



Charles N. Kahn III  
President and CEO

April 19, 2022

The Honorable Lina Khan  
Chairwoman  
U.S. Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

The Honorable Jonathan Kanter  
Assistant Attorney General  
U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Re: Request for Information on Merger Enforcement (FTC-2022-0003)

Dear Chairwoman Khan and Assistant Attorney General Kanter:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. The FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services.

We appreciate the opportunity to provide the Federal Trade Commission and Antitrust Division of the Department of Justice (the Agencies) with our views in response to their June 18, 2022, Request for Information on Merger Enforcement (RFI).

## I. RETAINING CONTINUITY IN MERGER GUIDELINES

Our members appreciate and rely on consistent and transparent guidelines in analyzing merger and acquisition activity. The Agencies' Horizontal Merger Guidelines (Guidelines) have been instrumental in providing insight into the Agencies' analytical techniques, practices, and enforcement policy, and our members have relied upon the consistency with which the Agencies have applied the Guidelines to mergers. This consistency leads to better decision-making, reduced costs, and more efficient merger review processes. Significant revisions to the Guidelines would risk eroding these efficiencies by introducing uncertainty. ***In short, the Guidelines work, and the FAH urges the Agencies to leave the Guidelines substantively intact, making only surgical amendments that are necessary and targeted to particular circumstances.***

We understand that the Agencies have concerns that certain industries are becoming more concentrated and less competitive. Accordingly, the Agencies are interested in updating the merger guidelines to “reflect the realities of the modern economy.”<sup>1</sup> Although some sectors have evolved over the past decade, modern market dynamics have remained relatively stable for other significant industries. In particular, the competitive playing field for hospital and health system services has not changed fundamentally since the Agencies last revised the Guidelines in 2010: hospitals and other health facilities continue to focus their operations on providing services needed in their local communities. Therefore, we believe an extensive re-work of the Guidelines would be unnecessary, introduce unwarranted inefficiencies, and create significant and unproductive uncertainty.

To the extent other industries may have changed drastically since 2010, we urge the Agencies to limit any substantial changes in their guidance to those particular industries. The Agencies can provide targeted, industry-specific guidance in joint statements regarding merger enforcement in such industries. For instance, the Agencies’ joint 1996 Statements of Antitrust Enforcement Policy in Health Care (1996 Statements) could serve as a template for potential future joint statements regarding these industries and other appropriate sectors.

The FAH nonetheless supports targeted changes to modernize enforcement of the antitrust laws regarding mergers in response to the Agencies’ RFI. As identified in Parts III through V below, the FAH has identified certain areas where revisions to the Guidelines may be appropriate to addressing hospital and health system mergers but urges the Agencies to limit revisions in other areas (*e.g.*, the market definition guidance in section 4 of the Guidelines) in order to minimize uncertainty and volatility.

Finally, we note that the 1996 Statements provide very helpful guidance and clarifications to healthcare organizations seeking to engage in procompetitive joint activities in the health care area, including hospital mergers, and recognize that “[m]ost hospital mergers and acquisitions do not present competitive concerns.” They also provide guidance on mergers that fall within certain “safety zones” and will not be challenged, absent extraordinary circumstances. As such, any updated merger Guidelines should incorporate the hospital merger safety zones established in the 1996 Statements and provide greater transparency by addressing the types of extraordinary circumstances under which hospital mergers that fall into these zones might be challenged.

## **II. MARKET DEFINITIONS CONTINUE TO BE KEY**

The FAH believes that defining product and geographic markets is vitally important to evaluating transactions, particularly in the hospital and health care system industry. The Agencies’ RFI asks whether it is “necessary to precisely define the market in every case?”<sup>2</sup> We believe the answer is an emphatic “yes.” Thus, we do not believe the Agencies should modify

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<sup>1</sup> Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement Docket No. FTC-2022-0003 (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](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).

<sup>2</sup> FTC-2022-0003 p.5.

their guidance regarding defining product and geographic markets in any significant way. Having specific principles and methods to define product and geographic markets is critical for both market participants, including hospitals and health systems, as well as the Agencies. Hospital and health system services in particular remain inextricably linked to their local communities in meaningful ways because comprehensive patient care requires the option for a patient to be physically present at a facility and each facility location is licensed and regulated at the State and/or local level. Clear market definition rules reflect this connection to the local community, bring greater certainty to the evaluation of potential transactions, and help avoid wasting resources on mergers that the Agencies are likely to challenge. Moreover, specific market definitions improve the efficiency of transaction decision-making and the Agencies' review of the transactions.

Eliminating the need to define specific markets would upend years of established judicial precedent and introduce substantial confusion and uncertainty to the marketplace. The determination of precise product and geographic markets remain especially apt to the assessment of hospital and health system mergers because they are subject to significant regulation such as state licensing provisions that impose geographic and scope limitations on hospitals and health systems. Ignoring the realities of the marketplace and the markets in which participants operate could lead to inconsistent outcomes and increased costs.

### **III. ACCOUNTING FOR HEALTHCARE'S TWO-STAGE COMPETITION MODEL IN DIVERSION RATIOS**

The FAH urges that any revisions to the Guidelines include guidance on how the Agencies will treat asymmetric diversion ratios between merging parties in the hospital and health system industry. The Guidelines state, "Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects."<sup>3</sup> The current diversion ratio guidance, however, does not account for the unique two-stage competition model that is present in the hospital and health system industry.

The two-stage competition model for hospitals and health systems means insurers and other third-party payers, rather than patients, are responsible for negotiating prices. Accordingly, hospitals and health systems do not have direct control over the prices typically paid for their in-network services. Diversion ratios measure *consumer* choice and preference, but in the two-stage competition model any analysis of diversion ratios should take into account whether a particular health system is a substitute from the perspective of an *insurer or other third-party payer*. Given the importance that the Agencies sometimes place on diversion ratios, consideration should be given to industries, such as hospitals and health systems, where the diversion ratio does not accurately capture relevant preferences in a two-stage competition model—in this case the preferences of insurers and other third-party payers. To alleviate this concern, the Agencies should refine the Guidelines to expressly recognize circumstances, such as hospital and health systems, where the diversion ratio may not be as reliable.

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<sup>3</sup> Guidelines § 6.1.

More specifically, because economic analyses such as diversion ratios and upward pricing pressure have become frequently important factors in merger investigations in the hospital and health system context, the Guidelines should establish safe harbors that can be used to effectively screen for concentrations that are highly unlikely to raise concerns of anticompetitive harm—this will promote efficiency in analyzing potential mergers and save resources across the system and all stakeholders, including the Agencies.

#### **IV. ADDRESSING QUALITY IMPROVEMENTS AND OTHER PRO-COMPETITIVE EFFICIENCIES**

The Guidelines should recognize and credit improvements in quality as a result of a merger. The Agencies' current Guidelines focus largely on financial or price efficiencies, mentioning improvements in quality only in passing.<sup>4</sup> However, hospital and health system mergers may produce significant improvements in quality of care. We believe the Agencies' current Guidelines undervalue these quality efficiencies and urge the Agencies to revise the Guidelines to appropriately account for quality-based efficiencies, particularly in hospital and health system mergers.

The FAH further requests that the Agencies provide greater transparency into how they quantify and substantiate pro-competitive efficiencies, including quality. Greater transparency will benefit all market participants by providing improved accuracy in their merger decision-making. For example, the FAH urges the Agencies to confirm that they will credit an efficiency as merger-specific despite the existence of a theoretical-but-impractical alternative to attaining such efficiency. In addition, the FAH urges the Agencies to include specific examples of the efficiencies that are most likely to be credited to merging parties in any revised Guidelines. In the hospital and health system context, potential examples of pro-competitive efficiencies could include, but are not limited to, improvements in population health management, readmission rates, mortality rates, patient outcomes, operational costs, or physician retention rates. And if the Agencies adopt specific examples of efficiencies, we suggest that any such exemplars should not be presented as an exhaustive list; rather, the Guidelines should retain their flexibility to account for a difference of circumstances amongst mergers.

Finally, the Agencies should ensure that updated Guidelines apply more flexible standards of efficiencies in the context of smaller independent or rural hospitals merging into integrated hospital systems with more sophisticated models of care delivery. As the 1996 Statements recognize, “many general acute care hospitals, especially with fewer than 100 licensed beds and an average daily census of fewer than 40 patients are unlikely to achieve the efficiencies that larger hospitals enjoy”; thus, there is greater potential for efficiencies to be realized through a merger with a larger hospital or health system.

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<sup>4</sup> 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.”).

**V. FAILING AND FLAILING FIRMS: RECOGNIZING THE PUBLIC'S INTEREST IN MAINTAINING HOSPITAL AND HEALTH SYSTEM SERVICES**

We believe the Agencies should adopt broader standards under Section 11 of the Guidelines to recognize “flailing” firms when the flailing firm serves the public interest and the weakened nature of the flailing firm would have adverse impacts on the public. Section 11 of the Guidelines recognizes that a merger “is not likely to enhance market power if imminent failure . . . of one of the merging firms would cause the assets of that firm to exit the relevant market.”<sup>5</sup> Importantly, Section 11 does not address the *flailing* firm. A weakened hospital or health system may be unable to invest in needed capital improvements, the recruitment and retention of professionals and staff, or the continued operation of unprofitable but needed service lines, which can reduce access to care and cause significant harm to the community. When a flailing hospital or health system cannot maintain robust and varied service lines, effectively recruit and retain health professionals, and continue investing in needed facilities and technologies, a potential merger may be in the public interest. As discussed above, a potential merger can increase a community’s access to high quality care in significant ways. It is not in the public interest to wait until a community’s hospital qualifies as a failing firm before parties can avail themselves of the benefits of Section 11 of the Guidelines. Once a hospital is lost or a particular service line is eliminated (*e.g.*, an emergency department), it becomes much more costly and burdensome to replace that hospital or service line. Such closures often result in an enduring barrier to care access in the community. Accordingly, the Agencies should expand Section 11 to include flailing firms where the public has an interest in the survival of the flailing firm, including an interest in access to community health care services.

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The FAH appreciates the opportunity to provide the Agencies with our views in response to their request for public comment on how the Agencies can modernize enforcement of the antitrust laws regarding mergers. We believe that the current Guidelines provide principled and transparent guidelines, which do not require significant overhaul.

As detailed above, certain revisions to the Guidelines may be beneficial to: (i) better capture the realities of the hospital and health system two-stage competition model, (ii) better recognize and credit quality and access to care improvements as a result of a merger, and (iii) expand Section 11 to include certain flailing firms. Otherwise, the FAH believes that a tailored approach, such as issuing industry specific guidelines, will provide the greatest benefit to consumers, while maintaining the consistent and transparent guidelines upon which marketplace participants may rely.

If you have any questions, please contact me at 202-624-1534, or any member of my staff at 202-624-1500.

Sincerely,



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<sup>5</sup> Guidelines § 11.