the Sherman and Clayton Acts, it almost certainly must eliminate or significantly demote consideration of business justifications and competitive benefits from the enforcement calculus. Finally, consistent with its actions elsewhere discussed in this article, the Commission seems to be opening the door to consideration of goals beyond consumer welfare in regulating business conduct, and one must wonder what sort of framework exists for incorporating social welfare factors into the enforcement calculus, let alone balancing them against the historical consumer goals relating to price, output, quality, and innovation.[117]

Of course, to the extent the FTC's expanded use of its standalone authority under Section 5 is directed toward health care providers (which seems probable), its authority in certain cases will be circumscribed by the FTC Act itself. The FTC's jurisdiction over corporations and associations extends only to such entities "organized to carry on business for [their] own profit or that of [their] members."[118] To be outside of the FTC's jurisdiction, there be a sufficient nexus between the conduct in question and an organization's public purpose and that the profits earned must be devoted to public, rather than private, interests.[119] This is not always as clear a line as it may first seem, as hospitals and providers

[115] 2021 Section 5 Statement at 7.

[116] There are many good examples: the history of telemedicine for one.

[117] All of these factors are broached in the dissenting statement of Commissioners Phillips and Wilson. Federal Trade Comm'n, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S, Wilson 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.

[118] 15 U.S.C.A. § 44. This limitation does not extend to the FTC's ability to enforce Section 7 of the Clayton Act against nonprofit organizations. See *Fed. Trade Comm'n v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

[119] *In re College Football Ass'n*, 117 F.T.C. 971, 1994 WL 16011007 (1994).

continue to pursue more diverse business relationships and participate in for-profit ventures.[120] Although there is little question that the FTC's jurisdiction under Section 5 does not extend to the conduct of nonprofit charitable hospitals acting solely as such, joint ventures, partnerships, and associations between nonprofit hospitals and private individuals (e.g., physicians) or for-profit organizations, and for-profit subsidiaries, are another matter, and the FTC has exerted jurisdiction over, *e.g.*, PHOs on many occasions. Accordingly, it is foreseeable that many forms of provider collaborations could be challenged under a standalone "unfairness" theory under Section 5 even in cases where harm to competition (as traditionally understood) may not be evident.

VI. Conclusion: Now What?

As of this writing, it remains to be seen how effectively the FTC's announced intentions to change the merger review paradigm and embrace a broader Section 5 authority translate into enforcement decisions and litigation. Nonetheless, hospitals and health care organizations contemplating horizontal and/or vertical growth through merger, acquisition, or affiliation face a level of legal uncertainty materially greater than in the recent past and will need to be honest about their organization's tolerance for risk. It may well be that some organizations will be better served by putting transactions on hold, at least for a time, until the practical implications of the FTC's actions are clearer.

However, the FTC is an independent agency and it is not blown easily in the political wind. The 2022 and 2024 elections almost certainly will not change the political makeup of the Commission. All three Democratic Commissioners have terms expiring before the end of President Biden's term. Thus, conceivably, the Commission will continue to have a Democratic majority through at least 2029.[121] Even without any action by Congress, the progressive influence on antitrust enforcement will remain strong, subject of course to whatever counterbalances are brought to bear by the courts.

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[120] *See California Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 766–68, (1999) (application of the jurisdictional requirement is not formulaic nor is there a substantiality requirement).

[121] Of the Democratic Commissioners, Commissioner Slaughter's term expires in 2022. She, or her replacement, would then have a seven-year term expiring in 2029. Commissioner Chopra's replacement, when confirmed (presumably in 2022), likewise will have a seven-year term.