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TESTIMONY

LACK OF RESOURCES AND LACK OF AUTHORITY OVER NONPROFIT ORGANIZATIONS ARE THE BIGGEST HINDRANCES TO ANTITRUST ENFORCEMENT IN HEALTHCARE

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Treating the Problem: Addressing Anticompetitive Conduct and Consolidation in Health Care Markets
US House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law

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Chairman Cicilline, Ranking Member Buck, and distinguished members of the Subcommittee on Antitrust, Commercial, and Administrative Law:

My name is Alden Abbott, and I am a senior research fellow at the Mercatus Center at George Mason University. My research focuses primarily on antitrust and competition policy. I formerly served as general counsel of the Federal Trade Commission (FTC). I have served in the US Department of Justice's Antitrust Division as well. I welcome the opportunity to give testimony that highlights key considerations in addressing anticompetitive conduct and consolidation in healthcare markets.

In this testimony, I will focus on four key points:

1. Additional funding for the federal antitrust agencies will substantially enhance their ability to deal effectively with antitrust challenges posed by healthcare competition.
2. The Federal Trade Commission Act should be modified so as to give the FTC authority over nonprofit entities.
3. Though existing antitrust statutes and agency guidance are fully adequate to address healthcare antitrust issues, narrowly targeted legislation to deal with specific abuses may be warranted.
4. Major legal reforms unrelated to antitrust, including state laws such as certificate-of-need laws, are key to substantially improving the effectiveness of healthcare competition.

ADDITIONAL FUNDING FOR THE ANTITRUST AGENCIES WILL SUBSTANTIALLY ENHANCE THE EFFECTIVENESS OF FEDERAL ANTITRUST ENFORCEMENT IN THE HEALTHCARE SECTOR

Federal antitrust enforcement is a bipartisan endeavor, and the commissioners who lead the FTC unanimously support substantially increased funding for the FTC's enforcement endeavors. Biden Administration requests for increased Antitrust Division resources may be forthcoming as well.

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Although government agencies invariably have a strong incentive to advocate for increased appropriations, such requests are fully warranted in the case of the FTC and the Antitrust Division.

Appropriate federal antitrust and consumer protection enforcement is good for the American economy. It promotes enhanced competition and consumer welfare. Regrettably, however, the effectiveness of federal enforcement in achieving these benefits is threatened by insufficient resources. As FTC Acting Chair Rebecca Kelly Slaughter explained in her April 20 testimony before the US Senate Committee on Commerce, Science, and Transportation,[1] FTC employment has remained flat despite a growing workload, with merger filings doubling in recent years. Lauren Feiner reports on that testimony:

> "The absence of resources means that our enforcement decisions are harder," [Slaughter] said. "If we think that we have a real case, a real law violation in front of us, but a settlement on the table that is maybe OK but doesn't get the job done, we have to make difficult decisions about whether it's worth spending a lot of taxpayer dollars to go sue the companies who are going to come in with many, many law firms worth of attorneys and expensive economic experts, versus taking that settlement."[2]

I can attest to the accuracy of Slaughter's observation, based on my experience as FTC general counsel in the Trump Administration. During my tenure, the FTC did indeed have to contend with resource limitations that adversely affected merger enforcement decision-making.

The problem of resource constraints is particularly acute in the case of healthcare merger reviews, given the increasing consolidation of healthcare institutions. As one noted healthcare scholar stated in 2019, "The Affordable Care Act did not start the consolidation rapidly occurring with hospitals/health systems and medical groups, but it most definitely accelerated the movement to combine. In the last five years, the number and size of consolidations have been at an all-time high."[3]

Moreover, according to health policy analyst Brian Miller and coauthors, "experts have expressed concern regarding a new merger wave due to pandemic-induced financial distress driven by the temporary cessation of profitable elective care and decreased hospital use."[4] Antitrust enforcers will need additional resources to ensure that this trend does not yield mergers that undermine the competitive process and harm consumers.

AMENDING THE FEDERAL TRADE COMMISSION ACT TO GIVE THE FTC AUTHORITY OVER NONPROFIT ENTITIES

Many healthcare entities (particularly hospitals) are organized as nonprofit corporations. This fact does not present problems for FTC and Antitrust Division merger enforcement under section 7 of the Clayton Act, which applies both to for-profit and not-for-profit enterprises. The Sherman Antitrust Act of 1890, enforced by the Antitrust Division (but not the FTC), also applies to nonprofits. Unfortunately, however, FTC nonmerger antitrust enforcement is stymied by the fact that it does not reach nonprofit

1. Lauren Feiner, "FTC Commissioners Agree They Should Act to Protect Consumer Privacy If Congress Doesn't," CNBC, April 20, 2021.
2. Feiner, "FTC Commissioners Agree."
3. Lawrence E. Singer, "Considering the ACA's Impact on Hospital and Physician Consolidation," *Journal of Law, Medicine & Ethics* 46, no. 4 (2019): 913–17.
4. Brian J. Miller et al., "Reversing Hospital Consolidation: The Promise of Physician-Owned Hospitals," *Health Affairs*," April 12, 2021; Lovisa Gustafsson and David Blumenthal, "The Pandemic Will Fuel Consolidation in U.S. Health Care," *Harvard Business Review*, March 9, 2021.

corporations.[5] This limitation makes no sense. It places major if not insurmountable obstacles before the FTC's ability to investigate and, where necessary, take enforcement action against a wide range of monopolizing or otherwise anticompetitive conduct in the healthcare sector.

Elimination of the nonprofit jurisdictional limitation has received bipartisan support by FTC commissioners, who have emphasized the constraint it places on the FTC's law enforcement capabilities. In September 2019, testifying before the US Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, then-FTC Chair Joseph Simons stated, "We're very interested in looking at unilateral conduct by hospitals, that are problematic under the antitrust laws[.] . . . But, generally when we do that, we find that they're nonprofits, and we don't have jurisdiction over them. That's another reason why we've been asking the Congress to eliminate our exemption for nonprofits."[6]

The FTC staff has profound expertise in healthcare markets, developed over decades.[7] It is high time it be given statutory authority over nonprofit entities to enable it to apply this expertise fully to all aspects of healthcare antitrust enforcement.

EXISTING ANTITRUST STATUTES AND AGENCY GUIDANCE ARE FULLY ADEQUATE TO ADDRESS HEALTH CARE ANTITRUST ISSUES, BUT NARROWLY TARGETED LEGISLATION TO DEAL WITH SPECIFIC ABUSES MAY BE WARRANTED

At this time, there are a variety of legislative proposals for far-reaching change in federal antitrust law. Respectfully, I do not believe that major statutory change in the antitrust field would be helpful. As I have argued recently,[8] although a few marginal adjustments to the antitrust statutes appear appropriate, such as elimination of the nonprofit exception to FTC jurisdiction, the mainstream consensus consumer-welfare approach should be retained. Antitrust statutory amendments affecting such areas as burdens of proof, presumptions, merger and monopolization standards, and blanket limits on mergers applicable to certain categories of firms (among other possible changes being advanced) would transform enforcement norms and judicial analysis, generating enormous private-sector uncertainty. This uncertainty would tend to deter innovation, harming consumers and the American economy. The claims by some that broad-based sweeping changes are needed owing to reduced competition in the American economy and ineffective antitrust enforcement have been rebutted by sound economic analysis[9]—at the very least, those claims have not been proven.

During my years as an executive in the FTC's Bureau of Competition and as FTC general counsel, I became quite familiar with FTC antitrust development and policy research applicable to healthcare. In

5. Specifically, the FTC may enforce section 5 of the Federal Trade Commission Act (which forbids "unfair methods of competition") against "persons, partnerships, or corporations." The Federal Trade Commission Act defines the term "corporation" as an entity "organized to carry on business for its own profit or that of its members," thereby placing a major obstacle in the path of FTC enforcement against nonprofits. To be sure, the FTC has asserted the power to act when nonprofit status has in effect been a sham device to shield actual for-profit activities. See In re Ohio Christian College, 80 F.T.C. 815, 1972 FTC LEXIS 223 (F.T.C. July 29, 1970). And a federal court recognized the FTC's authority over a nonprofit that acted in concert, in profit-making activities, with a for-profit entity. See FTC v. AmeriDebt, Inc., 343 F. Supp. 2d 451 (D. Md. 2004). Nevertheless, the FTC is, at best, severely hampered when it seeks to bring an enforcement action under section 5.
6. Steven Porter, "Nonprofit Hospitals and Antitrust Enforcement: Should FTC Have Jurisdiction?," *HealthLeaders*, September 17, 2019.
7. For links describing the full measure of FTC competition-related research and enforcement initiatives over time, see Federal Trade Commission, "Health Care Competition," accessed April 26, 2021, https://www.ftc.gov/news-events/media-resources/mergers-competition/health-care-competition.
8. Alden F. Abbott, "US Antitrust Laws: A Primer" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2021).
9. White House, *Economic Report of the President*, February 2020, 199–226.

my opinion, the FTC staff possesses the legal tools (with the exception of the nonprofit limitation, discussed earlier) to fully investigate and take action against anticompetitive behavior in this sector. What's more, the FTC has had an excellent enforcement track record, including in hospital mergers. It currently is addressing a broad range of healthcare-related activity. Existing agency guidance, including the 2020 *Vertical Merger Guidelines*,[10] provide ample support for appropriate, evidence-based, economically sound enforcement. New general legislation is not needed.

Nevertheless, I recognize that targeted statutory amendments, narrowly tailored to address specific competitive healthcare sector problems, may be appropriate in certain circumstances. A good example is the newly minted CREATES Act, which deals with regulatory abuses that had allowed branded pharmaceutical companies to forestall competition from both generic drug and biosimilar producers.[11] I testified in favor of the CREATES Act in 2017 before this subcommittee and in 2016 before the Subcommittee on Competition Policy, Antitrust, and Consumer Rights.[12] There is an extensive literature on how regulated entities may manipulate the regulatory process to undermine competition,[13] and the abuses dealt with by the CREATES Act present a prime example of such conduct.

Several scholars recently have advanced a number of additional legislative proposals to deal with perceived competitive problems afflicting healthcare. Professor Michael Carrier notably has called for legislation providing that pharmaceutical "pay for delay" settlements are presumptively illegal; authorizing the FTC to challenge pharmaceutical "product hopping"; allowing the FTC to challenge certain "patent thickets" (a particular issue in the area of biologic drugs); and limiting sham citizen petitions filed by brand-name drug producers with the FDA.[14]

I will not comment in this testimony on the merits of these or other targeted healthcare-related proposals, which deserve serious scrutiny. I would, however, add a word of caution. Antitrust enforcement focuses on the specific facts of a case to determine whether conduct in the particular instance at hand is likely to undermine competition and reduce consumer welfare. But proposals that broadly seek to condemn a certain practice risk rendering illegal (and deterring businesses from pursuing) specific beneficial manifestations of that practice. Accordingly, before legislating, Congress should seriously weigh whether in attacking a particular practice, the benefits of eliminating targeted harmful conduct would likely be outweighed by the costs of condemning and deterring specific instances of such conduct that could have benefited consumers, including through innovation.[15]

10. US Department of Justice and Federal Trade Commission, *Vertical Merger Guidelines*, June 30, 2020.
11. The CREATES Act, which was enacted in December 2019, establishes a private right of action that allows developers to sue brand companies that refuse to sell them product samples needed to support their applications. Food and Drug Administration, "Access to Product Samples: The CREATES Act," current as of March 13, 2020, https://www.fda.gov/drugs/guidance-compliance-regulatory-information/access-product-samples-creates-act.
12. Antitrust Concerns and the FDA Approval Process, hearing before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 115th Cong. (2017) (statement of Alden F. Abbott, Deputy Director and Senior Legal Fellow, Heritage Foundation); The CREATES Act: Ending Regulatory Abuse, Protecting Consumers, and Ensuring Drug Price Competition, hearing before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary, 114th Cong. (2016) (statement of Alden F. Abbott, Deputy Director and Senior Legal Fellow, Heritage Foundation).
13. Amihai Glazer, "Regulatory Policy," in *The Elgar Companion to Public Choice*, 2nd ed., ed. William F. Shughart II, Laura Razzolini, and Michael Reksulak (Cheltenham, UK: Edward Elgar, 2013).
14. Michael A. Carrier, "Helping Consumers Afford Prescription Drugs: An Antitrust Agenda for the New Congress," *HealthAffairs*, February 1, 2021.
15. Innovative activity may generate enormous welfare benefits, and thus particular care should be taken to avoid legal prohibitions that may reduce innovation.

MAJOR LEGAL REFORMS UNRELATED TO ANTITRUST ARE KEY TO IMPROVING THE EFFECTIVENESS OF HEALTHCARE COMPETITION

Whereas this hearing centers on antitrust, in some sense the antitrust treatment of healthcare-related transactions affects only the tip of the proverbial healthcare policy iceberg. Major improvements to the competitive condition of the healthcare sector require far more than enhanced antitrust enforcement.

Serious competitive distortions are posed by a host of state and federal statutory actions that bedevil the healthcare sector, including, as merely one example, economically unjustified state restrictions on entry into healthcare provision, so-called certificate-of-need laws.[16] More generally, as FTC Commissioner Christine Wilson has stated,

> The health care system is so fundamentally broken that antitrust cannot fix all that ails it. I believe many of these problems come down to consumers' ability and incentive to choose among different products and services. Because insurers pick up much of the tab, one set of consumers – patients – have very little incentive to compare the prices of various health care providers. Even if they were inclined to comparison shop, it's not clear they could, given the opacity of most prices. And the ability to comparison shop based on quality – in other words, patient outcomes – is even more limited, given the dearth of data available to patients.[17]

Although addressing non-antitrust-related healthcare reform is beyond the scope of this hearing,[18] it is noteworthy that the federal antitrust agencies have over the years done an outstanding job in calling for statutory and legislative reforms to improve healthcare competition under both Republican and Democratic administrations.[19] Enhancing competition in healthcare markets, whether through enforcement or legislative and regulatory reform, has been and should remain a nonpartisan endeavor.

CONCLUSION

Appropriate antitrust enforcement in healthcare strengthens competition and directly benefits American consumers. Given existing agency resource constraints and burgeoning antitrust-related issues affecting healthcare, congressional allocation of additional resources to support the FTC and Antitrust Division is fully warranted. Congressional elimination of the statutory limitation on FTC actions against nonprofits likewise is appropriate. There is no need, however, to amend the federal antitrust statutes to better address healthcare—existing antitrust enforcement standards are fully adequate to the task. Narrowly targeted statutory fixes to deal with specific competition abuses in the healthcare sector may, however, be warranted. Finally, substantive reforms unrelated to antitrust are urgently needed to improve the effectiveness of healthcare competition.

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16. As Mercatus Center scholars have explained, "Certificate-of-need (CON) laws require healthcare providers to seek permission from state regulators before they offer new services, expand facilities, or invest in technology. Researchers find that these laws tend to restrict access to healthcare, make services more expensive, and undermine the quality of care." Matthew D. Mitchell, Anne Philpot, and Jessica McBirney, "CON Laws in 2020: About the Update," Mercatus Center, February 19, 2021, https://www.mercatus.org/publications/healthcare/con-laws-2020-about-update.
17. Christine S. Wilson, "The FTC's Ongoing Efforts to Promote Competition and Choice in Our Health Care System" (remarks, The Price of Good Health – 2020 and Beyond, Council for Affordable Health Coverage, Washington, DC, January 16, 2020) 12. Wilson's remarks cite academic scholarship that focuses on some of these deficiencies.
18. Mercatus Center scholars have been and remain at the forefront of exploring market-oriented procompetitive healthcare policy reform. For links to Mercatus healthcare scholarship, see "Healthcare," Mercatus Center at George Mason University, accessed April 26, 2021, https://www.mercatus.org/tags/healthcare.
19. Maureen Ohlhausen, "Beyond Law Enforcement: The FTC's Role in Promoting Health Care Competition and Innovation," *Health Affairs Blog*, January 26, 2015; US Department of Justice, "Healthcare Competition Advocacy," accessed April 26, 2021, https://www.justice.gov/atr/health-care-competition-advocacy.