CONSUMERS F1RST
The Alliance to Make the Health Care System Work for Everyone

April 21, 2022

The Honorable Lina M. Khan
Chair
U.S. Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

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

Dear Chair Khan and Assistant Attorney General Kanter:

Consumers First is an alliance that brings together the interests of consumers, children, employers, labor unions, and primary care clinicians working to change the fundamental economic incentives and design of the health care system. Our work is to ensure the system truly delivers the health and high-value care that all families across the nation deserve. America's families, workers and employers cannot continue to bear the burden of rising health care costs. *Consumers First* welcomes the opportunity to provide comments on the Federal Trade Commission's (FTC) and the Department of Justice's (DOJ) Request for Information (RFI) on Merger Enforcement. We greatly appreciate your interest in addressing anticompetitive behaviors. This letter will specifically focus on these practices in the health care sector, and offer some high level recommendations.

The U.S. faces a health care cost crisis where national expenditures on health care have risen at a staggering rate – faster than workers' wages and inflation - making it more difficult for people to access and afford health care.[1,2] At the same time, our nation has the lowest life expectancy, the highest infant mortality and has among the highest maternal mortality rates compared with other industrialized nations.[3,4] At the same time, there continue to be millions of people who live with the burden of poor health, who cannot access the right care at the right time, who receive low-quality care,[5] and who disproportionately face systemic inequities, including communities of color, people with low incomes, people experiencing disabilities, and people living in distressed neighborhoods.[6]

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[1] Alliance for Health Policy, "Chapter 6 – Delivery System Reform," in *Sourcebook*, August 31, 2017, http://www.allhealthpolicy.org/sourcebook/delivery-system-reform/.

[2] Centers for Medicare & Medicaid Services, "National Health Expenditure Projections 2018-2027: Forecast Summary," n.d., https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/ForecastSummary.pdf.

[3] Irene Papanicolas, Liana R. Woskie, and Ashish K. Jha, "Health Care Spending in the United States and Other High-Income Countries," *JAMA* 319, no. 10 (2018): 1024–1039, https://jamanetwork.com/journals/jama/article-abstract/2674671.

[4] Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries. CommonwealthFund, 2020, Available at: https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries

[5] Institute of Medicine, *Best Care at Lower Cost: The Path to Continuously Learning Health Care in America* (Washington, DC: The National Academies Press, 2013), https://www.nap.edu/catalog/13444/best-care-at-lower-cost-the-pathto-continuouslylearning.

[6] Kenan Fikri and John Lettieri, The 2017 Distressed Communities Index (Washington, DC: Economic Innovation Group, 2017), https://eig.org/wp-content/uploads/2017/09/2017-Distressed-Communities-Index.pdf.

Data confirm this growing health care cost and quality crisis in the U.S.:

- 60% of the U.S. population has at least one chronic condition,[7] which results in lower quality of life, health complications and increased health care spending.[8]
- From 2019 to 2020, average family health insurance premiums increased 4%, but workers' wages only increased 3.4%, and inflation increased 2.1%.[9]
- The total cost of an employer-sponsored health insurance plan for one family grew from $5,791 in 1999[10] to $21,342 in 2020.[11]
- 44% of people in the U.S. report that they did not see a doctor when they needed to because of high health care costs, and one-third of people report that the cost of medical care interferes with their ability to secure basic needs like food and stable housing.[12]
- In 2020, private insurance payment rates varied between 1.6 and 2.5 times higher than Medicare rates for inpatient hospital services.[13]

High and increasing health care prices continue to make health care unaffordable for many American families, workers, and employers. Importantly, health care prices and costs vary significantly among providers, and the differences are unrelated to the quality of care or health outcomes.[14] Paying more does not mean consumers are getting better care. For example, in early 2021, list prices for COVID-19 diagnostic tests — the price charged to uninsured individuals and employer plans for out-of-network treatment — ranged from $20 to $850 per test at major hospitals across the U.S.[15] This large variation in prices does not account for the quality of the test. In fact, the quality of the test is entirely unrelated to the prices charged. This is not a new phenomenon. It is well established that hospital prices for services billed to private plans range from 150% to more than 400% of Medicare rates.[16]

We simply cannot afford to continue like this.

For decades, lawmakers, academics, policymakers, and advocates have worked to uncover the root causes of high and variable health care prices among hospitals and across cities. A 2010 landmark report by the then-Attorney General of Massachusetts, Martha Coakley, correlated the underlying driver of high and variable prices in Massachusetts to market power and leverage

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[7] Christine Buttorff, Teague Ruder, and Melissa Bauman, *Multiple Chronic Conditions in the United States* (Santa Monica, CA: RAND Corporation, 2017), *https://www.rand.org/content/dam/rand/pubs/tools/TL200/TL221/RAND_TL221.pdf*

[8] ibid.

[9] Gary Claxton et al., Employer Health Benefits: 2020 Annual Survey (San Francisco, CA: Kaiser Family Foundation, October 2020), https://www.kff.org/report-section/ehbs-2020-summary-of-findings/.

[10] Josh Bivens, "The Unfinished Business of Health Reform: Reining in Market Power to Restrain Costs without Sacrificing Quality or Access," Economic Policy Institute, October 10, 2018, https://www.epi.org/publication/health-care

[11] Claxton et al., Employer Health Bene

[12] NORC at the University of Chicago, "Americans' Views on Healthcare Costs, Coverage and Policy," n.d., https://www.norc.org/PDFs/WHI%20Healthcare%20Costs%20Coverage%20and%20Policy/WHI%20Healthcare%20Costs%20Coverage%20and%20Policy%20Topline.pdf

[13] Eric Lopez et al., "Comparing Private Payer and Medicare Payment Rates for Select Inpatient Hospital Services," (Kaiser Family Foundation, July 2020), https://www.kff.org/medicare/issue-brief/comparing-private-payer-and-medicare-payment-rates-for-select-inpatient-hospital-services/

[14] Christopher M. Whaley et al., Nationwide Evaluation of Health Care Prices Paid by Private Health Plans: Findings from Round 3 of an Employer-Led Transparency Initiative (Santa Monica, CA: RAND Corporation, 2020), https://www.rand.org/pubs/research_reports/RR4394.htm

[15] Nisha Kurani et al., "COVID-19 Test Prices and Payment Policy," Peterson-KFF Health System Tracker, March 10, 2021." https://www.healthsystemtracker.org/brief/covid-19-test-prices-and-payment-poli

[16] Chapin White and Christopher M. Whaley, *Prices Paid to Hospitals by Health Plans Are High Relative to Medicare and Vary Widely: Findings from an Employer-Led Transparency Initiative* (Santa Monica, CA: RAND Corporation, 2019), https://www.rand.org/pubs/research_reports/RR3033.html.

over the negotiations among insurers, hospitals, and physician groups.[17] A similar report by the New York State Health Foundation found a correlation between increased market share and high prices.[18] The dynamics of the Massachusetts and New York health care markets described in those reports were then identified in health care markets across the nation.[19] Importantly, these studies also show that, in many instances, higher prices were not correlated in any way to the quality of care that the institutions provided.[20, 21]

Consolidation of health care markets since the late 1990s has led to the highly concentrated market power that is so pervasive today. Ninety percent of metropolitan statistical areas have highly concentrated hospital markets, 65 percent of those areas have highly concentrated specialist physician markets, and 57 percent have highly concentrated insurer markets.[22] The magnitude of market consolidation across and within health care markets in the U.S. is a significant health care cost problem. Importantly, health care prices determined in such consolidated markets are not the result of competitive market negotiations. Instead, they are the result of rates negotiated based on relative market power between hospitals and insurers. Consolidation undermines the competitiveness of health care markets, allowing providers, insurers, and other sectors of the health care industry to amass a disproportionate share of market power to set prices, prevent data from flowing and limit provider networks. The result of excessive provider market power is health care prices that are neither value-driven nor equitable. Addressing the impact of consolidation on health care prices is a fundamental step toward controlling health care costs and creating a more fair and equitable system.

America's families, workers and employers cannot continue to bear the burden of rising health care costs. Health care consumers across the nation are calling on the administration to take action. This RFI is a critical step towards enacting robust policy that ensures price gouging is no longer tolerated.

High Level Recommendations

Consumers First **believes it is critical for the Federal Trade Commission and the Department of Justice to develop a national strategy to intervene, at scale, in multiple non-competitive health care markets** and to prevent ongoing anticompetitive behavior that leads to consolidated health care markets and high prices. In the short term, we offer these policy recommendations which can be implemented as immediate next steps for addressing anticompetitive health care markets.

We urge the FTC to establish stricter review and enforcement of mergers and hospital acquisitions of physician practices, upon completion of its study under the Merger Retrospective Program. This is in line with the goals of the study, which seeks to analyze patient level commercial claims data for inpatient, outpatient, and physician services in 15 U.S. states to understand the impact of mergers and hospital acquisitions of physician practices — vertical integration — on health care prices. The FTC should use the results of its

[17] Office of Attorney General Martha Coakley. (March 1, 2010). Examination of Health Care Cost Trends and Cost Drivers. Retrieved from https://www.mass.gov/files/documents/2016/08/vn/2010-hcctd-full.pdf.
[18] New York State Health Foundation. (December 2016). Why Are Hospital Prices Different? An Examination of New York Hospital Reimbursement. Retrieved from https://nyshealthfoundation.org/wp-content/uploads/2017/11/an-examination-of-new-york-hospital-reimbursement-dec-2016.pdf.
[19] L. S. Dafny, op. cit.
[20] Office of Attorney General Martha Coakley, op cit.
[21] New York State Health Foundation, op. cit.
[22] B. Fulton (2017). Health Care Market Concentration Trends in The United States: Evidence and Policy Responses. Health Affairs (Project Hope), 36(9), 1530-1538. Retrieved from https://www.ncbi.nlm.nih.gov/pubmed/28874478.

study to pursue legal action against monopolistic pricing abuses, examining the market share and recent merger activity of the acquiring entity, not just the size of the merger deal. We also urge the FTC to use the results of the study to make recommendations to Congress to increase health care market competition.

Additionally, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) should ensure that federal antitrust laws are fully applied to vertical integration and to cross-sector mergers. This includes acquisitions of hospitals, health systems, and pharmaceutical companies; and integrations between physician practices and hospitals as well as health insurers, pharmacy benefit managers, and specialty pharmacies; and mergers and acquisitions between health insurers and pharmaceutical managers.

We stand ready to assist you in your work to protect consumers and the market from anticompetitive, deceptive, and unfair business practices that lead to rising health care costs. Several of our individual organizations will also be submitting organizational responses to this RFI, and we look forward to connecting on these recommendations further. Thank you again for the opportunity to comment on these issues. Please contact Jane Sheehan, Director of Federal Relations (JSheehan@familiesusa.org) with any questions.

Sincerely,

Consumers First Steering Committee

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