

April 21, 2022

**Re:** Response to DOJ-FTC Merger Guidelines Request for Information

**To:** The Federal Trade Commission and Antitrust Division of the Department of Justice

**From:** Leemore Dafny

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This comment was prepared by academic economists with expertise in antitrust economics, health care markets, and merger enforcement.<sup>1</sup> We offer input targeted to specific questions in the Request for Information issued in January 2022.<sup>2</sup> Along with this comment, we include copies of two key publications cited herein.

The changes to the Merger Guidelines that we recommend have broad applicability across the economy. We illustrate the bases for these recommendations by discussing studies carried out in the context of health care markets, but that is far from the only sector where merger enforcement has been impeded by the relative silence of the Guidelines on these topics. That said, health care markets have been especially affected by the two gaps we highlight.

### **Serial Acquisitions**

*Question 1d1: Do the guidelines reflect any additional competitive concerns reflected in the statute’s prohibition against mergers that “may ... tend to create a monopoly”? Is this statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups? How should the guidelines address a merger that may tend to create a monopoly? How should the guidelines analyze whether there is a “trend toward concentration in the industry,” and what impact should such a trend have on the analysis of an individual transaction?*

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<sup>1</sup> We thank Cory Capps for valuable comments and permission to submit Cory Capps, David Dranove, and Chris Ody, “Physician practice consolidation driven by small acquisitions, so antitrust agencies have few tools to intervene,” *Health Affairs* 36, no. 9 (2017): 1556–1563.

<sup>2</sup> DOJ and FTC, “Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers,” <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>, Jan. 18, 2022. *See also*, FTC, “Request for Information on Merger Enforcement,” <https://www.regulations.gov/document/FTC-2022-0003-0001>, Jan. 18, 2022.

We believe revisions to the Guidelines should offer more clarity regarding the Agencies' approach to evaluating serial acquisitions. Unchallenged serial acquisitions of healthcare providers have increased concentration meaningfully within plausibly defined product and geographic markets, such as certain physician services sold within a county, city, or metropolitan area (see Capps, Dranove, and Ody 2017, attached). Further, empirical research shows that high concentration of ownership in physician service markets—as in other healthcare service markets—commonly leads to higher prices.<sup>3</sup> Together, these patterns and findings suggest a need to strengthen scrutiny and enforcement vis-à-vis potentially anticompetitive consolidation that occurs through serial acquisitions by a single parent within one or more plausible relevant markets.

Investigations of serial acquisitions are also likely to present opportunities to use evidence from a buyer's past acquisitions as part of the analysis of theories of harm and efficiency claims. We suggest that the Agencies also provide guidance regarding how they evaluate the impact of an incremental acquisition or set of acquisitions.<sup>4</sup>

Specifically, we suggest the Agencies consider incorporating into the revised Guidelines language similar to the following:

- In the case of serial acquisitions, in which an entity expands via multiple sequential acquisitions or mergers, the Agencies may consider past mergers or acquisitions by the relevant buyer and evaluate the cumulative effects of those past acquisitions together with the acquisition under review by the Agencies. For example, if the Agencies are evaluating hospital A's proposed acquisition of cardiology practice 5 in a given geography, and hospital A has already acquired cardiology practices 1, 2, 3, and 4 in that same geography, the Agencies may consider the implications on competition arising from the acquisitions of all 5 practices.
- In evaluating a proposed acquisition that is part of a series of acquisitions, the Agencies may (*or will ordinarily*) request and evaluate qualitative and quantitative data regarding the effects of prior acquisitions. Such analyses may include effects on price, quality, service offerings, access to services, and personnel compensation and work conditions. The Agencies may incorporate these analyses into decisions regarding a potential challenge or the terms in a consent decree, taking care to evaluate whether the economic incentives and conditions present in prior

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<sup>3</sup> For a summary of the association between concentration in physician markets and prices, and the effects of horizontal physician mergers on physician prices, see Karyn Schwartz et al., "What We Know About Provider Consolidation." Washington, DC: Kaiser Family Foundation, 2020, available at <https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/>.

<sup>4</sup> Clearly, enforcement decisions can differ depending on whether serial acquisitions are evaluated one-by-one or cumulatively. In particular, piecemeal evaluation could allow a serial acquirer to evade enforcement through strategic timing and sequencing of transactions. This approach to evaluation could also allow a buying spree that results in a highly concentrated market through a series of transactions that do not, individually, exceed HHI thresholds triggering further analysis. To illustrate, a firm with a 10% share could acquire 40 firms with shares of 1% each, reach a share of 50%, and never generate an HHI increase above even 100 points. (Per the 2010 *Horizontal Merger Guidelines*, "Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.")

acquisitions are likely to apply to the acquisition under review. Such real-world evidence may, depending on the specific results, bolster the case for or against challenging a given acquisition.

Although motivated by research and examples from the healthcare industry, we believe these recommendations apply generally to industries that feature serial acquisitions.

### **Cross-market and non-horizontal transactions**

Joint response to Questions 2.e., 12f, 12.g:

*Question 2e: How frequently have unchallenged mergers or mergers that were subject to remedies resulted in a lessening of competition, and how does that lessening of competition typically manifest? Please identify examples of such mergers. What are the characteristics of those transactions that, if recognized before the merger, would have helped anticipate the adverse outcomes?*

*Question 12f: Non-horizontal mergers. Do the current guidelines adequately identify the full range of non-horizontal mergers that may harm competition? Should the guidelines address the acquiring firm's market power in markets adjacent to the target's business? Should the guidelines address the possibility that a large firm entering a new market comprised of smaller companies by acquiring one of those market participants may eliminate potential competition or raise entry barriers and thereby substantially lessen competition?*

*Question 12g: Consummated mergers. Do the current guidelines adequately explain the appropriate analysis of consummated mergers and the use of post-merger evidence?*

There is substantial evidence that many unchallenged healthcare provider mergers have led to anticompetitive effects.<sup>5</sup> Here, we focus on evidence regarding so-called “cross-market mergers” among healthcare providers; this evidence provides some of the impetus for the recommendations that follow. A cross-market merger refers to a combination of entities participating in different relevant markets, such as a hospital system in one geographic area merging with a hospital system in another, potentially adjacent, area. Indeed, much of hospital M&A in recent years has occurred across rather than within the same geographic markets.

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<sup>5</sup> For a summary of this evidence, see Leemore Dafny, “How Health Care Consolidation Is Contributing to Higher Prices and Spending, and Reforms That Could Bolster Antitrust Enforcement and Preserve and Promote Competition in Health Care Markets,” Testimony before the U.S. House Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, Apr. 29, 2021, *available at* <https://docs.house.gov/meetings/JU/JU05/20210429/112518/HHRG-117-JU05-Wstate-DafnyL-20210429.pdf>, and Martin Gaynor, “Antitrust Applied: Hospital Consolidation Concerns and Solutions,” Statement before the Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, U.S. Senate, May 19, 2021, *available at* [https://www.judiciary.senate.gov/imo/media/doc/Gaynor\\_Senate\\_Judiciary\\_Hospital\\_Consolidation\\_May\\_19\\_2021.pdf](https://www.judiciary.senate.gov/imo/media/doc/Gaynor_Senate_Judiciary_Hospital_Consolidation_May_19_2021.pdf).

Prior research has shown that mergers among closely competing hospitals within the same geographic market tend to increase price, without offsetting improvements in quality, particularly when they occur in concentrated markets.<sup>6</sup> Since the Guidelines were last revised, economic research has documented price increases arising from mergers of hospitals across different geographic markets. In particular, a 2019 study co-authored by Professor Dafny and colleagues finds that hospital systems that acquire additional hospitals within the same state but outside the acquiring system’s existing geographic markets experience price increases (for commercially-insured patients) of 7-10 percent relative to a similar group of control hospitals.<sup>7</sup> In contrast, hospital systems that add additional out-of-state hospitals exhibit no statistically significant changes in price. Moreover, the price increases occur when the same insurers are active in the different geographic markets, i.e. when the merging parties negotiate with a “common buyer.” Last, the price increases occur among the same-state members of the acquiring system, i.e. this is not a result driven by price effects among target hospitals.

The fact pattern is consistent with an increase in the bargaining leverage of the merging hospital parties vis a vis *insurers*, notwithstanding the fact that the merging parties did not compete head-to-head for the same *patients*.<sup>8</sup> However, to our knowledge federal enforcers have yet to challenge a cross-market merger like that described above – prospectively or retrospectively – in part because it can be difficult to define the contours of the relevant market and/or for a transaction to trigger the HHI-related presumptions regarding the competitive effects of a proposed transactions.<sup>9</sup>

We further believe that some of the cross-market transactions in the last several years might have been scrutinized more closely had the Agencies demanded and considered evidence on the effects of prior acquisitions by the same acquirer. This history should be considered as potentially predictive of the effects of future acquisitions by the system. Specifically, we suggest the Agencies consider incorporating the following recommendations in the revised Guidelines:

- When reviewing mergers among parties that serve different markets (e.g., cross-market mergers), the Agencies’ review will emphasize the competitive effects of such a transaction over the formal delineation of relevant markets. Although the Agencies’ analysis of competitive effects will describe the affected commerce, the strategic interactions that drive market outcomes, and likely effects on intermediate

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<sup>6</sup> Ibid.

<sup>7</sup> More precisely, the effect is statistically significant when the merging hospitals are less than 90 minutes apart but more than 30 minutes apart (else the transaction would likely be deemed “in-market”). See Leemore Dafny, Kate Ho, and Robin Lee, “The price effects of cross-market mergers: theory and evidence from the hospital industry,” *RAND Journal of Economics* 50, no. 2 (2019): 286–325.

<sup>8</sup> See also, Aviv Nevo, “Mergers that Increase Bargaining Leverage,” Speech, Stanford Institute for Economic Policy Research, Jan. 22, 2014, available at <https://www.justice.gov/atr/file/517781/download>.

<sup>9</sup> When serving as the Attorney General for California, Xavier Becerra (currently the Secretary for the U.S. Department of Health and Human Services) attached a number of conditions to the approval of the 2019 affiliation of Cedars-Sinai Medical Center and Huntington Memorial Hospital, which the state alleged raised concerns due to “the risk of ‘cross market effects.’” See <https://oag.ca.gov/news/press-releases/attorney-general-becerra-conditionally-approves-affiliation-agreement-between>.

and final customers, relevant markets may not be asserted in such cases because market definition may be uninformative or even misleading with regard to the potential for the merger to yield anticompetitive effects.

- When performing a merger review, whether horizontal or nonhorizontal (including cross-market), the effects of prior mergers or acquisitions by the parties will explicitly be considered as sources of real-world evidence informing the Agencies' assessment of the likely effects of the transaction(s) under review. Such analyses of prior mergers and acquisitions will also include the evaluation of efficiencies that may be passed through to consumers. Depending on the specific findings, such direct evidence may bolster the case for or against challenging a given transaction.