

Comments on the Draft Vertical Merger Guidelines with Special Consideration to Health Care

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Richard M. Scheffler

Professor of the Graduate School
School of Public Health and Goldman School of Public Policy
Director, Nicholas C. Petris Center on Health Care Markets and Consumer Welfare (petris.org)
University of California, Berkeley

Daniel R. Arnold

Research Director, Nicholas C. Petris Center on Health Care Markets and Consumer Welfare
School of Public Health
University of California, Berkeley

Timothy T. Brown

Associate Director for Research, Berkeley Center for Health Technology
Associate Adjunct Professor of Health Economics, School of Public Health
University of California, Berkeley

Richard G. Frank

Margaret T. Morris Professor of Health Economics
Department of Health Care Policy
Harvard Medical School

H. E. Frech III

Professor of Economics and Technology Management
Department of Economics, College of Letters and Science
Technology Management Program, College of Engineering
University of California, Santa Barbara

Brent D. Fulton

Associate Adjunct Professor of Health Economics and Policy
Associate Director, Nicholas C. Petris Center on Health Care Markets and Consumer Welfare
School of Public Health
University of California, Berkeley

Sherry A. Glied

Dean and Professor of Public Service
Robert F. Wagner Graduate School of Public Service
New York University

Thomas L. Greaney

Visiting Professor of Law, UC Hastings College of Law
Chester A. Myers Professor Emeritus, Saint Louis University School of Law

Deborah Haas-Wilson

Marilyn Carlson Nelson Professor of Economics
Smith College

Jaime S. King

Bion M. Gregory Chair in Business Law and Professor of Law, UC Hastings College of the Law
Associate Dean and UC Hastings Faculty Director, UCSF/UC Hastings Consortium on Law,
Science, and Health Policy
Co-Director, UCSF/UC Hastings Master of Science Program in Health Policy and Law
Executive Editor, The Source on Healthcare Price and Competition

Stephen M. Shortell

Professor of the Graduate School
Blue Cross of California Distinguished Professor of Health Policy and Management Emeritus
Co-Director, Center for Healthcare Organizational and Innovation Research (CHOIR)
Co-Director, Center for Lean Engagement and Research (CLEAR)
Dean Emeritus, School of Public Health
Professor of Organization Behavior, Emeritus, Haas School of Business
University of California, Berkeley

Neeraj Sood

Professor of Health Policy and Vice Dean for Research
Sol Price School of Public Policy
University of Southern California

- Post-merger a new entrant would have to enter both input and output markets if _____

flow from integration of payers and providers. The most recent evidence shows that economic integration in health care has failed to generate clinical integration that produces either better quality or cost savings.¹⁰ A just published paper analyzing 29 quality measures found vertical integration had a limited effect on a small subset of quality measures while market concentration was strongly associated with reduced quality across all 10 patient satisfaction measures.¹¹

4. Ultimately, health care consists of a collection of conditions precedent for concern: high entry barriers, concentration at every level, regulation that inhibits competition and encourages consolidation, market dominance that gives rise to anticompetitive conduct, and a history of vertical integration that has often not yielded benefits.¹²
5. Since the VMGs are not industry-specific, the DOJ/FTC should consider promulgating policy statements akin to the 1994 Health Care Policy Statements which have provided some guidance to practitioners and courts.¹³

We are very concerned that the Draft VMG

evidence).¹⁴ In addition, there's the potential of cumulative anticompetitive effects arising from sequential vertical mergers.¹⁵ For example, a hospital system that continually purchases small physician practices that fall into the under 20% market share safe harbor could eventually accumulate considerable market power. The safe harbor approach of the Draft VMG is also at odds with the current Horizontal Merger Guidelines. The Horizontal Merger Guidelines presume anticompetitive effects when a market is highly concentrated (HHI > 2,500) and HHI increases significantly (change in HHI > 200). The Draft VMG have the opposite presumption. Mergers between parties with less than 20% market share are presumed not to lead to anticompetitive effects.

We end our comments with a few final points that the agencies may wish to consider.

Final Points

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