

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

person.⁶ One of the chief drivers of increasing healthcare expenditures is the increasing prices of healthcare services, particularly hospital prices.⁷ In addition, a recent report on healthcare workers finds that real wages for medical technicians and health aides at hospitals and outpatient facilities have stagnated or declined despite increased educational attainment and increased job growth.⁸ These troubling trends demand that all stakeholders take a step back, reevaluate their policies and tactics, and consider what enhancements or changes each of us can make to improve our healthcare provider markets.

Competition in healthcare provider markets plays a significant role in helping to deliver high quality, affordable care and to pay healthcare workers fair wages. The Federal Trade Commission, and other enforcers, work tirelessly within their existing authority to promote competitive healthcare markets, but with help from Congress and state governments, more can, and should, be done. When considering whether and how to expand or improve upon existing enforcement policy, we should first ask what role does the FTC play and how well are we performing? I will begin today by describing the FTC's role and track record in healthcare provider antitrust enforcement and the concerns that remain despite the best efforts of the FTC staff and other enforcers.

The FTC's Track Record in Healthcare Provider Markets and Recent Concerns

The Commission has a long history of challenging anticompetitive mergers in the healthcare industry. By one estimate, nearly half of all FTC merger challenges between 2000 and 2018 involved the healthcare industry, a significant portion of which focused on healthcare providers generally and hospitals in particular.

But the FTC has had to overcome significant obstacles. After successfully challenging several mergers in the late 1980s and early 1990s, the Commission and other antitrust enforcers suffered a string of severe hospital merger litigation defeats.¹³ In many of these cases, courts

⁶ See Centers for Medicare and Medicaid Services, National Health Expenditure Fact Sheet, <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/fact-sheet.html>

⁷ See Gary Claxton et al., How Have Healthcare Prices Grown in the U.S. Over Time? Kaiser Health System Tracker (May 8, 2018), <https://www.healthsystemtracker.org/collection/how-have-healthcare-prices-grown-in-the-u-s-over-time/#itemstart>; Rabah Kamal & Cynthia Cox, How do Healthcare Prices and Use in the U.S. Compare to Other Countries?, Peter Dinkowitz, Kaiser Health System Tracker (May 8, 2018), <https://www.healthsystemtracker.org/collection/how-do-healthcare-prices-and-use-in-the-u-s-compare>

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resources. Not only is our staffing crunched, the resources we have to devote to objectives beyond pay and benefits such as economic research and litigation costs have also declined. This is especially concerning since economic analysis has become more prominent in antitrust litigation.²⁶ Put bluntly, economic experts commanding significant fees have stretched agency resources to an alarming extent.²⁷ While the FTC has taken advantage of technological advancements and other productivity enhancements to do significantly more with less staff, just think of what we could accomplish today with 50% more staff.

The FTC's efforts are also constrained by limitations on merger reporting requirements. For example, under 16 CFR 201.60 (r)-7 (om)-2 (i)-2 (ne) (no) ant. (att) 6 .004 Tw -37.952 (limita) 6 (tio) 2 (n) 2 (s

Exemptions in our enforcement authority also poses problems. Although the FTC has jurisdiction to review all hospital mergers, it is prohibited from enforcing the antitrust laws against any anticompetitive practices of nonprofit entities, which make up more than 45% of all U.S. hospitals.³¹ So, for example, if a nonprofit hospital merger itself is not anticompetitive, but the newly merged entity engages in anticompetitive practices, the FTC is stuck on the sidelines. In effect, this means that all of the healthcare industry expertise that the FTC has worked for decades to, and continues to, develop cannot be developed alongside the DOJ and state enforcers to stop anticompetitive practices by roughly half of all hospitals nationwide. This is a significant lost opportunity.

Another challenge for the agency is the high evidentiary burden we face to challenge a merger. Given the recent research regarding the effects of hospital mergers, I think many Americans would be surprised by the type and extent of evidence that courts often expect the FTC to produce in order to block them.

independent authority.³⁸ Today, this restriction continues to constrain FTC research and advocacy activities

Our research and advocacy opportunities may also be hampered by a lack of rich and reliable data. Today, the Health Care Cost Institute has significantly improved our understanding of healthcare provider markets by gathering claims data from insurance carriers and making the data available to independent researchers, including several of those referred to earlier.

However, HCCI depends in part upon voluntary participation by insurance companies. While these voluntary efforts are laudable, they are also vulnerable. In fact, one of the largest cooperating insurers, United, is now backing out of its HCCI partnership, and Humana has also signaled that it will end its HCCI partnership.³⁹ Given the importance of such data and the urgent need to better understand healthcare provider markets, this is a troubling development. I urge United and Humana to maintain their engagements with HCCI.

Finally, we periodically face challenges imposed at the state level. To be sure, states play a vital role in antitrust enforcement today. States like Pennsylvania, Idaho, North Dakota, Illinois, Virginia, Ohio, California, and Washington have joined the FTC in seeking to block hospital and provider mergers or have brought independent enforcement actions. States also gather and share hospital and, in some cases, insurer data that has proven crucial for FTC enforcement efforts.

But, sometimes, our enforcement efforts are not in sync with the states. Occasionally, state level enforcers adopt resolutions to mergers that could inhibit more aggressive fomgo Tc 0 Tw 2.

States adopt COPAs with the intention of tackling legitimate concerns⁴² and they often require conditions to mitigate the relevant merger's anticompetitive effects.⁴³ However, in many cases, COPAs eventually lapse or are repealed, leaving the merger without regulatory oversight.⁴⁴ Moreover, there are too few empirical studies about whether COPAs actually perform better than a competitive market.

Opportunities with Existing Resources and Authority

The challenges we have identified are significant but they should not and do not deter the FTC's efforts and creative use of its current authority and resources. Indeed, the FTC has done important work to police healthcare provider competition and competition among hospitals in particular. That work has given us good perspective with which to continually ask ourselves what can and should we do better or differently with our existing resources and authority? Where do we need to turn to Congress or others for additional help? The FTC's recent actions have elicited a range of responses and I would like to share some of my views.

Some of the most significant contributions and improvements to our understanding of industries and market practices have been made when the Commission uses its authority to study markets such as former Chairman Muris's hospital merger retrospective program. The

than traditional horizontal concerns is important for parties considering mergers to know we will not shy away from challenging, for example, anticompetitive vertical organizations. sensitive to the concern that we might lose litigation, but our obligation is to identify the right outcome and fight for it.

A Legislative Opportunity: More Resources and More Authority

Given the scope of competitive concerns with hospital prices, quality, and wages, and the persistently high volume of hospital merger activity, Congress and the FTC also presented with an opportunity to rethink the FTC's resource base and authority.

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Regarding evidentiary burdens, Finally, Congress should also consider legislation that would simplify the evidentiary burden on the government and heighten the evidentiary burden on parties in merger litigation generally and hospital merger litigation in particular.⁴⁸ Altering the legal burdens could strengthen the agencies' position when they find significant evidence of anticompetitive harm without offsetting efficiencies and reduce the risk that impediments to evidence gathering would permit anticompetitive mergers.

The Role of States

States can and should continue to play an important supplemental and complementary role to federal enforcement. Recently, several states asked the FTC for training and support to evaluate and litigate hospital mergers and we answered.⁴⁹ In April, the FTC convened the first of several healthcare litigation workshops and we hosted representatives from 40 states. States should continue to work as active partners in blocking anticompetitive healthcare mergers, and make sure their actions to resolve competition concerns are consistent with the most pro-competitive enforcement goals.

Wherever possible, states should resist efforts to immunize anticompetitive hospital mergers. Recently Montana Governor Steve Bullock signed a bill to repeal the state's COPA laws and thereby prevent hospitals from seeking COPAs in the future. I hope other states that do not have active COPAs will follow Montana's lead. States that have implemented COPAs should work with the FTC to rigorously study how hospital mergers approved pursuant to COPA agreements and associated regulations have affected prices, quality, and wages. The FTC's ongoing COPA Assessment Project welcomes input from states and other stakeholders.⁵⁰ In June, the FTC will hold a workshop to assess the effects of COPAs and encourage all stakeholders to participate and further explore this pressing topic.

State authorities should also consider adopting other competition policies. States can establish state-level premerger notification requirements.

