

**Comments of The Academy Advisors to  
U.S. Department of Justice and Federal Trade Commission’s  
Request for Information on Merger Enforcement**

**Docket ID: FTC-2022-0003**

April 19, 2022

**Introduction**

The Academy Advisors submits this comment in response to the U.S. Department of Justice and Federal Trade Commission’s Request for Information on Merger Enforcement (“RFI”).

The Academy Advisors’ members are a group of integrated healthcare delivery networks that pursue innovative care efforts in communities throughout the country. In the aggregate, our health systems serve more than 40 million patients annually in 29 states across the country, with a workforce of approximately 475,000 employees. Our priorities include:

- Expanding healthcare services, coverage, and affordability;
- Improving health equity, reducing health disparities, and investing in the social determinants of health; and
- Addressing the COVID-19 pandemic and preventing future public health emergencies.

Our members’ hospitals and affiliated healthcare providers are in a unique industry that works every day to improve the health of the communities they serve. They do so facing declining reimbursement, shifts to put more reimbursement at risk, and often razor thin margins, while facing increased regulatory burdens and demands to provide the full continuum of care and population health management. On top of that, for the last two years, our members’ hospitals, doctors, nurses, and other medical and non-medical staff have been on the front lines of the COVID pandemic. The mental, physical, and emotional strain on our colleagues has been immense. In this environment, hospitals and other providers need to find new ways to provide the highest-quality, integrated, and efficient care possible. Sometimes this can be achieved independently or through contractual collaborations. Other times, however, it requires integrating with other healthcare providers.

Our member organizations are dedicated to the relentless pursuit of bettering patient care through proactive, meaningful policy development. As integrated delivery networks, our members are well-positioned to partner with policymakers on areas of common interest, and are eager to engage in dialogue, share necessary clinical and administrative expertise, and provide specific case-study examples of policy successes. We appreciate the opportunity to comment on the agencies’ RFI.

**Executive Summary**

The Academy Advisors recognizes the importance of antitrust merger enforcement and the key role of the DOJ and FTC in antitrust enforcement. The agencies’ merger guidelines provide an important

and helpful resource to all industries and the legal community by describing the agency’s approach to merger enforcement. And we recognize and value the importance of antitrust law to a healthy, competitive economy that brings high quality, competitive pricing, and innovation to consumers.

We respectfully submit that any changes to the Horizontal Merger Guidelines or promulgation of new Vertical Merger Guidelines should be based on consensus, if not unanimity, for any significant changes. This includes consensus across both agencies—the FTC and DOJ—to avoid different enforcement approaches based merely on which agency reviews a particular merger.

We urge the agencies to carefully consider that any changes to address actual or perceived shortcomings in the guidelines, to enhance enforcement against certain technology industries, could have significant unintended consequences and adverse effects, and impose undue burdens, on organizations in other industries. Because potential changes to the guidelines likely will affect all industries and both for-profit and not-for-profit organizations, any guidelines changes should be incremental. The agencies should not tip the careful and reasonable balance between healthy antitrust enforcement, on the one hand, and not unduly burdening merging parties and chilling procompetitive, or competitively benign, transactions, on the other hand.

In this regard, our members are concerned that the RFI appears to suggest that the merger guidelines and agency-enforcement policies have been far too lax and need substantial revision and expansion. As an organization of healthcare providers, The Academy and its members know firsthand that the FTC has used the existing guidelines to successfully pursue robust enforcement in our industry for over a decade. In fact, since the 2010 Horizontal Merger Guidelines were issued, the FTC likely has brought more challenges to healthcare-provider mergers than any other industry and has lost only one litigated healthcare-provider case in the last two decades. Beyond these litigated cases stopping provider mergers, FTC enforcement also has resulted in other provider mergers being abandoned pre- and post-complaint, others stalled before ever being pursued, and several more provider mergers subject to consent-order remedies.

We submit that no changes are needed to maintain the FTC’s ability to scrutinize healthcare-provider mergers and, thus, nothing more than modest or incremental changes to the merger guidelines are warranted. If anything, the guidelines give too little weight to the procompetitive benefits of healthcare-provider mergers and merger defenses. Indeed, among other things, our members believe that the agencies should give greater consideration to the specific characteristics of the healthcare industry, especially the potential benefits of healthcare-provider integration, including efficiencies. They oppose potential changes that would impose rigid and uniform presumptions of harm that will often be misaligned with the complexities of the healthcare industry. Our comments to specific aspects of the RFI follow.

## **Responses to Specific RFIs**

### **Presumptions**

RFI 5 asks a series of questions that suggest that the agencies are considering adding new, or tightening current, presumptions as to when a merger may be unlawful. Coupled with what may signal heightened rebuttal burdens for merging parties, especially with respect to efficiencies (discussed below), these questions hint at the establishment of an inflexible, uniform-across-all-industries, near *per-se prohibition* of mergers regardless of the merger-specific facts and characteristics of the industry. The likeliest result will not be more, but less competition, as procompetitive and competitively neutral deals are discouraged.

Beyond the critical points that (1) market shares can be highly sensitive to market definition, which is often a highly disputed point, and (2) any presumptions should be rebuttable, we submit that expanding reliance on market-share or other structural presumptions in the guidelines is unnecessary, an overly rigid analytical approach, and, ultimately, would fail to account for transaction- and market-specific factors that would likely mean that such presumptions would be excessively restrictive. This adverse effect would be exacerbated if new guidelines substantially lower permissible thresholds to the kinds of single-digit market shares that were common in some of the cases cited in the RFI or specific market-structure presumptions of some of the old guidelines.

First, imposing new, restrictive presumptions is unnecessary. The Agencies' Horizontal Merger Guidelines ("HMGs") already provide rebuttable market concentration-based presumptions that guide staff investigations, and, as the RFI notes, there is already case law (which the antitrust bar knows well) with market-share thresholds that trigger presumptions. Indeed, the Commission routinely cites to and relies on these older cases with market share-based presumptions in litigated merger cases. Further, the agencies win the vast majority of litigated merger cases, and filed complaints alone cause many parties to abandon their mergers. Therefore, adding additional or stricter presumptions in new guidelines is unnecessary.

Second, uniform market share-based and other structural presumptions are overly rigid. By definition, market shares rely on historical information and are backward-looking. Thus, they may say little about the future competitive significance of either merging firm, and risk overstating the competitive effects of a merger.<sup>1</sup> Moreover, the information to calculate market shares may be unavailable or unreliable, making shares difficult, if not impossible, to calculate with precision. Thus, market share or other structural presumptions should not be the predominant basis for determining whether a transaction is unlawful.

Finally, overly rigid market share and other structural presumptions may not account for transaction or industry-specific considerations. For example, a rigid, say, 30% market-share presumption could lead the agencies to treat a transaction involving a firm with a 28% share acquiring a differentiated, financially and competitively struggling firm with a 2% share, in a market with several other significant competitors, the same way that the agencies treat a merger involving two close and vigorous head-to-head competitors, each with a 25% share and few other meaningful competitors—i.e., presumptively unlawful. Moreover, such rigid presumptions might overstate the competitive significance of a merger if it involved a small market with infrequent (or even frequent) bid opportunities, where market shares could be "volatile and shifting."<sup>2</sup>

For these reasons, presumptions of potential competitive harm or market power in the guidelines should not be expanded or tightened. If the agencies do consider adding presumptions of competitive harm or market power to the guidelines, then it would only be fair to provide new safe harbors and safety zones to identify transactions that will be presumed *not* to harm competition or warrant meaningful investigation.

## Efficiencies

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<sup>1</sup> See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) (stating that market shares are "not conclusive indicators of anticompetitive effects" and that "only a further examination of the particular market—its structure history and probable future—can provide the appropriate setting for judging the probably anticompetitive effects of a merger.").

<sup>2</sup> See *United States v. Baker Hughes Inc.*, 908 F.2d 981, 985-86 (D.C. Cir. 1990).

The RFI questions suggest that the agencies may eliminate consideration of efficiencies entirely. This would be a bad solution in search of a non-existent problem.

First, and critically, nothing in Section 7 of the Clayton Act prohibits the agencies from evaluating efficiencies. On the contrary, the statute demands an analysis of whether a transaction may have “the effect” of substantially lessening competition or tending to create a monopoly. The agencies cannot fairly fulfill their statutory duty under Section 7 unless they also consider the *procompetitive effects* of a merger in assessing whether the overall effect of a transaction is to substantially lessen competition—or even to enhance competition. That is how the agencies and agency staff have long approached the effects inquiry.

Second, the burden to prove efficiencies is already overwhelming. To be cognizable under the existing HMGs, claimed efficiencies must: (1) be merger-specific; (2) be verifiable and substantiated, particularly as to how and when each efficiency will be achieved, any costs of achieving them, and how each would enhance the firm’s ability and incentive to compete; (3) not be vague or speculative; (4) not arise from anticompetitive reductions in output or service; (5) be calculated net of costs to achieve the efficiencies; (6) be in the same relevant market as any potential anticompetitive effects (unless “inextricably linked”); (7) be of a “character and magnitude” to outweigh potential anticompetitive effects; and (8) be passed through to consumers.

The burden is so high that, to date, no court has ever approved an otherwise-unlawful transaction on the basis of efficiencies. Therefore, there can be no serious argument that too many mergers are being approved by courts based on efficiency claims. Likewise—and contrary to some popular belief—agency staff generally do *not* approve mergers based on efficiencies. In our members’ and their counsels’ experience, while efficiencies may be one factor that could tip the agencies’ decision in a few *borderline* transactions where there is little evidence or likelihood of competitive harm, those are by far rare exceptions rather than common occurrences. In our members’ and their counsels’ experience, more often, efficiencies are used to help staff quickly close investigations that ought to be quickly closed anyway. Simply put, transactions are not being waved through the agencies on the basis of efficiencies.

Third, the agencies have recognized efficiencies in the merger guidelines for decades and should continue to do so. Tentatively recognized in the 1982 Merger Guidelines,<sup>3</sup> efficiencies have been fully endorsed as one of, if not *the*, primary benefit of mergers in the 1984, 1992, 1997, and 2010 merger guidelines.<sup>4</sup> It would be a mistake and unfair to go backwards and stop considering—or to give even less weight to—evidence of a transaction’s potential procompetitive effects. It would be all the more unfair because the RFI generally suggests that the agencies plan to increase their consideration of evidence that could show anticompetitive effects.<sup>5</sup> Combined with the RFI portending potentially strong presumptions of harm being included in the guidelines, eliminating efficiencies (and the failing and flailing firm) defense from the merger guidelines risks turning merger analysis into the kind of *per se* antitrust analysis that the agencies undertake with price fixing and other criminal antitrust violations. The merger

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<sup>3</sup> See U.S. Department of Justice Antitrust Division, 1982 Merger Guidelines, Section V.A n.53, at [https://www.justice.gov/archives/atr/1982-merger-guidelines#N\\_53](https://www.justice.gov/archives/atr/1982-merger-guidelines#N_53).

<sup>4</sup> See, e.g., 1984 Merger Guidelines, § 3.5 (“The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers.”) and 2010 Horizontal Merger Guidelines, § 10 (“a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”).

<sup>5</sup> See RFI generally and RFI 1 and 2 in particular.

guidelines should remain no less open to the possibility that a merger could have procompetitive effects as they are alert to the possibility of anticompetitive effects.

Indeed, in our members' experience, the guidelines should be more open to crediting the benefits of integration, broadly defined. Since the passage of the Affordable Care Act, much of the federal government has been pushing and incentivizing healthcare providers to provide more integrated care. There are continually increasing pressures and trends to move from fee-for-service to value-based care and associated risk-based contracting, as well as an important movement toward population health management. All of these forces require healthcare providers to provide more integrated care along the entire care continuum. Doing so often requires horizontal and vertical integration.

Finally, in our members' experience, integration can achieve substantial, tangible benefits for the communities and patients they serve. For example, an acquiring partner can invest more capital in a smaller partner hospital, enabling the acquired provider to add new services, buy new or more sophisticated equipment, and add new consumer-friendly technologies and access points for patients. A high-quality system can implement programs, best practices, technologies, and models that improve the quality of the acquired system, resulting in better healthcare outcomes. Integration can eliminate frictions as patients move across otherwise unaffiliated providers that may be on different electronic medical records and different payer contracts, ensuring a more seamless and smooth transition across providers and the care continuum. A combined healthcare system may also be able to gain purchasing efficiencies, borrow at a lower cost of capital, and achieve other cost efficiencies, making it easier to control costs and even enable the merged system to increase their charity care. In some cases, an acquisition results in the acquired hospitals' employees moving onto the acquirer's more generous compensation and benefits program. In short, integration can ultimately result in substantial and meaningful benefits for consumers, employees, and local communities.

## **Failing and Flailing Firm**

RFI 15 asks about the failing and flailing firm defenses and suggests that the agencies are contemplating further limiting those defenses. Our members believe that would be a mistake.

The COVID-19 pandemic has put a tremendous strain on healthcare providers, especially small and rural hospitals. During the pandemic, providers treated sicker patients, whose care was more complex and involved greater resources, and providers were required to halt elective procedures, which tend to be more profitable and help offset costs. At the same time, supply and labor costs skyrocketed because of supply chain disruptions and labor shortages, particularly among nurses. One source estimates that staffing shortages have cost hospitals approximately \$24 billion and additional PPE spending an additional \$3 billion, and that hospitals will have lost at least \$54 billion in net income in 2021.<sup>6</sup> According to the University of North Carolina's Cecil G. Sheps Center for Health Services Research, 19 rural hospitals closed in 2020, more than any other year since 2005.<sup>7</sup> While federal assistance likely avoided similar results in 2021, when only two rural hospitals closed, that aid will end and more small and rural hospitals will face ongoing financial pressures.

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<sup>6</sup> American Hospital Association, *Cost of Caring* (Oct. 2021) (citing report by Premier), at <https://www.aha.org/guidesreports/2021-10-25-cost-caring>.

<sup>7</sup> The Cecil G. Sheps Center for Health Services Research, *Rural Hospital Closures*, at <https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/>.

In part as a result of these severe financial and operational strains (and the other industry dynamics mentioned above), healthcare providers of all types—small, rural, community, and larger hospital systems and other healthcare providers—look to partnerships to achieve cost savings, lower their borrowing costs, and stabilize their deteriorating financial condition. They seek these partnerships, not to gain market power and raise prices, but often simply to keep their hospital doors open and continue to provide local access to quality healthcare services. Moreover, through these transactions, the acquirer can invest additional capital and provide funding for new and improved service offerings. Preserving hospitals also maintains good, well-paying jobs for the local community. If a hospital closes, those jobs are lost and patient may need to travel farther for quality care. In emergency situations, the consequences of needing to travel farther for care could be negative at best or fatal at worst.

For these reasons, we urge the agencies not to roll back the availability or raise the bar even further on the failing firm or weakened competitor defenses. As it stands now, there is already an incredibly high hurdle to successfully make out these defenses. Indeed, no recent court decision has approved a merger on either ground<sup>8</sup> and the agencies rarely do so either<sup>9</sup>. Further restricting the availability of these defenses may deprive communities—particularly rural and poorer urban communities—of access to local healthcare if more hospitals cannot partner with stronger financial institutions and are instead forced to shutter their doors.

### Special Characteristics Markets

RFI 12.a. asks whether the guidelines' approach to markets characterized by bargaining has been adequate. When it comes to provider mergers, we believe it has not.

The FTC's analytical approach to healthcare provider merger investigations and enforcement actions has been based on a bargaining model. In every recent enforcement action, the FTC alleges that a merger would result in the merged firm having increased leverage with payers to raise reimbursement rates.<sup>10</sup>

Unfortunately, this approach ignores the substantial bargaining leverage of payers. In most healthcare markets, there is typically three to five large payers who wield substantial bargaining leverage with healthcare providers and whose revenues and margins far exceed those of providers. Yet when merging providers point to payers' bargaining leverage, Commission staff typically respond that a provider merger does not change payers' leverage, only the merging providers' leverage. That response, however, runs contrary—or at least gives exceedingly short shrift—to Section 8 of the HMGs, which explicitly states that powerful buyers can constrain the ability of merging parties to raise prices. Though the HMGs note that the presence of powerful buyers alone does not eliminate the potential for anticompetitive effects, in our members' experience, the agencies give too little credit to the ability of large payers to constrain any potential attempt to change reimbursement rates.

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<sup>8</sup> See, e.g., *United States v. Energy Sols. Inc.*, 2017 U.S. Dist. LEXIS 109663, \* (D. Del. 2017) (rejecting failing firm defense); *ProMedica Health Sys. v. FTC*, 749 F.3d 559, \*572 (6th Cir. 2014) (rejecting weakened competitor defense).

<sup>9</sup> See, e.g., *In re CentraCare Health Sys.*, Dkt. No. C-4594 (F.T.C. Oct. 6, 2016) (implying acceptance of a failing firm defense by two of three Commissioners, but still requiring a remedy); *Statement of Bureau of Competition Director Richard Feinstein on the FTC's Closure of Its Investigation of Consummated Hospital Merger in Temple, Texas*, File No. 091-0084 (Dec. 23, 2009) (closing investigation after examining whether the acquired hospital satisfied the failing firm defense).

<sup>10</sup> See, e.g., Compl., *In re Lifespan Corp.*, Dkt. No. 9406, ¶ 41 (F.T.C. filed Feb. 17, 2022).

Moreover, the typical approach to analyzing bargaining leverage generally ignores or underappreciates the extent to which both providers and payers make pricing trade-offs in contract negotiations, which may have nothing to do with bargaining leverage. In negotiations, providers and payers commonly negotiate over all medical services offered by the provider—hundreds of inpatient, outpatient, and physicians services—making concessions and changes to reimbursement rates that increase some rates and decrease others, trading off reimbursement under fee-for-service and value-based contracts, and across commercial and Medicare Advantage networks and plans. A guidelines framework that analyzes the hypothetical ability of a merged provider to seek higher reimbursement in some service lines does not adequately account for the ability of payers to negotiate for lower rates in other service lines, drop the provider from their network entirely, tier or steer patients away from the provider especially as hospital price transparency is becoming ubiquitous, or take other steps to constrain the provider. In short, there is much that the agencies’ existing bargaining model does not adequately consider.

RFI 12.g. asks whether the guidelines adequately explain the analysis of consummated mergers, and the RFI introduction asks for specific examples of mergers that have harmed competition. Section 2.1.1 of the current HGMs discusses the types of evidence considered in consummated mergers and notes that the agencies also consider the same types of evidence as in unconsummated mergers. This seems adequate.

More broadly, however, we respectfully submit that the agencies should be judicious in attempting to review long-consummated mergers to try to find anticompetitive effects, given the particular challenges in such cases, the use of agency resources required, and the potential for disturbing efficiencies that have already been or are being achieved.

Although the agencies can challenge consummated mergers, their post-closing merger challenges generally occur within a short time after consummation, stem from investigations that were pending when the closing occurred (or soon thereafter), and/or occur where the merged firm was subject to a hold-separate agreement.<sup>11</sup> Mergers are rarely challenged years after their consummation. And for good reason. The more time that elapses between merger consummation and an antitrust investigation and challenge, the more complex the analysis and more difficult it is to link any post-closing anticompetitive effects to the merger itself. Even if prices have increased post-merger, numerous competitively benign variables could account for price changes. Moreover, there could be offsetting post-merger quality improvements and service expansions that could be equally difficult to evaluate and properly credit. Importantly, as a practical matter, contemporaneous documentary evidence and witnesses may no longer be available or reliable, either to prove or disprove the competitive effects of merger. Finally, a viable remedy may be difficult or impossible to achieve, especially in the healthcare context.<sup>12</sup>

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<sup>11</sup> See, e.g., Compl., *United States v. Parker-Hannifin Corp.*, Cas. No. 1:17-cv-01354-UNSA (D. Del. filed Sept 26, 2017) (transaction consummated on Feb. 28, 2017; suit filed Sept. 26, 2017), at <https://www.justice.gov/opa/press-release/file/999266/download>; FTC Press Release, “FTC Challenges Consummated Mergers of Companies that Make Microprocessor Prosthetic Knees” (Dec. 20, 2017) (merger closed September 22, 2017; challenged December 20, 2017; and parties agreed to hold-separate agreement), at <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor>; Compl. *FTC v. ProMedica Health Sys., Inc.*, Cas. No. 3:11-cv-00047-DAK, ¶ 2 (N.D. Ohio filed Jan. 7, 2011) (transaction closed August 31, 2020, subject to a hold-separate agreement; suit filed Jan. 1, 2011), at <https://www.ftc.gov/sites/default/files/documents/cases/2011/01/110107promedicacmpt.pdf>.

<sup>12</sup> See *In re Evanston Nw. Healthcare Corp.*, p. 88-91 (F.T.C. Aug. 6, 2007) (citing, among other factors, the long time elapsed, greater risk of unforeseen costs and failure of the remedy, elimination of merger benefits achieved, and negative effect on patient care as reasons to reject a structural remedy in favor of a behavioral remedy).

The FTC has a strong track record of merger retrospectives, and there is appropriate scope for agencies to challenge mergers post-consummation. We suggest, however, that the agencies' priorities, especially when taxpayer resources are precious and limited, should not be unduly focused on long-consummated mergers, which are likely to involve a substantial investment of resources, a complex and potentially unreliable analysis, and an uncertain outcome. For such long-consummated mergers, healthcare systems, the local community, and patients should be able to rely on the finality and certainty of transactions consummated years ago, barring exceptional evidence and justification for such post-consummation enforcement actions.

## Types and Sources of Evidence

RFI 2.a. asks whether the guidelines have been unduly focused on price effects rather than non-price effects. The FTC's healthcare provider enforcement actions show that the agency focuses significantly on non-price effects. In all recent complaints challenging a hospital merger, the FTC alleged some form of non-price harm.<sup>13</sup> During investigations, agency staff certainly investigate quality and other non-price elements of competition. Thus, we do not believe the guidelines or agency practice suggest a lack of focus on non-price harms.

RFI 2.c. asks if the guidelines have "overemphasiz[ed] predictive quantification techniques." Our members believe that the FTC's approach does not overemphasize, or particularly emphasize at all, quantification techniques as it relates to non-price harms. Rather, the existing approach does not appear to quantify, and often provides relatively little detail about, the allegations of quality harms from provider mergers. To the contrary, the existing approach often fails to account for providers' continuous—and often demonstrable—efforts to improve quality.

Among other things, hospital services are highly regulated, accreditation by The Joint Commission<sup>14</sup> is effectively required, HCAHPS (Hospital Consumer Assessment of Healthcare Providers and Systems)<sup>15</sup> gauges patient satisfaction, and LeapFrog<sup>16</sup> rates provider safety and quality. The notion that a merger would diminish providers' efforts to maintain or improve quality stands in contrast to our members' real-world experience working to improve quality every day, at every one of their hospitals, including those with which they combine. If anything, the guidelines should be more accepting of the potential for healthcare provider mergers to result in improved quality, expanded access to care, more efficient and integrated care, and new services—especially when the acquired firm is a small, rural, or

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<sup>13</sup> See, e.g., Compl., *In re Lifespan Corp.*, Dkt. No. 9406, ¶ 58 (F.T.C. filed Feb. 17, 2022) ("The Proposed Transaction will diminish the combined firm's incentive to compete on *quality of care, access to care, and service offerings* to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and self-pay patients.") (emphasis added), at [https://www.ftc.gov/system/files/documents/cases/d\\_9406\\_lifespan-cne\\_p3\\_complaint\\_public\\_redacted.pdf](https://www.ftc.gov/system/files/documents/cases/d_9406_lifespan-cne_p3_complaint_public_redacted.pdf); Compl. *In re Method Le Bonheur Healthcare*, Dkt. No. 9396, ¶ 45 (F.T.C. filed Nov. 12, 2020) (same), at [https://www.ftc.gov/system/files/documents/cases/d9396\\_administrative\\_part\\_3\\_complaint\\_public\\_version599815.pdf](https://www.ftc.gov/system/files/documents/cases/d9396_administrative_part_3_complaint_public_version599815.pdf); Compl., *In re Thomas Jefferson Univ.*, Dkt. No. 9392, ¶ 69 (F.T.C. filed Feb. 27, 2020) ("The Transaction will dampen the merged firm's incentive to compete on *quality of care and service offerings* to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and self-pay patients.") (emphasis added), at [https://www.ftc.gov/system/files/documents/cases/d09392\\_administrative\\_part\\_iii\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/d09392_administrative_part_iii_complaint.pdf).

<sup>14</sup> See <https://www.jointcommission.org/accreditation-and-certification/>.

<sup>15</sup> See <https://hcahpsonline.org/> and <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/HospitalHCAHPS>.

<sup>16</sup> See <https://www.leapfroggroup.org/ratings-reports>.



financially challenged hospital. If a merger can achieve quality improvements, that can effectively result in a quality-adjusted price decrease—something that is often glossed over in merger reviews.

More generally, RFI 2 (and others) implies that the existing merger guidelines have restricted the scope, depth, and consideration of evidence in the agencies' merger investigations. That is certainly not the case or our members' experience.

Notably, the current Horizontal Merger Guidelines (“HMGs”) already provide that the agencies will “consider *any reasonably available and reliable evidence* to address the central question of whether a merger may substantially lessen competition.”<sup>17</sup> The HMGs then identify several categories of information that, while “not exhaustive,” are generally the most informative.<sup>18</sup> Expanding the types and sources of evidence is unnecessary, but also would unduly burden merging parties with little additional analytical benefit.

Already, the agencies receive evidence through Hart-Scott-Rodino filings and, in both HSR-reportable and non-reportable transactions, agency staff have the ability to request documents and data through access letters and interviews of party and third-party executives. Depending on the scope, these preliminary investigations can take weeks or months, and require merging parties to spend tens of thousands, if not hundreds of thousands, of dollars to respond.

Moreover, if there is a Second Request or compulsory process in a non-HSR-reportable transaction, the agencies already ask for an increasingly and astoundingly burdensome amount of documents, data, information, and testimony from the parties that requires large teams of lawyers, contract attorneys, economists, and vendors to help the merging hospitals collect, compile, process, and submit a response. Complying—even partially complying—with a Second Request or compulsory process can take months and require the parties (including not-for-profit systems) to spend millions of dollars in order to produce hundreds of thousands, if not millions, of documents and terabytes of data. Ultimately, agency staff uses only a minuscule fraction of this evidence in depositions or in litigation. And given the sheer volume of this information, as well as staff time and resource constraints, staff sometimes cannot even review all of this information—meaning the parties' expenditures and efforts to produce all the requested information and data may be wasted.

These time and cost expenditures not only burden the merging parties, but also third parties who also receive burdensome subpoenas and Civil Investigative Demands. These burdens often fall on local employers, other healthcare providers, and health plans, who may also need to submit a substantial amount of information and bear substantial costs for a transaction that they are not a party to.

Further expanding the types, sources, and scope of evidence collected in merger investigations is likely to materially burden merging parties and third parties with additional time and monetary costs, without commensurate advances in the agencies' merger analysis. As the current Horizontal Merger Guidelines already provide, the agencies should continue to “apply a range of analytical tools to the *reasonably available and reliable evidence* to evaluate competitive concerns in a *limited period of time*.”<sup>19</sup>

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<sup>17</sup> HMGs § 2.

<sup>18</sup> *Id.*

<sup>19</sup> HMGs § 1 (emphasis added).

## Conclusion

Merger guidelines need to be durable. Otherwise, guidelines will simply be political documents that are revised with each change of leadership at the agencies, as happened with the 2020 Vertical Merger Guidelines. That kind of policy disruption will leave industries without guidance or sufficient certainty as to how their transactions will be evaluated. It may also make it more likely that courts will disregard the agencies' guidelines.

Merger guidelines also should be based on bi-partisan—or, better still, non-partisan—consensus on core principles that will guide agency enforcement. This consensus must extend across the two agencies so that different standards do not apply depending on whether our industry's transactions or our particular merger happens to be reviewed by the FTC or the DOJ. This consensus can be achieved if the guidelines are balanced and based on established principles and theories of harm, rather than novel and untested theories.

The agencies must carefully consider that these guidelines apply across industries, to firms of all sizes, and to firms that are for profit as well as not-for-profit. So guidelines revisions to tackle competition concerns regarding some of the largest and most profitable technology companies in the world, for example, could also impose undue burdens on transactions by much smaller local or regional not-for-profits. Therefore, we encourage the agencies to refrain from drastic, one-sided changes to the merger guidelines that do not add any meaningful value to merger analysis, but could simply make it harder to complete any transaction.

Thank you for your consideration.

Respectfully submitted,

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