

**Concurring Statement of Commissioner Christine S. Wilson
In the Matter of DaVita Inc.,
and Total Renal Care, Inc.,
File No. 211-0013
October 25, 2021**

Today, the Commission announces a consent order to settle allegations that the proposed acquisition of the dialysis business of the University of Utah Health (“University”) by Total Renal Care, Inc., a wholly-owned subsidiary of DaVita Inc. (“DaVita”), may substantially lessen competition in the market for outpatient dialysis services in the greater Provo, Utah area. I support the outcome but believe that two aspects of the consent order warrant discussion so that my support is not misconstrued. Those two sets of provisions relate to prior approval and non-compete agreements. I then highlight a third provision – a ban on no-poach agreements – in light of the ongoing dialogue regarding whether antitrust enforcement adequately protects competition for labor inputs.

Prior Approval and Non-Compete Agreement Provisions

First, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah. The Commission rescinded the 1995 Policy Statement Concerning Prior Approval and Prior Notice (“1995 Policy”) on July 21, 2021. I dissented from this rescission for three reasons: the 1995 Policy was put in place to prevent resource-intensive and vindictive litigation; it preserved the use of prior approval provisions in appropriate circumstances; and the majority did not provide new guidance explaining how these provisions would be used following rescission of the 1995 Policy.¹

Because I believe the 1995 Policy provided sound guidance on the appropriate use of prior approval provisions, I will assess the propriety of the prior approval provision in this matter against that touchstone. The 1995 Policy noted that prior approval is most likely appropriate where there is a credible risk that a company engaged in an anticompetitive merger would attempt the same or approximately the same merger in the future.² DaVita has engaged in a pattern of acquiring independent dialysis facilities;³ many of these acquisitions fall below HSR

¹ Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021 at 8-11 (July 21, 2021),

https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf. See also Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf.

² Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745, 39746 (Aug. 3, 1995), https://www.ftc.gov/system/files/documents/public_statements/410471/fmnpriorapproval.pdf.

³ Paul J. Eliason et al., *How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*, 135 QUARTERLY J. ECON. 221, 235 (2020) (showing how the acquisitions of independent facilities have contributed to DaVita’s overall growth).

thresholds and consequently escape premerger review,⁴ including this proposed acquisition. There is some evidence that this pattern of sub-HSR acquisitions has led to higher prices and lower service levels in the dialysis field.⁵ It is for this reason that I have encouraged the Commission on previous occasions to study this industry.⁶

Against this backdrop, I believe a prior approval provision is appropriate here. Specifically, there is a credible risk that DaVita will attempt to acquire additional dialysis facilities in the same general area in which divestiture has been ordered. But to be clear, my vote in favor of this consent should not be construed as support for the liberal use of prior approval provisions foreshadowed by the Commission's majority when it rescinded the 1995 Policy.

Second, the order contains provisions that prohibit DaVita from enforcing non-compete agreements in the University of Utah nephrologists' medical director contracts.⁷ Some commentators have suggested that non-compete provisions should be banned, and some of my current and former colleagues on the Commission have expressed sympathy for that view.⁸

⁴ Thomas Wollmann, *How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274) ("In short, the FTC blocks nearly all reportable facility acquisitions resulting duopoly and monopoly. In sharp contrast, the dashed line reflects exempt facility acquisitions. These ownership changes witness effectively no enforcement actions, regardless of simulated HHI change. This includes dozens of facility acquisitions involving $\Delta\text{HHI} > 2,000$, several of which involve ΔHHI near 5,000.").

⁵ Eliason et al., *supra* note 3, at 223 ("We find that acquired facilities alter their treatments in ways that increase reimbursements and decrease costs. For instance, facilities capture higher payments from Medicare by increasing the amount of drugs they administer to patients, for which Medicare paid providers a fixed per-unit rate during our study period. ... On the cost side, large chains replace high-skill nurses with lower-skill technicians at the facilities they acquire, reducing labor expenses. Facilities also increase the patient load of each employee by 11.7% and increase the number of patients treated at each dialysis station by 4.5%, stretching resources and potentially reducing the quality of care received by patients.").

⁶ See, e.g., Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (February 11, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf#:~:text=Statement%20of%20Commissioner%20Christine%20S.%20Wilson%2C%20Joined%20by,that%20drive%20content%20curation%20and%20targeted%20advertising%20practices.

⁷ Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of DaVita, Inc. and Total Renal Care, Inc., No. 211-0013 (October 25, 2021), ("[The Order] prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist").

⁸ Letter from Chair Lina M. Khan to Chair Cicilline and Ranking Member Buck at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-20210928-SD005.pdf> ("The FTC has heard concerns about noncompete clauses at its open meetings, and the Commission recently opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition. As we pursue this work, I am committed to considering the Commission's full range of tools, including enforcement and rulemaking."); New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace at 1 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf ("I also want to thank the advocates and academics—including those participating today—who have raised awareness about and contributed both research and new ideas to the discussion concerning non-compete provisions in employment contracts. State attorneys general and their staff have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anticompetitive non-compete clauses in employment contracts."); Letter from Commissioner Rohit Chopra to

While I disagree with that perspective,⁹ I have concluded that the provisions limiting the effect of non-competes in this matter are necessary to achieve an effective remedy. Specifically, the operations of a dialysis facility must occur under the auspices of a nephrologist; indeed, without a nephrologist, a dialysis clinic cannot operate. Nephrologists are in short supply,¹⁰ and the inability of a facility owner to retain or replace a licensed nephrologist could serve as a barrier to entry or, in this case, preclude the buyer from continuing to compete in the market. Moreover, a repeal of non-competes to effectuate a remedy is not novel: past consent orders have included provisions that prohibit merging parties from enforcing non-competes to aid divestiture buyers in hiring employees.¹¹ For these reasons, I support the provisions pertaining to non-competes in this matter – but my acquiescence to these provisions should not be construed as support for a sweeping condemnation of non-competes more generally.

Ban on No-Poach Agreements

The order contains an anti-no-poach provision that prevents DaVita from entering into any agreement that would restrict the divestiture buyer from soliciting DaVita’s employees. I highlight this provision because some critics have asserted that antitrust enforcement ignores

Assistant Attorney General Makan Delrahim at 3 (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf (“A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication.”); Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, (posted by the Fed. Trade Comm’n on July 21, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0001>.

⁹ Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 9-12, (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

¹⁰ Muhammad U. Sharif et al., *The global nephrology workforce: emerging threats and potential solutions!*, 9 CLINICAL KIDNEY J. 11, 13 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4720191/> (“These facts would suggest that the current nephrology workforce [in the U.S.] should increase in order to compensate for the expected growth in patient numbers. Unfortunately, the opposite appears to be the case.”).

¹¹ See, e.g., Decision and Order, Gallo et al. No. 191-0110 at VI.A.4 (April 5, 2021), https://www.ftc.gov/system/files/documents/cases/gallo-cbi_decision_and_order_final_201107.pdf (“Remove any impediments within the control of Respondents that may deter relevant Divestiture Business Employees from accepting employment with the Acquirer, including removal of any non-compete...”); Decision and Order, Stryker et al., No. 201-0014 at VI.B.3 (Dec. 17, 2020), <https://www.ftc.gov/system/files/documents/cases/2010014c4728strykerwrightorder.pdf> (“Remove any impediments within the control of Respondents that may deter Implant Business Employees from accepting employment with the Acquirer, including removal of any non-compete...”); Decision and Order, Arko Holdings et al., No. 201-0041 at VI.B.3 (Oct. 7, 2020), https://www.ftc.gov/system/files/documents/cases/c-4726_201_0041_arko_empire_order.pdf (“Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with an Acquirer ...”). This consent does contain a new twist on our approach to non-competes. Specifically, DaVita may not enforce non-competes to the extent they prevent competitors or potential competitors from obtaining the services of a nephrologist, which will allow potential competitors to launch a competing dialysis clinic in Utah. Given my understanding of DaVita’s business practices, the nephrologist shortage, and the historical industry context, I believe this remedy constitutes appropriate fencing-in relief.

competition for labor as an input.¹² I believe that modern antitrust enforcement does, in fact, police the market for unlawful practices impacting competition for labor.¹³ Naked no-poach agreements are per se illegal under the antitrust laws, and have been subject to enforcement accordingly.¹⁴

With respect to the instant matter, DaVita and its former CEO were recently indicted for agreeing with competitors to refrain from recruiting one another's employees.¹⁵ In a past consent order, where respondents had entered into no-poach agreements, provisions explicitly prohibiting these agreements have been included in an order.¹⁶ I support the inclusion of an anti-no-poach provision in this order because of the relevant allegations against DaVita and to allow the Commission to pursue an order violation in the event that DaVita attempts to limit competition through anticompetitive no-poach agreements in the future.

¹² Testimony of Eric A. Posner on Antitrust and Labor Markets at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-Wstate-PosnerE-20210928.pdf> (“Yet, while thousands of antitrust cases have been brought over the years, hardly any have addressed labor market cartelization. The Justice Department and the Federal Trade Commission have reviewed thousands of mergers, approving some and rejecting others, but have not even once analyzed the labor market effects of a merger.”).

¹³ Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 12-14, (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

¹⁴ DEP’T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

¹⁵ Indictment, United States v. DaVita Inc. et al., No. 1:21-cr-00229 (D. Colo. July 14, 2021).

¹⁶ Press Release, Fed. Trade Comm’n, VieVu’s Former Parent Company Safariland Agrees to Settle Charges That It Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon (April 17, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/vievus-former-parent-company-safariland-agrees-settle-charges-it> (“According to the complaint, the agreements barred Safariland from competing with Axon now and in the future on all of Axon’s products, limited solicitation of customers and employees by either company, and stifled potential innovation or expansion by Safariland. . . . Under the proposed order, Safariland is required to obtain approval from the Commission before entering into any agreement with Axon that restricts competition between the two companies.”).