



September 18, 2023

The Honorable Lina M. Khan
Chair
U.S. Federal Trade Commission

The Honorable Jonathan Kanter
Assistant Attorney General
U.S. Department of Justice

Re: Draft Merger Guidelines for Public Comment

Submitted electronically via Regulations.gov

Dear Mr. Kanter and Ms. Khan:

Consumers First is an alliance that brings together the interests of consumers, children, employers, labor unions, and primary care working to realign and improve the fundamental economic incentives and design of our health care system. Our goal is to ensure the nation's health care system fulfills its obligation to the people it serves by providing affordable, high-quality, cost-effective care to everyone. *Consumers First* appreciates the opportunity to provide comments on the Federal Trade Commission (FTC) and Department of Justice (DOJ) Proposed Draft Merger Guidelines as they relate to the health care sector.

The draft Merger Guidelines serve to inform the public, the business community, practitioners, and the courts on the framework the FTC and DOJ, also identified as "the agencies," will use to determine whether a merger is potentially in violation of federal anti-trust law.¹ *Consumers First* applauds the FTC's and DOJ's efforts to meaningfully update these guidelines to better address the realities of competition and consolidation within health care markets today. The United States is in the midst of a health care affordability and quality crisis driven by rapid consolidation that has eliminated competition in the health care industry, underscoring the importance and timeliness of these updated guidelines.²

Between 2015 and 2019 commercial health spending in the United States increased by a staggering 21.8% and since 2015 hospital prices have grown four times faster than workers' paychecks.^{3,4} The impacts of high-cost care are hitting U.S. families hard, particularly in communities of color. One in four

¹U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines", https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

² Robert A. Berenson et al., "Addressing Health Care Market Consolidation and High Prices", *The Urban Institute*, https://www.urban.org/sites/default/files/publication/101508/addressing_health_care_market_consolidation_and_high_prices_1.pdf.

³Health Care Cost Institute, "2021 Health Care Cost and Utilization Report", April 2023, <https://healthcostinstitute.org/health-care-cost-and-utilization-report/annual-reports>

⁴Drew Desilver, "For most U.S. workers, real wages have barely budged in decades", *Pew Research Center*, August 7, 2018, <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>

Americans report that they cannot afford quality care and 17% have had to cut back on health care to afford household expenses, while these rates are even higher for Black and Hispanic individuals.^{5,6}

Despite the high and growing cost of U.S. health care, health outcomes remain bleak for too many, performing worse than comparable countries in key metrics, including maternal mortality and unmanaged chronic diseases, such as diabetes and heart disease.⁷ Health care consolidation, particularly among large hospital corporations, is a major driver of these high and rising health care prices and stagnant or worsening health care quality and outcomes.^{8,9,10} Horizontal hospital mergers increase the average price of services by 6%-18% with no demonstrated improvements in quality or access to care.¹¹ Additionally, vertical integration between physicians and hospitals is associated with a 14% increase in prices for the same services.¹² Fortunately, the FTC and DOJ have longstanding statutory mandates to scrutinize anti-competitive practices and mergers which play a vital role in protecting consumers, workers, employers, and clinicians from the harmful impacts of health care market concentration and monopolization.¹³

The comments in this letter represent the views of the *Consumers First* steering committee. Several of our individual organizations will also be submitting organizational responses to this RFI, and we look forward to connecting on these recommendations further. We ask that these comments, and all supporting citations referenced herein, be incorporated into the administrative record in their entirety.

Our comments specifically focus on anticompetitive practices in the health care sector and address four out of thirteen draft Merger Guidelines:

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition

Guideline 9: When a Merger is a Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series

⁵Nicole Willcoxon, "Majorities Rate Cost, Equity of U.S. Healthcare Negatively", *Gallup*, October 6, 2022, <https://news.gallup.com/poll/402191/majorities-rate-cost-equity-healthcare-negatively.aspx>.

⁶ *ibid*.

⁷Peter G. Peterson Foundation, "How Does The Us Healthcare System Compare To Other Countries?", July 12, 2023, <https://www.pgpf.org/blog/2023/07/how-does-the-us-healthcare-system-compare-to-other-countries#:~:text=However%2C%20despite%20higher%20healthcare%20spending,infant%20mortality%2C%20and%20unmanaged%20diabetes>.

⁸ NCCI Insights, "The Impact of Hospital Consolidation on Medical Costs", July 11, 2018, https://www.ncci.com/Articles/Pages/II_Insights_QEB_Impact-of-Hospital-Consolidation-on-Medical-Costs.aspx

⁹ Chart 2.9: Announced Hospital Mergers and Acquisitions, 1998–2015," *TrendWatch Chartbook 2016: Trends Affecting Hospitals and Health Systems* (Washington, DC: American Hospital Association, 2016)

¹⁰ Chart 2.9: Announced Hospital Mergers and Acquisitions, 2005–2017," *TrendWatch Chartbook 2018: Trends Affecting Hospitals and Health Systems* (Washington, DC: American Hospital Association, 2018).

¹¹Richard M. Scheffler et al., "The Sky's the Limit", *California Health Care Foundation*, October 3, 2019, <https://www.chcf.org/publication/the-skys-the-limit/#related-links-and-downloads>

¹²Karyn Schwartz et al., "What We Know About Provider Consolidation", *KFF*, September 02, 2020, <https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/#:~:text=Patterns%20of%20consolidation%20leading%20to,in%20the%20least%20concentrated%20markets>.

¹³Federal Trade Commission, "The Antitrust Laws", <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets

***Consumers First* supports the agencies' decision to revert the post-merger Herfindahl-Hirschman Index (HHI) thresholds back to those of the former 1982 Guidelines as it relates to the health care sector.**

Highly concentrated health care markets are directly correlated with high, rising and variable health care prices.¹⁴ The DOJ and FTC rely on HHI thresholds to measure the level of market concentration – that is, the number and relative size of rivals competing to offer a product or service to a group of customers – to inform when a merger meets the standard for structural presumption, or is presumptively anti-competitive.¹⁵ ***Consumers First* supports the agencies' efforts to examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated health care market to determine whether the merger will substantially lessen competition.** It is well established that a merger eliminating even a small competitor in a highly concentrated health care market can significantly reduce competition.^{16,17,18} This rationale serves as the basis for the agencies to determine which mergers may substantially reduce competition. Importantly, the agencies are proposing to change the HHI threshold for highly concentrated markets by lowering the HHI threshold of what is considered a highly concentrated market from 2,500 to 1,800.¹⁹ The agencies are also proposing to lower the threshold used to determine if a merger would significantly reduce competition or create a monopoly from a change in HHI greater than 200 points to a change in HHI greater than 100 points.²⁰ Taken together, these changes will help to capture a greater number of mergers causing undue concentration and would strengthen the thresholds triggering a structural presumption that the merger would reduce competition or could create a monopoly in a market. Alongside the updated HHI standard, the proposed guidelines also incorporate single firm market share as a metric for structural presumption regardless of market concentration.²¹ Under this addition, a merger that grants a firm 30% of market share, alongside a post-merger change in HHI of over 100, would also be presumed to have anti-competitive effects and therefore be in violation of federal anti-trust law.²²

These changes to the HHI thresholds would significantly increase the number of health care mergers subject to anti-trust review by the FTC and DOJ.²³ With the additional consideration of market share, smaller mergers that result in growth in market share may now be more heavily scrutinized by the

¹⁴ Health Affairs, “The Role of Prices in Excess US Health Spending”, June 09, 2022, <https://www.healthaffairs.org/doi/10.1377/hpb20220506.381195/>

¹⁵ The White House, “Protecting Competition Through Updated Merger Guidelines”, July 19, 2023, <https://www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines/>

¹⁶ *ibid.*

¹⁷ Tara Bannow and Bob Herman, “DOJ, FTC primed for more aggressive scrutiny of health care mergers”, *STAT News*, July 19, 2023, <https://www.statnews.com/2023/07/19/antitrust-scrutiny-health-care/>

¹⁸ Herbert J. Hovenkamp and Carl Shapiro, “Horizontal Mergers, market Structure, and Burdens of Proof”, University of Pennsylvania Carey law School, 2018

¹⁹ U.S. Department of Justice and the Federal Trade Commission, “Merger Guidelines”, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ Tara Bannow and Bob Hernman, “DOJ, FTC primed for more aggressive scrutiny of health care mergers”, *STAT News*, July 19, 2023, <https://www.statnews.com/2023/07/19/antitrust-scrutiny-health-care/>

agencies.²⁴ For example, a merger between a hospital that holds 29% of market share and a hospital with 2% of market share would now meet the threshold for structural presumption.²⁵ **Consumers First believes these updated thresholds will allow the FTC and DOJ to more effectively reign in the widespread consolidation of health care entities that is driving unaffordable care for consumers, employers and workers.**

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition

The FTC and DOJ propose applying the updated Merger Guidelines to both horizontal and vertical mergers rather than current guidelines, which only apply to horizontal mergers.²⁶ Under the updated guidelines, the agencies now emphasize a vertical merger's potential to cause harm to competition, specifically when the merger has the ability to close off a competitor's access to products, customers, or services.²⁷ To determine whether a vertical merger is harmful to competition, the agencies will examine a merger's impact on the vertical supply chain.²⁸ If a merger will result in a firm holding a foreclosure share - a share of a related market that provides a product to a competitor - greater than 50%, the merger will be assumed to substantially lessen competition.²⁹ In cases where a merger results in a foreclosure share below 50%, the guidelines propose the agencies consider a range of other indicators that a merger will deprive rivals of a fair opportunity to compete, such as a market's trend toward vertical integration or the nature and purpose of a merger.³⁰

This increased scrutiny into vertical mergers has significant implications for health care markets, given the growing trends of vertical consolidation in health care which have resulted in greater market concentration and increases in health care spending.³¹ Between 2012 and 2018, the number of hospital-acquired physician practices grew from 35,700 to over 80,000.³² Hospitals then acquired an additional 21,000 physician practices from 2019 to 2020, representing a 25% increase in corporate ownership of physician practices in that year alone.³³ Research has shown that growing rates of vertical consolidation

²⁴ *ib id.*

²⁵ Benjamin R. Dryden et al., "DOJ and FTC Propose Comprehensive Overhaul of Merger Guidelines, Including Presumption against Horizontal Mergers that Result in Market Shares Above 30%", *Foley and Lardner LLP*, July 20, 2023, <https://www.foley.com/en/insights/publications/2023/07/doj-ftc-overhaul-merger-guidelines>

²⁶ Purchases Business Group on Health, "Vertical Integration Isn't Great for Health Care Consumers or Purchasers", August 23, 2021, <https://www.pbgh.org/despite-claims-vertical-integration-isnt-great-for-health-care-consumers-or-purchasers/>

²⁷ U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines", https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

³¹ M. Susan Ridgely, "Does Vertical Integration Improve or Imperil U.S. Health Care?", *The Rand Blog*, November 16, 2021, <https://www.rand.org/blog/2021/11/does-vertical-integration-improve-or-imperil-us-health.html>

³² Physicians Advocacy Institute (PAI), "Updated Physician Practice Acquisition Study: National and Regional Changes in Physician Employment, 2012-2018," February 2019, <http://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/021919- Avalere-PAI-Physician-Employment-Trends-Study-2018-Update.pdf?ver=2019-02-19-162735-117>.

³³ Dave Muoio, "Hospitals, corporations own nearly half of medical practices, spurred by COVID-19 disruption: report", *Fierce Healthcare*, June 29, 2021, <https://www.fiercehealthcare.com/practices/practice-consolidation-private-practice-departures-skyrocketed-during-covid-19>

are contributing to higher prices and often lower quality of care.^{34, 35, 36} One study found that as a result of physician-hospital integration, prices increased as much as 14% for a single service.³⁷ Alongside higher costs, vertical integration of physician practices is associated with lower quality care, such as increased odds of inappropriate MRI referral and post procedure complications.^{38, 39} **Consumers First supports the agencies' decision to increase oversight of vertical health care mergers and strengthen enforcement of anti-trust laws with respect to health care mergers under the updated Merger Guidelines. Consumers First believes this decision is critical to mitigating the negative impacts of vertical integration on the affordability and quality of health care.**

Alongside an increase in oversight into vertical health care mergers, Consumers First believes the FTC and DOJ must ensure that federal anti-trust laws are fully applied to cross-market mergers in the health care sector. Cross-market mergers are mergers between firms in different geographical markets and therefore do not typically threaten competition in a single geographic market for buyers, however they may impact competition through common payer and employer networks.⁴⁰ An example of this is cross-market hospital systems requiring payers to contract with multiple or all hospitals in the system, leveraging their cross-market position to reduce the negotiating power of the payer.⁴¹ Dynamics such as this enable price increases, research shows cross-market mergers can increase health care prices by 7%-30%.⁴² Between 2010 and 2019, more than half of hospitals involved in mergers or acquisitions were in different geographic locations than the acquiring firm.⁴³ Despite the prevalence of cross-market

³⁴ Robert O'Neill, "Study Finds Vertical Integration In Medicine Is Leading To Higher Costs And Worse Health Outcomes", Harvard Kennedy School, March 02, 2023, <https://www.hks.harvard.edu/faculty-research/policy-topics/health/study-finds-vertical-integration-medicine-leading-higher>

³⁵ M. Susan Ridgely, "Does Vertical Integration Improve or Imperil U.S. Health Care?", *The Rand Blog*, November 16, 2021, <https://www.rand.org/blog/2021/11/does-vertical-integration-improve-or-imperil-us-health.html>

³⁶ Matt Kuhrt, "Vertical integration drives higher Medicare spending on common testing procedures", *Fierce Healthcare*, May 03, 2021, <https://www.fiercehealthcare.com/hospitals/vertical-integration-drives-higher-medicare-spending-common-testing-procedures>

³⁷ Cory Capps et al, "The Effect of Hospital Acquisitions of Physician Practices on Prices and Spending." *Journal of Health Economics*, May 1, 2018, <https://doi.org/10.1016/j.jhealeco.2018.04.001>.

³⁸ Purchases Business Group on Health, "Vertical Integration Isn't Great for Health Care Consumers or Purchasers", August 23, 2021, <https://www.pbgh.org/despite-claims-vertical-integration-isnt-great-for-health-care-consumers-or-purchasers/>

³⁹ Robert O'Neill, "Study Finds Vertical Integration In Medicine Is Leading To Higher Costs And Worse Health Outcomes", Harvard Kennedy School, March 02, 2023, <https://www.hks.harvard.edu/faculty-research/policy-topics/health/study-finds-vertical-integration-medicine-leading-higher>

⁴⁰ Alan Condon, "The FTC could come for 'cross-market' hospital mergers next", *Becker's Hospital Review*, March 01, 2023, <https://www.beckershospitalreview.com/hospital-transactions-and-valuation/the-ftc-could-come-for-cross-market-hospital-mergers-next.html#:~:text=%22Cross%2Dmarket%22%20mergers%20are,services%20to%20distinct%20patient%20populations.>

⁴¹ Victoria Bailey, "Increase in Cross-Market Hospital Systems May Hurt Market Competition", *Revcycle Intelligence*, November 10, 2022, <https://revcycleintelligence.com/news/increase-in-cross-market-hospital-systems-may-hurt-market-competition#:~:text=However%2C%20emerging%20evidence%20has%20shown,mutual%20forbearance%20between%20hospital%20systems.>

⁴² Mather S. Lewis and Kevin E. Pflum, "Hospital systems and bargaining power: evidence from out-of-market acquisitions." *The RAND Journal of Economics*, (2017) <https://doi.org/10.1111/1756-2171.12186>

⁴³ Dave Muoio, "Cross-market hospital consolidation is on the rise and understudied, researchers say", *Fierce Healthcare*, November 07, 2022, <https://www.fiercehealthcare.com/providers/cross-market-hospital-consolidation-rise-and-understudied-researchers-say>

mergers and their impact on health care cost and quality, the FTC has never challenged a merger of this nature and many go without inspection.⁴⁴

Guideline 9: When a Merger is a Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series

The FTC and DOJ propose evaluating mergers in the context of the series of mergers and acquisitions that may have preceded it.⁴⁵ Under current guidelines, the FTC and DOJ do not explicitly consider the complete series of mergers or acquisitions that may lead up to a proposed merger under review.⁴⁶

Consumers First supports the agencies' efforts to update the guidelines to include consideration of the whole series of mergers and acquisitions that lead up to a merger within the health care sector. This is a critical step in identifying patterns of mergers and acquisitions that historically have not been reviewed by the FTC and DOJ but can be key drivers of consolidation and the steady accumulation of market power by large dominant health care systems.⁴⁷ This guideline is particularly important for addressing the increasing role of private equity in health care and the current trend of buying up many small practices to create powerful medical groups that grow to dominate local markets.⁴⁸ Over the past decade, private equity deals in health care have tripled in value, totaling \$750 billion.⁴⁹ Despite the value of these deals and the ways in which private equity has driven consolidation in the health care market, private equity has faced little scrutiny by antitrust agencies.⁵⁰ **Consumers First supports this updated guideline that will allow the FTC and DOJ to address consolidation driven by multiple, smaller acquisitions in order to ensure healthier and more competitive health care markets.**

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers

Building off of previous guidelines, the updated Merger Guidelines explicitly state that a merger's impact on competition within labor markets will be considered when determining whether a merger is in violation of federal anti-trust law.⁵¹ As the guidelines state, mergers between competing buyers have

⁴⁴ Scott Hulver and Zachary Levinson, "Understanding the Role of the FTC, DOJ, and States in Challenging Anticompetitive Practices Of Hospitals and Other Health Care Providers", KFF, August 07, 2023, <https://www.kff.org/health-costs/issue-brief/understanding-the-role-of-the-ftc-doj-and-states-in-challenging-anticompetitive-practices-of-hospitals-and-other-health-care-providers/>

⁴⁵ U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines", https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

⁴⁶ U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines", August 19, 2010, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>

⁴⁷ Aimee Cicchiello and Lovisa Gustafsson, "Federal Antitrust Tools Are Inadequate to Prevent Anticompetitive Health Care Consolidation", *The Commonwealth Fund*, May 13, 2021, <https://www.commonwealthfund.org/blog/2021/federal-antitrust-tools-are-inadequate-prevent-anticompetitive-health-care-consolidation>

⁴⁸ Reed Abelson and Margot Sanger-Katz, "Who Employs Your Doctor? Increasingly, a Private Equity Firm", *New York Times*, July 10, 2023, <https://www.nytimes.com/2023/07/10/upshot/private-equity-doctors-offices.html>

⁴⁹ Jeanne A. Markey and Raymond M. Sarola, "Private equity, health care, and profits: It's time to protect patients", *STAT*, March 24, 2022, <https://www.statnews.com/2022/03/24/private-equity-health-care-profits-time-to-protect-patients/>

⁵⁰ Richard M. Scheffler et al., "Monetizing Medicine: Private Equity And Competition In Physician Practice Markets", July 10, 2023, https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf

⁵¹ U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines", https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

the potential to reduce competition and therefore violate anti-trust law.⁵² While previous guidelines have indirectly protected competition among employers, these proposed guidelines would allow the FTC and DOJ to challenge a merger based on whether the merger would substantially lessen competition for workers.⁵³

***Consumers First* supports the update to the Merger Guidelines that would allow FTC and DOJ to consider competition within labor markets in the health care sector.** Substantial evidence directly correlates more concentrated health care markets with a significant reduction in wage growth particularly among laborers whose education and skills are not easily transferable to other markets.⁵⁴ Reduced competition in health care markets resulting from anticompetitive mergers and acquisitions has also been linked to deteriorating working conditions, including reductions in safe staffing levels and poor adherence to health and safety standards.⁵⁵ This finding is consistent with other academic research correlating mergers and acquisitions with significant reductions in health care quality and worse health care outcomes.^{56,57} **As a result, *Consumers First* recommends that the FTC and DOJ consider the impacts of proposed mergers on patient access to high quality health care and health outcomes.**

Consumers First is grateful for the opportunity to comment on the draft FTC and DOJ Merger Guidelines. Thank you for considering the above recommendations. Please contact Sophia Tripoli, Senior Director of Health Policy at Families USA, at stropoli@familiesusa.org for further information.

Sincerely,

American Academy of Family Physicians
American Benefits Council
American Federation of State, County & Municipal Employees
Families USA
Purchaser Business Group on Health

⁵² U.S. Department of Justice and the Federal Trade Commission, “Merger Guidelines”, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

⁵³ U.S. Department of Justice and the Federal Trade Commission, “2023 Draft Merger Guidelines for Public Comment” https://www.ftc.gov/system/files/ftc_gov/pdf/Merger-Guidelines-Fact-Sheet-07-17-2023.pdf

⁵⁴ Elena Prager and Matt Schmitt, “When an Industry Consolidates, What Happens to Wages?”, *Kellogg Insight*, April 04, 2019, <https://insight.kellogg.northwestern.edu/article/merger-consolidation-wages-effect>

⁵⁵ National Nurses United, “Nurses call on Federal Trade Commission and Department of Justice to strengthen guidelines to limit negative effects of mergers, acquisitions on patients and healthcare workers”, April 21, 2022, <https://www.nationalnursesunited.org/press/nurses-call-on-ftc-and-doj-to-strengthen-merger-guidelines>

⁵⁶ Arthur H. Gale, “Bigger but not better: hospital mergers increase costs and do not improve quality.” *Missouri medicine* vol. 112,1 (2015): 4-5., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6170097/>

⁵⁷ Elevance Health, “Costs and Quality After Independent Hospitals Are Acquired by Health Systems”, August, 2023, <https://www.elevancehealth.com/public-policy-institute/costs-and-quality-after-independent-hospitals-are-acquired-by-health-systems>