

November 8, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The Honorable Alvaro Bedoya
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan, Commissioner Slaughter, and Commissioner Bedoya:

I am writing to express my disappointment with the Federal Trade Commission's (FTC's) decision to allow pharmaceutical giant Amgen to move forward with its acquisition of Horizon Therapeutics (Horizon) pursuant to a consent order.¹ Amgen, which has a long history of employing anticompetitive business tactics,² completed its acquisition of Horizon, which has faced repeated criticisms for hiking its drug prices,³ in October 2023.⁴ The proposed consent order resolving the FTC's suit against Amgen aims to address antitrust issues present in the transaction through behavioral remedies, but I remain concerned regarding the effects of this deal on the price and availability of medicine. I urge the FTC to reject the use of remedies – both behavioral and structural – in merger review and to vigorously challenge consolidation and anticompetitive behavior in the health care industry, consistent with its proposed merger guidelines.

¹ U.S. Federal Trade Commission, "Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition," press release, September 1, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>.

² U.S. House of Representatives Committee on Oversight and Reform, "Drug Pricing Investigation: Amgen – Enbrel and Sensipar," October 2020, pp. i-iii, <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/Amgen%20Staff%20Report%2010-1-20.pdf>.

³ FiercePharma, "Horizon's faced repeated price-hike criticism, but Vimovo just got its 11th raise—to almost \$3,000," Eric Sagonowsky, February 15, 2018, <https://www.fiercepharma.com/pharma/horizon-s-vimovo-gets-a-february-price-hike-its-11th-recent-years-report>.

⁴ Amgen, "Amgen Completes Acquisition of Horizon Therapeutics plc," press release, October 6, 2023, <https://www.amgen.com/newsroom/press-releases/2023/10/amgen-completes-acquisition-of-horizon-therapeutics-plc>.

The pharmaceutical industry has engaged in rampant consolidation in recent decades. Between 1995 and 2015, the 60 leading pharmaceutical companies merged down to only 10 firms.⁵ Innovation and access to affordable drugs has directly suffered as a result.⁶ Amgen has built patent thickets and made pricing decisions driven by aggressive revenue targets that resulted in exorbitant profits and executive payouts. Amgen's \$27.8 billion acquisition of Horizon adds Horizon's rare immune-disease drugs to Amgen's already extremely profitable pharmaceutical lineup, giving Amgen even more opportunities and market power to continue jacking up prices and squeezing money out of patients.⁷

I wrote to you in January 2023 requesting that the FTC carefully scrutinize Big Pharma mergers, with a specific request to examine the proposed Amgen-Horizon merger.⁸ I was encouraged by the FTC's decision in May 2023 to file suit to block Amgen's acquisition of Horizon, citing concerns that the deal would "allow Amgen to leverage its portfolio of blockbuster drugs to entrench the monopoly positions of Horizon medications used to treat two serious conditions, thyroid eye disease and chronic refractory gout."⁹ This action marked the FTC's first litigated challenge to a pharmaceutical merger in over a decade, and it appeared to send a powerful signal to Big Pharma that they should not, and will not, be allowed to violate antitrust law and harm patients with no accountability.¹⁰ However, the subsequent settlement between FTC and Amgen clearing the way for the merger to proceed has led some Wall Street analysts to conclude that "review of other pending pharmaceutical deals could potentially pan out favorably for the companies involved," allowing the sector to "breathe a sigh of relief."¹¹

The settlement announced on September 1, 2023 contains a proposed consent order that imposes certain conditions on Amgen in exchange for allowing the merger to move forward. Among these conditions are prohibitions on bundling Amgen products with Horizon's monopoly medications, and on using product rebates or contract terms to exclude or disadvantage any product that would

⁵ Washington Post, "Drug companies keep merging. Why that's bad for consumers and innovation." Robin Feldman, April 6, 2021, <https://www.washingtonpost.com/outlook/2021/04/06/drug-companies-keep-merging-why-thats-bad-consumers-innovation/>.

⁶ *Id.*; Harvard Business Review, "Research: Innovation Suffers When Drug Companies Merge," Justus Haucap and Joel Stiebale, August 3, 2016, <https://hbr.org/2016/08/research-innovation-suffers-when-drug-companies-merge>.

⁷ Reuters, "Amgen dives deeper into rare disease drugs with \$27.8 billion Horizon deal," Manas Mishra and Bhanvi Satija, December 12, 2022, <https://www.reuters.com/article/horizon-therapeu-m-a-amgen-idCAKBN2SW0J0>; Wall Street Journal, "Amgen Agrees to Acquire Horizon Therapeutics for \$27.8 Billion," Ben Dummett, Dana Cimilluca, and Laura Cooper, December 12, 2022, <https://www.wsj.com/articles/amgen-in-advanced-talks-to-buy-horizon-therapeutics-11670785882>.

⁸ Letter from Senator Elizabeth Warren to U.S. Federal Trade Commissioners, January 25, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.01.25%20Letter%20to%20FTC%20re%20Big%20Pharma%20Deals.pdf>.

⁹ U.S. Federal Trade Commission, "FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses," press release, May 16, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>.

¹⁰ Axios, "FTC sues to block Amgen's \$28 billion Horizon takeover," Dan Primack, May 16, 2023, <https://www.axios.com/2023/05/16/ftc-amgen-horizon>.

¹¹ CNBC, "The FTC cleared Amgen's \$27.8 billion Horizon buyout – here's what it means for other massive pharma deals," Annika Kim Constantino, September 5, 2023, <https://www.cnbc.com/2023/09/05/ftc-clears-amgen-horizon-buyout-what-it-means-for-other-pharma-deals.html>.

compete with these monopoly medications.¹² The consent order also requires Amgen to seek FTC approval prior to engaging in certain business opportunities or acquisitions related to these medications, and provides for the imposition of a monitor to report on Amgen's behavior. Many of these behavioral remedies are set to be in place for 15 years, though others will expire in 2032.

As I previously submitted to the FTC and Department of Justice (DOJ),¹³ behavioral remedies, which require certain commitments from the merging parties,¹⁴ are difficult to administer and enforce and cease to be binding once the term of the agreement ends, though anticompetitive effects remain.¹⁵ Even structural remedies, which are thought to be easier to enforce, fail to maintain competitive conditions because companies have an incentive to ensure that the businesses they spin off do not succeed.¹⁶ We are concerned that Amgen will continue its pre-merger anticompetitive behavior on a larger scale, notwithstanding the consent order, and will abandon any restraint once the consent order expires.

Further, allowing behavioral and structural remedies encourages companies to "litigate the fix" by proposing remedies during ongoing litigation that force a judge's focus to stray from the original antitrust violations of the merger.¹⁷ The FTC should not put itself in the position of having to continuously revisit old transactions in order to ensure parties are complying with their promises. Instead, the FTC should refuse to accept behavioral or structural remedies in order to strengthen antitrust enforcement and protect competition.

In addition, the FTC should finalize its proposed merger guidelines to strengthen antitrust enforcement in the health care industry.¹⁸ These draft merger guidelines – which are rooted in statutory text, the congressional intent of antitrust laws, and binding Supreme Court precedent – are a useful tool to fight rampant consolidation in health care and protect consumers from inflated prices. Specifically, proposed Guideline 7 provides that mergers should not entrench or extend a

¹² U.S. Federal Trade Commission, "Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition," press release, September 1, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>.

¹³ Public Comments filed by Senator Elizabeth Warren, et al. with the U.S. Federal Trade Commission and U.S. Department of Justice, September 18, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.09.18%20Letter%20FTC%20and%20DOJ%20re%20Merger%20Guidelines.pdf>.

¹⁴ CPI Antitrust Chronicle, "Structural vs. Behavioral Remedies," Frank Maier-Rigaud and Benjamin Loertscher, April 2020, p. 4, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf.

¹⁵ U.S. Department of Justice, "Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunication Institute's Conference in Mexico City," November 7, 2018, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute>.

¹⁶ Institute for Local Self-Reliance, "Strengthening Enforcement Against Illegal Mergers: Updating the Merger Guidelines," April 21, 2022, p. 29, <https://cdn.ilsr.org/wp-content/uploads/2022/04/ILSR-Merger-Guidelines-Comment-Letter.pdf>.

¹⁷ Bloomberg Law, "ANALYSIS: How 'Litigating the Fix' Is Upending Merger Review," Eleanor Tyler, May 11, 2023, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-litigating-the-fix-is-upending-merger-review>.

¹⁸ Public Comments filed by Senator Elizabeth Warren, et al. with the U.S. Federal Trade Commission and U.S. Department of Justice, September 18, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.09.18%20Letter%20FTC%20and%20DOJ%20re%20Merger%20Guidelines.pdf>.

company's already-dominant position.¹⁹ Amgen's acquisition of Horizon is poised to entrench the monopoly positions of certain medications to the detriment of competition and consumers.²⁰ The FTC should urgently finalize the proposed guidelines and rely on them in challenging transactions that would further entrench a dominant company like Amgen.

The FTC has the power and responsibility to hold Big Pharma accountable and protect access to pharmaceutical products for millions of Americans that are struggling to pay for prescription drugs. We urge you to have confidence in the FTC's and DOJ's correct reading of antitrust statutes and Supreme Court precedent and, consistent with the proposed merger guidelines, block any pharmaceutical mergers that pose anticompetitive harms.

Sincerely,



Elizabeth Warren
United States Senator

¹⁹ U.S. Department of Justice and U.S. Federal Trade Commission, "Draft FTC-DOJ Merger Guidelines for Public Comment," July 2023, pp. 3, 18,

https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

²⁰ U.S. Federal Trade Commission, "FTC Sues to Block Pharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses," press release, May 16, 2023,

<https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>.



Office of the Chair

November 9, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your letter sharing your concerns about consolidation in the health care industry and its effects on older adults and people with disabilities. Given the high stakes for American consumers, local communities, and the nation's economy, policing merger activity and other forms of potentially anticompetitive conduct in health care continues to be a top Commission priority. As such, the FTC has a full docket of health care investigations, litigation, and policy initiatives to defend and promote competition in the health care space.¹ In evaluating any health care transaction, we assess the likelihood of potential price increases, and also potential harm to patient service and the labor market.

The FTC diligently pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market. Although I am unable to discuss any current non-public investigations, the FTC recently challenged hospital mergers in Utah,² Rhode Island,³ and New Jersey.⁴ All of these transactions were abandoned by the parties.⁵ The FTC also continues its advocacy program against Certificate of Public

¹ Fed. Trade. Comm'n, *The FTC's Health Care Work*, Health Care Competition, <https://www.ftc.gov/news-events/topics/competition-enforcement/health-care-competition>.

² Press Release, Fed. Trade Comm'n, *FTC Sues to Block Merger Between Utah Healthcare Rivals HCA Healthcare and Steward Healthcare* (June 2, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-utah-healthcare-rivals-hca-healthcare-steward-health-care-system>.

³ Press Release, Fed. Trade Comm'n, *FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers* (Feb. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-rhode-island-attorney-general-step-block-merger-rhode-islands-two-largest-healthcare-providers>.

⁴ Press Release, Fed. Trade Comm'n, *FTC Sues to Block Merger Between New Jersey Healthcare Rivals RWJBarnabas Health and Saint Peter's Healthcare System* (June 2, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-new-jersey-healthcare-rivals-rwjbarnabas-health-saint-peters>.

⁵ See Press Release, Fed. Trade Comm'n, *Statement of Bureau of Competition Director Holly Vedova Regarding the Decision of Utah Healthcare Competitors HCA Healthcare and Steward Health Care System to Abandon Their Proposed Merger* (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/statement-bureau-competition-director-holly-vedova-regarding-decision-utah-healthcare-competitors>; see also Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of Attempted Merger of Rhode Island's Two Largest Healthcare Providers* (Mar. 2, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/statement-regarding-termination-attempted-merger-rhode-islands-two-largest-healthcare-providers>; see also Press Release, Fed. Trade Comm'n, *Federal Trade Commission Opposition to Transaction Leads New Jersey Healthcare Rivals RWJBarnabas Health and Saint Peter's Healthcare System to Abandon Proposed Merger* (June 14, 2022),

Advantage (COPA) agreements, in which states attempt to replace hospital market competition with state oversight.⁶ Often COPAs impact rural communities. Research has shown that several hospital mergers subject to COPAs have resulted in higher prices, reduced quality of care for patients, and slow wage growth for nurses, pharmacy workers, and other non-medical skilled workers.⁷

In addition to hospital mergers, the FTC has also pursued challenges to acquisitions of hospital-based physician practices. In September, the FTC sued U.S. Anesthesia Partners, Inc. (USAP), the dominant provider of anesthesia services in Texas, and private equity firm Welsh, Carson, Anderson & Stowe, alleging that they engaged in a multi-year anticompetitive scheme to consolidate anesthesiology practices in Texas. The complaint alleges that USAP and its private equity backer Welsh Carson used a roll-up strategy to buy up nearly every large anesthesia practice in Texas and raise prices.⁸ To better identify and investigate such roll-up schemes, the FTC and the Department of Justice have proposed to amend the information contained in Hart-Scott-Rodino premerger notification forms to require merging parties to report prior acquisitions over the past ten years, regardless of the size of the transactions.⁹

The FTC welcomes the opportunity to collaborate with other federal partners to improve antitrust enforcement and promote competition in healthcare markets in line with the President's Executive Order on Competition.¹⁰ For instance, FTC staff has offered comments to the Department of Health and Human Services seeking to further the two agencies' joint goals of fostering procompetitive innovation,¹¹ and we have a long-standing Memorandum of Understanding with the FDA that is critical to our work in promoting competition in pharmaceutical markets.¹² In September, the Commission issued a policy statement that was supported by the FDA, warning brand-name pharmaceutical companies that they could face legal

<https://www.ftc.gov/news-events/news/press-releases/2022/06/federal-trade-commission-opposition-transaction-leads-new-jersey-healthcare-rivals-rwjbarnabas>.

⁶ See, e.g., Press Release, Fed. Trade Comm'n, FTC Staff Submission to NYS Health Department Regarding the COPA Application of SUNY Upstate Medical University and Crouse Health System (Oct. 14, 2022),

<https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-staff-submission-nys-health-department-regarding-copa-application-suny-upstate-medical>.

⁷ See Press Release, Fed. Trade Comm'n, FTC Policy Paper Warns About Pitfalls of COPA Agreements for Patient Care and Healthcare Workers (Aug. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-policy-paper-warns-about-pitfalls-copa-agreements-patient-care-healthcare-workers>.

⁸ Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>.

⁹ Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

¹⁰ Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

¹¹ Press Release, Fed. Trade Comm'n, FTC Submits Comment on Proposed Information Blocking Rule to the Department of Health & Human Services Office of the National Coordinator for Health Information Technology (ONC) (June 6, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/06/ftc-submits-comment-proposed-information-blocking-rule-department-health-human-services-office>.

¹² Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration (1971), <https://www.ftc.gov/legal-library/browse/cooperation-agreements/memorandum-understanding-between-federal-trade-commission-food-drug-administration>.

action if they improperly list patents in the FDA's catalog of approved drugs, known as the Orange Book.¹³ Improperly listing patents in the Orange Book may harm competition from less expensive generic alternatives and keep prices artificially high, and may violate Section 5 of the Federal Trade Commission Act. Commission staff recently employed the FDA's procedures for disputing more than 100 patents held by manufacturers of brand-name asthma inhalers, epinephrine autoinjectors, and other drug products as improperly or inaccurately listed.¹⁴

As federal agencies with shared responsibility to enforce the antitrust laws, the FTC and DOJ often collaborate. In the area of merger enforcement, the FTC and DOJ released a new set of draft merger guidelines in July 2023 as part of an ongoing initiative to better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers. The draft revised guidelines touch on all industries, including health care. The draft merger guidelines reflect learning gained during several two-day workshops held by the agencies in June, October, and November 2022 to facilitate public dialogue,¹⁵ which brought together FTC and DOJ staff, offices of state attorneys general, international enforcement partners, academics, and other experts.¹⁶

In addition to the DOJ, the FTC routinely partners with state attorneys general, which have been especially important in the FTC's challenges to hospital mergers.¹⁷ These collaborations occur on a formal basis as law enforcement partners on specific investigations and litigation, within the confidentiality provisions of the protections of the law and as authorized by Rule 4.11(c) of the Commission's Rules of Practice, 16 C.F.R. § 4.11(c). In addition to these formal partnerships, staff from the FTC and state attorney general offices engage in informal discussions through workshops and meetings where staff share best practices about health care matters.

To better understand the marketplace, the FTC has recently launched three health-care related studies under Section 6(b) of the FTC Act, which authorizes the Commission to conduct market-wide inquiries that allow us to keep pace with new business practices and market trends.

¹³ Press Release, Fed. Trade Comm'n, FTC Issues Policy Statement on Brand Pharmaceutical Manufacturers' Improper Listing of Patents in the Food and Drug Administration's 'Orange Book' (Sept. 14, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-issues-policy-statement-brand-pharmaceutical-manufacturers-improper-listing-patents-food-drug>.

¹⁴ Press Release, Fed. Trade Comm'n, FTC Challenges More than 100 Patents as Improperly Listed in the FDA's Orange Book (Nov. 7, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-challenges-more-100-patents-improperly-listed-fdas-orange-book>.

¹⁵ Press Release, Fed. Trade Comm'n, FTC, DOJ Issue Summary on Joint Pharmaceutical Merger Analysis Workshop (June 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-issue-summary-joint-pharmaceutical-merger-analysis-workshop>.

¹⁶ The workshop discussion is summarized in a staff report, FED. TRADE COMM'N, THE FUTURE OF PHARMACEUTICALS: EXAMINING THE ANALYSIS OF PHARMACEUTICAL MERGERS (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Future%20of%20Pharma%20Workshop%20-%20Summary.pdf.

¹⁷ See, e.g., Press Release, Fed. Trade Comm'n, FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers (Feb. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-rhode-island-attorney-general-step-block-merger-rhode-islands-two-largest-healthcare-providers>; Press Release, Fed. Trade Comm'n, FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems (Feb. 27, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-commonwealth-pennsylvania-challenge-proposed-merger-two-major-philadelphia-area-hospital-systems>.

One study will examine pharmacy benefit managers' (PBM) roles at the center of the U.S. pharmaceutical system. PBMs often have enormous influence on which drugs are prescribed to patients, which pharmacies patients can use, and how much patients ultimately pay at the pharmacy counter. Another 6(b) study is gathering data from six health insurance companies to study the effects of physician group and healthcare facility consolidation.¹⁸ In a third study, we issued orders to five health insurance companies and two health systems to obtain information to further examine the effects of COPAs.¹⁹

Demands on the Commission continue to grow. Merger review and litigation have strained the agency's resources and capacity to investigate new merger filings which continue to require close scrutiny. While Congress has charged the Commission with a critical mission, the resources allocated to us have failed to keep pace. Even though our nation's GDP has increased six-fold since the early 1980s, we currently employ fewer staffers than we did in that period, which has forced the Commission to make difficult decisions about prioritizing investigations.²⁰ Additional resources would better equip the Commission to fully pursue its mandate and continue the vital work of promoting competition in healthcare markets.

¹⁸ Press Release, Fed. Trade Comm'n, FTC to Study the Impact of Physician Group and Healthcare Facility Mergers (Jan. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers>.

¹⁹ See Press Release, Fed. Trade Comm'n, FTC to Study the Impact of COPAs (Oct. 21, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-study-impact-copas>.

²⁰ FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REP., FISCAL YEAR 2021 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf; Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,



Lina M. Khan
Chair
Federal Trade Commission

cc: The Honorable Merrick Garland
Attorney General
United States Department of Justice
950 Pennsylvania Ave. NW
Washington D.C. 20530



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UNITED STATES OF AMERICA
00000053388 "UNCLASSIFIED" 2/8/2024
Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

November 16, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your letter expressing your concerns about improper listing of drug-related patents in the Food and Drug Administration's Orange Book.

The Commission voted to approve a policy statement addressing this topic at its open meeting on September 14, 2023.¹ As expressed in the policy statement, the Commission shares your concerns that improperly listing patents in the Orange Book can delay or lock out generic manufacturers from entering the market, thereby inflating prices. For this reason, Commission staff have recently employed the FDA's procedures for disputing 110 Orange Book listings. Last week, Commission staff sent letters to the ten responsible branded-drug manufacturers informing them of this action, attaching the Commission's Orange Book Policy Statement and highlighting that the Commission reserves its right to investigate improper listings as unfair methods of competition in violation of Section 5 of the FTC Act.²

The ten branded-drug manufacturers that received letters today are AbbVie, AstraZeneca, Boehringer Ingelheim Pharmaceuticals, Impax Laboratories, Kaleo, Mylan Specialty, and subsidiaries of Glaxo-Smith Kline and Teva.. The disputed patent listings at issue involve asthma and COPD inhalers and EpiPens, including well known blockbuster products such as Symbicort and Spiriva. Under FDA procedures, the FDA will notify the branded-drug manufacturers of the dispute, and the companies will have 30 days to either remove the listings or certify they are accurate and relevant, under penalty of perjury.

We are also pleased to have support from FDA Commissioner Robert M. Califf, who applauded our policy statement and noted that the "FDA stands ready to assist the FTC."

¹ See Press Release, Fed. Trade Comm'n, FTC Issues Policy Statement on Brand Pharmaceutical Manufacturers' Improper Listing of Patents in the Food and Drug Administration's 'Orange Book' (Sept. 14, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-issues-policy-statement-brand-pharmaceutical-manufacturers-improper-listing-patents-food-drug>.

² See Press Release, Fed. Trade Comm'n, FTC Challenges More than 100 Patents as Improperly Listed in the FDA's Orange Book (Nov. 7, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-challenges-more-100-patents-improperly-listed-fdas-orange-book>.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,



Lina M. Khan
Chair
Federal Trade Commission

cc: The Honorable Pramila Jayapal
United States House of Representatives
Washington, D.C. 20515

WASHINGTON, DC 20510

December 8, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Chair Khan and Assistant Attorney General Kanter:

We are writing regarding our concerns about reports of an imminent merger between health care giants Cigna and Humana.¹ Valued at more than \$60 billion,² this would be the “biggest deal of the year”³ and would be the latest example of massive health care conglomerates using anticompetitive mergers to increase their market dominance and reduce competition. We urge DOJ and FTC to closely scrutinize the impact of this deal if it moves forward, and reject it if your agencies find that it will reduce competition, drive up health care prices, or hurt patients.

The U.S. health insurance market is dominated by a few massive conglomerates,⁴ following extensive market consolidation by companies that have “bulk[ed] up at the expense of patients and taxpayers.”⁵ A merger between Cigna and Humana, two of the nation’s largest health insurers,⁶ will make matters even worse:

The national insurance landscape [is] dominated by six major plans. ... A Cigna-Humana merger would [] consolidate our national players down to five.....This deal would naturally lead to speculation and anticipation about potential future deals as large corporate players Walmart, Amazon, and Walgreens look to grow and compete in the healthcare market.... A merger between Cigna and Humana could ultimately be anticompetitive for smaller players — but it could also be a catalyst for further consolidation. In most cases, consolidation does not equal better prices or more options.⁷

¹ Reuters, “US health insurers Humana, Cigna in talks to merge -source,” Anirban Sen and Deena Beasley, November 29, 2023, <https://www.reuters.com/markets/deals/us-health-insurers-humana-cigna-talks-merge-wsj-2023-11-29/>.

² Healthcare Finance News, “Insurers Cigna and Humana reportedly in talks to merge,” Jeff Lagasse, November 30, 2023, <https://www.healthcarefinancenews.com/news/insurers-cigna-and-humana-reportedly-talks-merge>.

³ Wall Street Journal, “Cigna, Humana in Talks for Blockbuster Merger,” Lauren Thomas, Anna Wilde Mathews, and Laura Cooper, November 29, 2023, <https://www.wsj.com/business/deals/cigna-humana-in-talks-for-blockbuster-merger-c5c7f1b0>.

⁴ The Advisory Board, “A Cigna + Humana merger may be on the horizon. Here’s our take,” Jared Landis, Vidal Seegobin, Mallory Kirby, Sally Kim, and Max Hakanson, November 30, 2023, <https://www.advisory.com/daily-briefing/2023/11/30/cigna-humana-ec>.

⁵ Axios, “A rumored merger would create yet another care titan,” Caitlin Owens, November 30, 2023, <https://www.axios.com/2023/12/01/cigna-humana-merger-health-costs-cvs>.

⁶ Business Insider, “Why a giant health insurer merger is probably destined to fail,” Shelby Livingston, November 30, 2023, <https://www.businessinsider.com/cigna-humana-merger-antitrust-scrutiny-2023-11>.

⁷ The Advisory Board, “Daily Briefing, A Cigna + Humana merger may be on the horizon. Here’s our take,” Jared Landis, Vidal Seegobin, Mallory Kirby, Sally Kim, and Max Hakanson, November 30, 2023, <https://www.advisory.com/daily-briefing/2023/11/30/cigna-humana-ec>.

A particular concern for the potential merger is that Cigna and Humana also own ExpressScripts and Humana Pharmacy Solutions, the nation's second and fourth largest pharmacy benefit managers (PBMs).⁸ Four PBMs – ExpressScripts, Humana Pharmacy Solutions, OptumRx, and CVS Caremark, each owned by or affiliated with an insurance company – control 87 percent of the U.S. PBM market.⁹ Post-merger, the new Cigna-Humana PBM would control an entire third of the market.¹⁰ And because Cigna and Humana also own their own pharmacies, they are incentivized to drive up drug prices rather than negotiate them down, because vertically integrated PBMs “profit from the higher prices [in their own pharmacies].”¹¹ The merged company would have an incentive to wield its PBM market power to steer patients to their own vertically integrated pharmacies where they may set higher prices, hurting patients and driving up costs for taxpayers and independent pharmacies.¹²

The risks of this merger are clear and profound. As one expert noted, “[w]hen you have anti-competitive markets, it not only increases prices, but it severely decreases the pressure to improve the product... When that product is a health insurance plan... if you don't have the threat of losing customers to another firm, the quality issue becomes really important.”¹³

We are encouraged by DOJ and FTC's efforts to tackle consolidation, including through challenges to anticompetitive deals.¹⁴ In line with these efforts, the agencies should be prepared to carefully scrutinize a Cigna-Humana deal and block it if it is deemed to violate antitrust laws.

Sincerely,


Elizabeth Warren
United States Senator


Mike Braun
United States Senator

⁸ Wall Street Journal, “Cigna-Humana Merger Is Likely to Face Antitrust Challenge,” David Wainer, November 30, 2023, <https://www.wsj.com/business/cigna-humana-merger-is-likely-to-face-antitrust-challenge-498636bc>; Becker's Hospital Review, “The top insurers all have PBMs, here's who they are,” Alia Paavola, April 10th, 2019, <https://www.beckershospitalreview.com/pharmacy/the-top-insurers-all-have-pbms-here-s-who-they-are.html>.

⁹ Becker's Hospital Review, “Top PBMs by 2022 market share,” Paige Twenter, May 23, 2023, <https://www.beckershospitalreview.com/pharmacy/top-pbms-by-2022-market-share.html>.

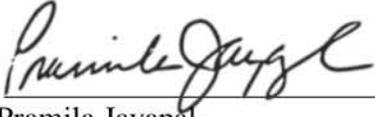
¹⁰ Axios, “A rumored merger would create yet another health care titan,” Caitlin Owens, December 1, 2023, <https://www.axios.com/2023/12/01/cigna-humana-merger-health-costs-cvs>.

¹¹ Wall Street Journal, “Generic Drugs Should Be Cheap, but Insurers Are Charging Thousands of Dollars for Them,” Joseph Walker, September 11, 2023, <https://www.wsj.com/health/healthcare/generic-drugs-should-be-cheap-but-insurers-are-charging-thousands-of-dollars-for-them-ef13d055>.

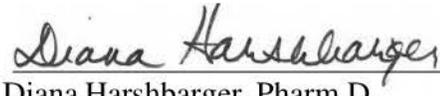
¹² *Id.*

¹³ Axios, “A rumored merger would create yet another health care titan,” Caitlin Owens, December 1, 2023, <https://www.axios.com/2023/12/01/cigna-humana-merger-health-costs-cvs>.

¹⁴ See, e.g., U.S. Federal Trade Commission, “FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses,” press release, May 16, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>; U.S. Department of Justice, “Justice Department Sues to Block JetBlue's Proposed Acquisition of Spirit,” press release, March 7, 2023, <https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit>.



Pramila Jayapal
Member of Congress



Diana Harshbarger, Pharm.D.
Member of Congress

Washington, DC 20515

December 11, 2023

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

Dear Chair Khan:

Deregulation of the residential electric supply market promised to bring consumers in Massachusetts and other states a choice of electricity supply providers and lower bills. Instead, consumers — disproportionately in low-income communities and communities of color — have endured unfair and deceptive marketing and sales tactics by competitive electric suppliers, saddling those consumers with higher electric bills and costing them hundreds of millions of dollars in net losses, with knock-on effects that delay climate action. The Federal Trade Commission (FTC) needs to intervene, investigate, and rigorously enforce consumer protection laws against an industry that too often preys on, misleads, and overcharges vulnerable consumers for a basic and essential service.

In the late 1990s, Massachusetts and other states enacted legislation allowing residents to buy electricity from a supplier other than their default utility.¹ Underlying this deregulatory effort was the assumption that competition in the market for residential electricity would bring lower power prices for customers. But the *Wall Street Journal*, for example, found that “in nearly every state where they operate, retailers have charged more than regulated incumbents.”² Specifically, data from Massachusetts, Connecticut, Illinois, Maine, Maryland, New York and Pennsylvania “confirm that families pay far too much when they sign up for alternative electric supply instead of sticking with their utility companies.”³

Competitive electric suppliers, such as Liberty Power and Starion Energy, have fleeced Massachusetts consumers. As Massachusetts Attorney General Andrea Joy Campbell recently explained in testimony before the state legislature: “From Boston to Lawrence to Lynn — and beyond — we have seen again and again Massachusetts residents being targeted by competitive electric suppliers. And these suppliers use deceptive marketing tactics that hide the fact that their products do not provide consumers with meaningful savings and in fact, can result in higher utility bills.”⁴ Indeed, Attorney General Campbell’s office has found that, in the last seven years,

¹ Mass. Gen. Laws ch. 164, § 1 (1997).

² Scott Patterson & Tom McGinty, *Deregulation Aimed to Lower Home-Power Bills. For Many, It Didn’t*, Wall St. J. (Mar. 8, 2021) (emphasis added), <https://www.wsj.com/articles/electricity-deregulation-utility-retail-energy-bills-11615213623?page=16>.

³ Jenifer Bosco, *Retail ‘choice’: A bad deal for consumers and the planet*, Utility Dive (Sept. 22, 2023), <https://www.utilitydive.com/news/retail-choice-bad-deal-consumers-arrearages-renewable-energy-community-choice/694355/>.

individual residential customers who received their electric supply from competitive suppliers paid \$607 million more on their electric bills than they would have paid to their default utility.⁵

Especially troublesome, the Attorney General's Office found that competitive electric suppliers have targeted vulnerable populations:

- low-income customers in Massachusetts are nearly twice as likely to sign up with individual competitive electric suppliers and are charged higher rates than non-low-income customers;
- assuming 600-kilowatt hour per month usage, typical for a Massachusetts household, an average non-low-income customer who signed up with a competitive supplier lost \$222 per year while the average low-income customer lost \$254 per year;
- low-income customers collectively experienced an annual net loss of more than \$20 million due to higher rates and additional monthly fees;
- communities of color, communities with low median incomes, and communities with high percentages of residents lacking English proficiency correlate with higher rates of participation in the individual residential market for electric supply;⁶ and
- customers of advanced age who cannot understand the transaction or are particularly vulnerable are targeted and subjected to aggressive sales tactics.⁷

The competitive electric suppliers and their marketing agents have engaged in myriad unfair and deceptive acts and practices to lure consumers into oppressive retail electricity contracts, including:

- selling unnecessary "price protection" or "rate increase" protection products by convincing customers that electricity prices would otherwise soar without the protections;
- misleading customers about the actual difference in price between the competitive plan and basic utility service;

⁴ Remarks of Attorney General Andrea Joy Campbell before the Joint Committee on Telecommunications, Utilities and Energy, Massachusetts House of Representatives (Sept. 21, 2023); see Miriam Wasser, *Why a plan to drive down electric prices in Mass. led to higher bills*, NPR (May 8, 2023), <https://www.wbur.org/news/2023/05/08/massachusetts-eversource-national-grid-third-party-competitive-electricity>.

⁵ Remarks of Attorney General Andrea Joy Campbell before the Joint Committee on Telecommunications, Utilities and Energy, Massachusetts House of Representatives (Sept. 21, 2023).

⁶ *Id.*; Susan M. Baldwin & Timothy E. Howington, *Consumers Continue to Lose Big: the 2023 Update to An Analysis of the Individual Residential Electric Supply Market in Massachusetts*, Massachusetts Attorney General's Office (May 2023), <https://www.mass.gov/doc/consumers-continue-to-lose-big-the-2023-update-to-an-analysis-of-the-individual-residential-electric-supply-market-in-massachusetts/download>.

⁷ *In re Liberty Power Holdings LLC*, Addendum to Proof of Claim Filed by the Commonwealth of Massachusetts, Case No. 21-13797-SMG (Bankr. S.D. Fla.).

- failing to disclose industry consensus about price drops and that, if basic service prices decreased, consumers would pay higher prices under the competitive plan;
- failing to disclose that the customer's introductory rate would automatically renew to a higher variable rate;
- falsely stating the rates that customers currently paid for basic service in order to trick them into signing up for contracts that charged an even higher rate than those the customers were currently paying; and
- switching customers from their utility to competitive services without authorization, a practice known as "slamming."

Competitive electric supplier scams come with another high cost — climate change. Massachusetts and other states are working hard to transition from dirty fossil fuels to a clean energy future. But when consumers see high electric bills due to inflated prices charged by non-utility energy supply companies, they "may be understandably hesitant to switch their home heating and appliances from gas-powered to electric."⁸ One way to help keep the cost of electricity low is to stop competitive electric suppliers from conning consumers out of hundreds of million dollars for the same electricity they would have received if they had just stayed with their local utility.

The Massachusetts Attorney General's Office, like other states' consumer protection watchdogs, has taken enforcement action against competitive electric suppliers who engage in wrongful marketing and sales practices. But many of these bad-actor competitive electric suppliers operate across state lines, which makes enforcement actions time-consuming and difficult for state officials, thereby warranting federal intervention. Indeed, after ten years pursuing competitive electric suppliers, the Massachusetts Attorney General's office has recovered only \$19 million — a small fraction of the more than \$600 million lost.⁹

Under the FTC Act, the Commission is charged with protecting consumers from "unfair or deceptive acts or practices."¹⁰ In 2020, then-FTC Commissioner Rohit Chopra said that the agency had a key opportunity to "reduce residential consumers' burdensome energy costs" by taking action against "unscrupulous energy suppliers that employ deceptive marketing practices to entice consumers to switch from their local distribution company's services."¹¹ As these

⁸ Jenifer Bosco, *Retail 'choice': A bad deal for consumers and the planet*, Utility Dive (Sept. 22, 2023), <https://www.utilitydive.com/news/retail-choice-bad-deal-consumers-arrearages-renewable-energy-community-choice/694355/>.

⁹ Chris Lisinski, State House News Service, *Mass. leaders eye changes to 'predatory' electric sales tactics*, WBUR (June 6, 2023), <https://www.wbur.org/news/2023/06/06/mass-leaders-eye-changes-to-predatory-electric-sales-tactics>.

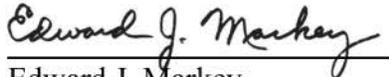
¹⁰ 15 U.S.C. § 45.

¹¹ Rohit Chopra, *Statement: Regarding the FTC EnergyGuide rule*, U.S. Federal Trade Commission (Dec. 22, 2020), https://www.ftc.gov/system/files/documents/public_statements/1585238/20201222_final_chopra_statement_on_ene_rgyguide_rule.pdf.

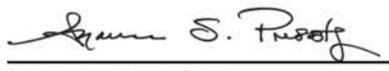
practices have continued in the intervening years, the FTC still has both the opportunity and the responsibility to protect consumers.

As colder weather approaches and competitive electric suppliers across the nation continue to prey on fears of high electricity bills, the FTC must signal it will not tolerate business as usual by competitive electric suppliers. These suppliers continue to target vulnerable populations, engage in unlawful tactics, and dramatically overcharge consumers — precisely the types of wrongdoing against which the FTC is empowered to act to protect consumers. We urge the FTC to immediately open an investigation into the unfair and deceptive marketing acts and practices of competitive electric suppliers.

Sincerely,


Edward J. Markey
United States Senator


Elizabeth Warren
United States Senator


Ayanna Pressley
Member of Congress



FOIA-2024-00567

UNITED STATES OF AMERICA
00000053391 "UNCLASSIFIED" 2/8/2024
Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

December 18, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your November 8, 2023, letter to the Federal Trade Commission ("Commission" or "FTC") regarding the Amgen, Inc./Horizon Therapeutics plc merger. I appreciate the opportunity to address concerns about consolidation in the healthcare industry.

I share your concerns about the ways that anticompetitive mergers and acquisitions and other unlawful conduct can undermine affordable, accessible, and high-quality healthcare. Ensuring that the agency addresses unlawful transactions and polices illegal anticompetitive conduct—especially in critical healthcare markets, including pharmaceuticals—is a top priority for me.

Unlawful M&A is one tactic that pharmaceutical companies can use to subvert fair competition. The FTC's consent order with Amgen, and most recently, the agency's move to block Sanofi's acquisition of a nascent competitor, demonstrates our commitment to policing consolidation in pharmaceutical markets. Beyond M&A, pharma companies can also unlawfully claim patent protection for medical products, which deprives Americans of generic competition and keeps prices artificially inflated. In this vein, we recently challenged over 100 patents spanning several essential medical devices used by millions of Americans, including inhalers and epinephrine injectors. If we are successful, our actions could spur more competition and, in turn, lower the cost of life-saving drug products for patients.

The FTC's inquiry into the opaque practices of pharmacy benefit managers under Section 6(b) of the FTC Act is another crucial aspect of our work in healthcare markets. Public reports and comments lay out how PBMs abuse their middleman position to raise drug prices and undercut independent pharmacies that often serve rural communities or more vulnerable populations. As drug prices have soared and independent pharmacies across the country have shuttered, investigating the business practices of PBMs is more urgent and critical than ever.

More broadly, we have vigorously policed consolidation in healthcare markets and moved to block five health system mergers that we alleged would have raised prices, harmed workers, suppressed innovation, or decreased the quality of care for patients. And in a first-of-its-kind lawsuit, we sued U.S. Anesthesia Partners and a New York-based private equity firm, Welsh, Carson, Anderson & Stowe, alleging that they rolled-up anesthesiology practices in

Texas—driving up prices to boost their own profits. While serial acquisition schemes, which are increasingly common in healthcare markets, have evaded antitrust scrutiny, the FTC is putting market participants on notice that antitrust laws squarely apply. We have proposed core updates to our merger policy, such as the merger guidelines, to more effectively identify and combat unlawful serial acquisition strategies.

Safeguarding competition and tackling anticompetitive conduct in healthcare markets can have life-or-death consequences for American families. That is why we are using the full scope of the FTC's tools and authorities to protect Americans' access to affordable, high-quality care. I can assure you that the agency is vigilant in its oversight of healthcare markets and will not hesitate to take strong and appropriate action against any activity that violates statutes or orders that we enforce.

Thank you again for raising this topic and for your interest in these issues. If you or your staff have any questions, please contact Jeanne Bumpus, the Director of the FTC's Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in black ink that reads "Lina Khan". The signature is written in a cursive, flowing style.

Lina M. Khan
Chair
Federal Trade Commission



FOIA-2024-00567

UNITED STATES OF AMERICA
00000053392 "UNCLASSIFIED" 2/8/2024
Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

January 25, 2024

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your letter expressing concern that unfair or deceptive marketing and sales tactics by residential electric suppliers may target low-income communities and communities of color in Massachusetts and other states that have retail electricity competition. In your letter you asked the Federal Trade Commission (FTC) to intervene and enforce consumer protection laws as appropriate.

Although the Commission's broad authority under the FTC Act gives the FTC discretion to address deceptive practices, retail electricity sales are subject to the authority of state energy and consumer agencies, which have their own specifically tailored regulatory frameworks. The information you provided will help us identify potentially deceptive practices and support our efforts to assist and coordinate with state agencies to protect consumers. FTC staff will continue to work with state regulatory agencies to determine how best to respond to the issues you raise.

Additionally, if any of your constituents would like to file a consumer complaint, we encourage them to do so using the FTC website or by contacting our Consumer Response Center at 877-FTC-HELP (877-382-4357). Although the Commission does not intervene in individual consumer disputes, our staff regularly monitors complaints to look for law enforcement targets, evaluate the need for consumer education, and make policy recommendations. We also share our complaint database and collaborate with other law enforcement and regulatory partners, including the Massachusetts Attorney General, in the Consumer Sentinel Network complaint database.

We encourage states to use the FTC's consumer and business education materials to help consumers identify scams or deceptive practices. Consumers can access those materials directly through the Commission's website at www.ftc.gov.

If you or your staff have additional questions or comments, please do not hesitate to contact Jeanne Bumpus, Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

A handwritten signature in black ink that reads "Lina Khan". The signature is written in a cursive, flowing style.

Lina M. Khan
Chair, Federal Trade Commission



Office of the Chair

December 26, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your letter expressing your concerns about ExxonMobil's proposed acquisition of Pioneer Natural Resources and Chevron's proposed acquisition of Hess.

The FTC diligently pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market, including oil and gas markets. Our recent merger enforcement in oil and gas markets includes:

- preventing a private equity fund from eliminating a major competitor in Utah waxy crude oil;¹
- preventing the loss of close competition in three geographic markets for terminating services for gasoline, diesel fuel, and other fuel products;² and
- an action that led to the abandonment of Berkshire Hathaway Energy's proposed acquisition of the Questar Pipeline, a natural gas pipeline located in central Utah.³

The Commission's scrutiny is not limited to the largest transactions; we recognize that even smaller mergers, if unchallenged, can deprive families and small businesses of competitive markets in communities of any size. For this reason, we take an aggressive enforcement

¹ Press Release, Fed. Trade Comm'n, FTC Approves Final Order Requiring EnCap to Sell Off EP Energy Corp.'s Entire Utah Oil Business (Sep. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-approves-final-order-requiring-encap-sell-ep-energy-corps-entire-utah-oil-business>; see also Press Release, Fed. Trade Comm'n, FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Oct. 10, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-approves-final-order-prevent-interlocking-directorate-arrangement-anticompetitive-information>.

² Press Release, Fed. Trade Comm'n, FTC Approves Final Order to Protect South Carolina and Alabama Markets from Anticompetitive Gasoline Terminal Deal (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-protect-south-carolina-alabama-markets-anticompetitive-gasoline-terminal>.

³ Press Release, Fed. Trade Comm'n, Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah (Jul. 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination>; see also Press Release, Infineum, Acquisition Terminated (Feb. 16, 2023), <https://www.infineum.com/en-gb/news/acquisition-terminated/>.

stance to prevent competitive harm, whether the merger involves a few stations⁴ or hundreds.⁵ We also recently returned to the practice of using “prior approval” provisions in merger settlements regarding future relevant merger activity, and we continue to assess additional ways we can deter those who propose unlawful transactions.⁶

As federal agencies with shared responsibility to enforce the antitrust laws, the FTC and DOJ finalized new merger guidelines in December 2023, as part of an ongoing joint project to better reflect how the agencies determine a merger’s effect on competition in the modern economy and evaluate proposed mergers. The revised guidelines touch on all industries, including oil and gas markets. The merger guidelines reflect learning gained throughout workshops and hearings, which brought together FTC and DOJ staff, staff from offices of state attorneys general, international enforcement partners, academics, and other experts.

In addition to merger enforcement, the FTC maintains close oversight of oil and gas markets throughout the country to ensure that market participants are not engaging in unlawful activity at the expense of the American public. The FTC has assembled vast competition policy and enforcement expertise in matters affecting the production and distribution of gasoline.⁷ Our recent efforts have included identifying and stamping out a wide-ranging agreement that allegedly harmed competition in local retail gasoline and diesel fuel markets.⁸ Section 5 reaches beyond the limits of other antitrust laws such as the Sherman Act. The Commission has long relied on its Section 5 authority to combat “invitations to collude,”⁹ and we remain keenly on the

⁴ See, e.g., Press Release, Fed. Trade Comm’n, FTC Approves Final Order Restoring Competitive Markets for Gasoline and Diesel in Michigan and Ohio (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-restoring-competitive-markets-gasoline-diesel-michigan-ohio>; Press Release, Fed. Trade Comm’n, FTC Approves Final Order Imposing Divestitures and Protecting Retail Fuel Customers Following Global Partners LP’s Acquisition of Wheels (Mar. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-approves-final-order-imposing-divestitures-protecting-retail-fuel-customers-following-global>; Press Release, Fed. Trade Comm’n, FTC Approves Final Order Imposing Conditions on Casey’s General Stores, Inc.’s Acquisition of Buck’s Intermediate Holdings, LLC (Jun. 9, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-approves-final-order-imposing-conditions-caseys-general-stores-incs-acquisition-bucks>.

⁵ See, e.g., Press Release, Fed. Trade Comm’n, FTC Approves Final Order Requiring Divestitures of Hundreds of Retail Gas and Diesel Fuel Stations Owned by 7-Eleven, Inc. (Nov. 10, 2021) (modified Jan. 24, 2023 to correct scrivener’s errors), <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-approves-final-order-requiring-divestitures-hundreds-retail>; see also Press Release, Fed. Trade Comm’n, FTC Sues 7-Eleven for Anticompetitive Acquisition in Violation of 2018 Consent Order (Dec. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-sues-7-eleven-anticompetitive-acquisition-violation-2018-consent-order>.

⁶ Press Release, Fed. Trade Comm’n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive>; see also Fed. Trade Comm’n, Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), <https://www.ftc.gov/public-statements/2021/10/statement-commission-use-prior-approval-provisions-merger-orders>.

⁷ Oil and Gas Industry Initiatives, <https://www.ftc.gov/advice-guidance/competition-guidance/industry-guidance/oil-gas-industry-initiatives>.

⁸ Press Release, Fed. Trade Comm’n, FTC Approves Final Order Restoring Competitive Markets for Gasoline and Diesel in Michigan and Ohio (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-restoring-competitive-markets-gasoline-diesel-michigan-ohio>.

⁹ See, e.g., Oregon Lithoprint, Inc., Docket No. C-4645, Analysis to Aid Public Comment, 83 Fed. Reg. 11,529, 11531 (Mar. 15, 2018) (“The Commission has long held that an invitation to collude violates Section 5 of the FTC

look-out for activity short of collusion that runs afoul of our broad authority under Section 5 of the FTC Act.

I am committed to using all available agency tools and statutory authority against all manner of law violations at any level of the oil and gas industry, including breaches of the Commission's Petroleum Market Manipulation Rule;¹⁰ collusive practices or other unfair methods of competition; anticompetitive mergers; and unfair, fraudulent, or deceptive conduct. Multiple offices agency-wide police energy markets, including our consumer protection staff who provide their general expertise in evaluating potential deception and fraud in the marketplace. I have deployed staff throughout the agency to examine the applicability of the Petroleum Market Manipulation Rule in particular, as just one part of an across-the-board effort to help ensure that we have the necessary tools and the appropriate resources to address any market manipulation or other illegal conduct in oil and gas markets and beyond.

Demands on the Commission continue to grow. Merger review and litigation have strained the agency's resources and capacity to investigate new merger filings which continue to require close scrutiny. While Congress has charged the Commission with a critical mission, our resources have failed to keep pace. We currently employ fewer staffers than we did in the early 1980s, even though our nation's GDP has increased six-fold over the same period, and the Commission has been forced to make difficult decisions about prioritizing investigations. Additional resources would better equip the Commission to fully pursue its mandate and continue the vital work of promoting competition in oil and gas markets.

Act even where there is no proof that the competitor accepted the invitation.”), https://www.ftc.gov/system/files/documents/federal_register_notices/2018/03/oregon_frn_3-15-18.pdf.

¹⁰ See Prohibition of Energy Market Manipulation Rule, 16 C.F.R. Part 317. Section 811 of the Energy Independence and Security Act of 2007 (EISA) authorized the FTC to issue regulations to prohibit any manipulative or deceptive device or contrivance in wholesale petroleum markets. Section 812 of EISA makes it unlawful for energy companies to report false or misleading information related to the wholesale price of crude oil, gasoline, or petroleum distillates to a federal department or agency under certain conditions. The FTC can sue violators of EISA or of the Petroleum Market Manipulation Rule in federal court.

Thank you again for raising your concerns about the anticompetitive effects of oil and gas mergers. If you or your staff have any questions, please don't hesitate to contact Jeanne Bumpus, the Director of the FTC's Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in black ink that reads "Lina Khan". The signature is written in a cursive, flowing style.

Lina M. Khan
Chair, Federal Trade Commission



FOIA-2024-00567

00000053394

"UNCLASSIFIED"

2/8/2024

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

December 26, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20515

Dear Senator Warren:

Thank you for your letter regarding sharing your concerns about the proposed merger between Cigna and Humana. As you may have seen in the press, Cigna and Humana have announced their plans to abandon the merger.¹ Please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

cc: The Honorable Mike Braun
The Honorable Pramila Jayapal
The Honorable Diana Harshbarger

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Ave., NW
Washington D.C. 20530

¹ See, e.g. Anirban Sen, *Cigna Abandons Pursuit of Humana, Plans \$10 Billion Share Buyback*, REUTERS, Dec. 11, 2023, <https://www.reuters.com/markets/deals/us-health-insurer-cigna-scraps-deal-buy-humana-wsj-2023-12-10/>.

United States Senate

SPECIAL COMMITTEE ON AGING

WASHINGTON, DC 20510-6400

(202) 224-5364

April 28, 2023

U.S. Attorney General Merrick Garland
950 Pennsylvania Avenue NW
Department of Justice
Washington, D.C. 20530

Chair Lina Khan
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Dear Attorney General Garland and Chair Khan:

We write with growing concern regarding hospital consolidations across the country and the resulting impacts on health care quality, costs, and the workforce. As members of the U.S. Senate Special Committee on Aging, we are particularly concerned about the impact of hospital consolidation on older adults and people with disabilities. We urge you to utilize the full range of your oversight and remedial authorities to defend competition and a safe and strong hospital system.

On July 9, 2021, President Biden issued an Executive Order, which included a directive for antitrust agencies to focus on hospital consolidation as part of their response to corporate consolidation. Specifically, the president urged the Department of Justice and the Federal Trade Commission to "review and revise" merger guidelines to ensure patients are not harmed. We request the Administration to provide us updates on the progress of these recommendations and priorities regarding consolidation in domestic health care markets.

While the COVID-19 pandemic contributed to the shift towards consolidation in the health care industry, this trend was occurring well before the pandemic and has contributed to these negative trends. Rapid consolidation of hospitals and health systems has become more common across the country over the past few decades. According to the American Hospital Association, between 1998 and the end of 2021, there were 1,887 hospital mergers announced, reducing the number of hospitals from 8,000 to 6,000 nationwide.¹ The top ten health systems now control nearly a quarter of the market share, and their revenue has grown at twice the rate of the rest of the market.² These consolidations and closures are especially stark in rural areas; since 2010, more than 151 rural hospitals have closed, including 37 over the last three years.³

¹<https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality/#:~:text=%E2%80%9CIt's%20not%20a%20new%20trend,to%20around%20just%20over%206%2C000.%E2%80%9D>

²<https://www2.deloitte.com/us/en/insights/industry/health-care/hospital-mergers-acquisition-trends.html>

³<https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/>

Furthermore, health system acquisitions of physician practices have also steadily increased, including during the COVID-19 pandemic. Hospitals acquired 4,800 physician practices between January 2019 and January 2022, increasing hospital-owned practices by nine percent. As of January 2022, 74 percent of physicians work for a hospital or corporate entity, growing by 19 percent since January 2019.⁴

While the economy continues to improve under President Biden's leadership, consolidation in the health care industry at-large has driven up prices for consumers and driven down wages for workers. Evidence shows that hospitals with fewer competitors charge significantly higher prices. For example, hospitals without a competitor nearby charge 12 percent higher on average than hospitals with three or more competitors nearby. Prices in hospitals with one nearby competitor are on average 7.3 percent higher.⁵ These higher prices are often not accompanied by better quality care, and studies suggest higher rates of consolidation may lead to higher mortality rates.⁶ While higher rates of consolidation may promote efficiency and increase care coordination, studies show that merged hospitals and integrated systems are not less costly or higher quality than their independent peers.

Decades of health system consolidation leave communities without access to necessary care. Those most affected by downsizing and closing certain outpatient services, a common byproduct of health system consolidation, are people of color, older adults, and people with disabilities. Independent hospital closures or mergers with larger health systems occur in rural and urban areas and can cause significant strain on their communities.⁷

While higher costs and lower quality care are concerning outcomes from increasing hospital consolidation, we are also worried about the impact to the workforce. There is strong evidence that hospital mergers lead to reduced workers compensation and benefits, as well as the loss of employment options for health care workers.⁸ There is a clear link between hospital consolidation and wage stagnation in one of the most critical areas of our workforce.⁹ Also, the nation faces a health care workforce shortage that has been severely exacerbated by the COVID-19 pandemic. An aging workforce, burnout, and the lack of nursing faculty are all factors contributing to the overall staffing shortage, and the World Health Organization has predicted a shortfall of 15 million health care workers by 2030.

We appreciate your time and attention in answering the following questions:

⁴ <https://revcycleintelligence.com/news/physician-practice-acquisitions-by-hospitals-corporations-grew>

⁵ [https://www.judiciary.senate.gov/imo/media/doc/Gaynor Senate Judiciary Hospital Consolidation May 19 2021.pdf](https://www.judiciary.senate.gov/imo/media/doc/Gaynor%20Senate%20Judiciary%20Hospital%20Consolidation%20May%2019%202021.pdf)

⁶ [https://www.judiciary.senate.gov/imo/media/doc/Gaynor Senate Judiciary Hospital Consolidation May 19 2021.pdf](https://www.judiciary.senate.gov/imo/media/doc/Gaynor%20Senate%20Judiciary%20Hospital%20Consolidation%20May%2019%202021.pdf)

⁷ <https://communitycatalyst.org/posts/addressing-the-impact-of-hospital-consolidation-on-health-equity/>

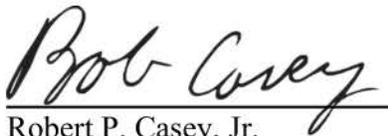
⁸ <https://www.aeaweb.org/articles?id=10.1257/aer.20190690>

⁹ <https://www.aeaweb.org/articles?id=10.1257/aer.20190690>

1. Since President Biden issued the Executive Order on "Promoting Competition in the American Economy" in June 2021, what specific steps has your agency or department taken to address the impact of hospital consolidation on health care costs, patient care, and the health care workforce?
2. Hospital consolidations can have greater negative impacts in certain areas, such as rural communities, and on populations that face challenges in accessing quality, affordable health care, such as people with disabilities, people with low incomes, and communities of color. In its regulatory and enforcement actions, how does your agency or department assess the impact of hospital consolidation on these communities?
3. The COVID-19 pandemic further taxed the already stressed health care workforce, and reduced competition in the health care industry has further limited their employment opportunities. In its regulatory and enforcement actions, how does your agency or department assess the impact of hospital consolidation on health care workers?
4. How do the Department of Justice (DOJ) and the Federal Trade Commission (FTC) coordinate to ensure a consistent approach to regulatory and enforcement action when addressing the effects of mergers and acquisitions in the health care industry?
5. How do the DOJ and FTC work with other federal partners, including the Department of Health and Human Services (HHS) and the Department of Labor (DOL), on issues related to hospital consolidation and its impact on patient care quality, accessibility, and the health care workforce?

Thank you for your consideration. We commend the Biden Administration for being a champion for promoting competition across the economy. We look forward to working with you to craft responsive policies that address the negative impacts of hospital consolidation on health care quality, cost, and the workforce.

Sincerely,



Robert P. Casey, Jr.
United States Senator
Chairman, Special Committee
on Aging



John Fetterman
United States Senator



Elizabeth Warren
United States Senator



Raphael Warnock
United States Senator

A handwritten signature in cursive script, appearing to read "Richard Blumenthal", is written over a horizontal line.

Richard Blumenthal
United States Senator

CC: DOL, HHS, White House

United States Senate

WASHINGTON, DC 20510-3203

November 1, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We write regarding our concerns about two blockbuster oil-and-gas deals announced in October: ExxonMobil's (Exxon) proposed \$60 billion acquisition of Pioneer Natural Resources (Pioneer)¹ and Chevron's proposed \$53 billion acquisition of Hess Corporation (Hess)² – two of the largest oil-and-gas deals of the 21st century. By allowing Exxon and Chevron to further integrate their extensive operations into important oil-and-gas fields, these deals are likely to harm competition, risking increased consumer prices and reduced output throughout the United States. At the regional level, the deals threaten to harm small operators and suppress wages. The Federal Trade Commission (FTC) must carefully consider all of the possible anticompetitive harms that these acquisitions present. Should the FTC determine that these mergers would violate antitrust law, we urge you to oppose them.

This Industry Is Already Too Concentrated, and Americans Are Already Paying the Price.

In the 1990s, over 2,600 mergers occurred throughout all segments of the U.S. petroleum industry.³ Between 1990 and 2001, the number of major U.S. energy companies plunged by more than half, dropping from 19 to 9, due to merger activity.⁴ Most notably, Exxon merged with Mobil in 1999; Chevron merged with Texaco in 2001 (after Chevron had already acquired Gulf Oil and Texaco had already bought Getty Oil in the 1980s).⁵

Such consolidation enabled anticompetitive coordination in the industry, and the remaining firms were well aware that they were members of an oligopoly with a “small number of companies involved, all of whom share[d] a motivation to recoup costs and not undermine the market.”⁶ For example, according to internal Mobil and BP documents, the majors understood that “[f]looding the market and depressing margins on the base volume”⁷ they marketed was unprofitable. Likewise, they knew that directing their individual supplies into, or away from, particular regions of the country enabled them to achieve “price uplift scenarios” and to “leverage up” prices.⁸ The Government Accountability Office found that five specific mergers from that time period – Marathon-Ashland, Shell-Texaco I (Equilon), BP-Amoco, MAP-UDS, and Exxon-Mobil – led to wholesale gasoline price increases ranging from 0.39 to 5.00 cents per gallon.⁹ Of those five, the price increase due to the Exxon-Mobil merger was the greatest.

After these huge mergers took place, the majors' upstream operations were skewed to the detriment of consumers. Studies at the time demonstrated that spending on drilling for new oil supplies by the merged giants fell significantly compared to the drilling budgets before their mergers.¹⁰ Strangely enough, the majors cut back on upstream production at a time when crude prices were sky high and exploration costs had fallen by more than half, "one of the biggest potential disconnects between supply and demand in the 150-year history of the oil business."¹¹ These anticompetitive tactics resulted in a fragile supply for the nation where isolated mishaps at refineries or broken pipelines caused enormous price spikes for consumers (as took place in 2000, 2001, 2002, and 2005) – all of which financially benefited the oligopolists, providing them no incentive to stabilize national supply.¹²

Consolidation in midstream operations hurt Americans consumers, as well. In 1993, the largest five oil refiners had a collective share of about one-third of the American market, and the largest ten controlled 55.6 percent. By 2005, due to the wave of mergers, the top five controlled 55 percent of the market, and the largest ten had 81.4 percent.¹³ This increase in concentration enabled the largest players to manipulate the industry by withholding supply in order to drive up prices, and since most of the firms were also vertically integrated, they benefited from higher prices at the retail level, as well.¹⁴

Similar market dynamics exist today. The oil-and-gas industry is still dominated by a handful of corporate giants, led by the top-two players Exxon and Chevron. Any further consolidation could harm American consumers. This is especially true given the inelastic demand for gas products; those who drive to work rarely have substitutes for gas, so as prices rise, people do not purchase less gas. In April 2020, as the COVID-19 pandemic began, retail gasoline prices averaged \$1.84. Prices steadily rose for two years, hitting a historic height of \$4.93 in June 2022, and remain relatively high today at \$3.84.¹⁵ Meanwhile, Exxon and Chevron posted their own historic heights in 2022: \$56 billion in profits for Exxon¹⁶ and \$36.5 billion for Chevron.¹⁷ They were not alone; Big Oil corporations collectively earned an industry high of nearly \$200 billion last year.¹⁸ President Biden rightfully called for the FTC to investigate the oil industry for price gouging¹⁹ since such surges cannot be explained away by increased production costs from the pandemic or inflation,²⁰ especially in light of these firms' astronomical profits.

The Deals Could Harm Competition and Lead to Even Higher Prices for Americans.

Exxon is the largest oil-and-gas corporation in the United States, operating up and down the supply chain and across the entire industry. Its acquisition target, Pioneer, is an upstream petroleum operator drilling in Texas's Permian Basin. Pioneer owns more drilling acreage than any other producer in the Permian where Exxon is also a top producer. A merged Exxon-Pioneer could produce a staggering 1.2 million barrels per day – more than twice the amount of the next competitor.²¹ Accordingly, this deal would enable the new Exxon to dominate the Permian – the most prolific oil-and-gas field in the world and America's most important.

Chevron is America's 2nd largest oil-and-gas firm with integrated operations rivaling Exxon's. Hess is one of the largest producers in North Dakota's Bakken Shale, the deepwater Gulf of Mexico, and offshore Guyana.

Supporters of the deals have argued that the global market for oil and gas is so enormous that dominant firms in the relevant basins would not have enough supply to restrict capacity or raise prices in any meaningful way.²² Focusing only on the global market is improper. Even if these energy firms represent a small fraction of the global petroleum market, the question before the FTC is whether these proposed transactions may substantially lessen competition in any line of commerce.²³ Thus, the FTC must consider how Exxon's or Chevron's vertically integrated operations may harm American competition in any national or regional market. For example, Exxon owns extensive midstream operations in the Permian Basin, meaning Exxon controls storage, refining, and transportation for a significant amount of capacity in the region where it will acquire Pioneer's drilling operations. Exxon has an extensive pipeline system that transfers crude supply from the Permian to the Texas Gulf Coast. Recently, Exxon expanded its refinery operations on the Texas Gulf Coast by an additional capacity of 250,000 barrels per day²⁴ and announced plans to ramp up its exporting operations²⁵ on the Texas Gulf Coast, suggesting that Exxon-Pioneer intends to move significantly more oil and gas out of the United States than the two companies exported separately. Exxon's CEO Darren Woods put it more bluntly in 2020: "These projects are export machines, generating products that high-growth nations need to support larger populations with higher standards of living. Those overseas markets are the motivation behind our investments. The supply is here; the demand is there. We want to keep connecting those dots."²⁶ This export strategy – in the nation's most important oil-and-gas field, no less – could reduce the amount of their capacity ultimately available to American consumers and thereby increase prices throughout the energy supply chain, including at the gas pump. Furthermore, as we described above, the major energy firms already have a history of artificially reducing supply and increasing prices following rounds of consolidation.

If this "consolidation trend in the US"²⁷ continues accelerating, competing exploration-and-production companies will find it increasingly difficult to operate without Exxon's and Chevron's networks, which creates new abilities and incentives for Exxon and Chevron to engage in anticompetitive tactics. Exxon's and Chevron's operations downstream would enable them to redirect Pioneer's and Hess's crude supply to themselves, away from (and possibly to the detriment of) their midstream competitors. These new market dynamics could result in price hikes for midstream customers, and such added costs are often passed downstream to retail customers, including drivers at gas stations.

We also urge you to investigate how an Exxon-Pioneer merger might impact local operators in the Permian as well as oilfield employees such as geologists and engineers. Potential anticompetitive harms at any level of the supply chain and in any market merit consideration by the FTC.

The FTC Must Protect Americans from Big Oil.

These deals also demonstrate how corporate consolidation can frustrate self-governing democracy. At a time when Americans overwhelmingly support governmental efforts to clean up the environment and protect our nation from climate disasters,²⁸ Exxon and Chevron are doubling down on fossil-fuel production.²⁹ The proposed transactions would augment these corporations' outsized political power, further enabling them to spend millions on lobbyists to thwart climate legislation, litigation to slash environmental rules, and a coordinated campaign to

mislead consumers and discredit climate science – all to protect their billions in profits.³⁰ By taking actions to promote competition, the FTC would also prevent the fossil-fuel industry from further subverting our democratic processes.

Under President Biden, the FTC has been willing to stand up to Big Oil. Just last year, the FTC required an energy private-equity fund to divest its entire crude-oil business in Utah before allowing a similar transaction to close, expressing concerns that the deal would lead to higher prices for refiners and consumers at the pump.³¹

The fight against Big Oil is not new. When the Justice Department took on Standard Oil in the early twentieth century, the Supreme Court protected competition by breaking up Standard Oil into 43 different firms.³² Eventually, the global industry reorganized into seven dominant global players, including five prominent American companies – three of which (Standard Oil of California, Gulf Oil, and Texaco) combined into today's Chevron, and two of which were Standard Oil of New Jersey (now known as Exxon) and Standard Oil of New York (now known as Mobil). In our view, the FTC should not have approved the ExxonMobil merger in 1999, which created the largest corporate successor of Standard Oil's original illegal monopoly, or the merger between Chevron and Texaco in 2001. Lax enforcement during that period resulted in market manipulation, unstable supply, and price hikes for Americans. We must avoid similar mistakes going forward. It is incumbent upon the FTC to closely review the Exxon-Pioneer and Chevron-Hess acquisitions and take appropriate action should such reviews uncover any possible anticompetitive effects enabled by the acquisitions.

If anything, the FTC should be investigating the past anticompetitive mergers of Big Oil conglomerates like ExxonMobil and Chevron to determine whether these energy giants should be broken up once again.

We appreciate your attention to these serious matters.

Sincerely,

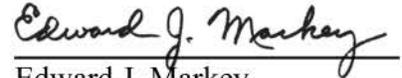


Charles E. Schumer
United States Senator

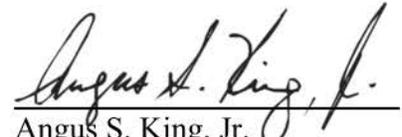


Amy Klobuchar
United States Senator

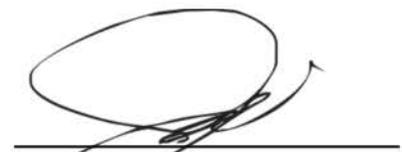

 Elizabeth Warren
 United States Senator

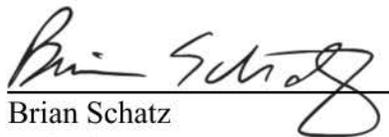

 Edward J. Markey
 United States Senator

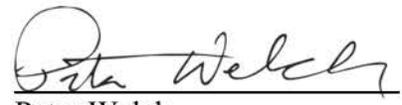

 Mazie K. Hirono
 United States Senator


 Angus S. King, Jr.
 United States Senator


 Ron Wyden
 United States Senator


 John Fetterman
 United States Senator


 Brian Schatz
 United States Senator


 Peter Welch
 United States Senator


 Debbie Stabenow
 United States Senator

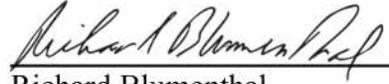

 Sheldon Whitehouse
 United States Senator


 Tina Smith
 United States Senator


 Bernard Sanders
 United States Senator



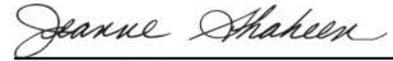
Tammy Baldwin
United States Senator



Richard Blumenthal
United States Senator



Jack Reed
United States Senator



Jeanne Shaheen
United States Senator



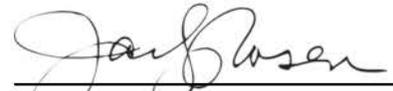
Jeffrey A. Merkley
United States Senator



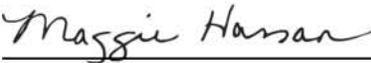
Tammy Duckworth
United States Senator



Cory A. Booker
United States Senator



Jacky Rosen
United States Senator



Margaret Wood Hassan
United States Senator

- ¹ Wall Street Journal, "Exxon to Buy Pioneer in \$60 Billion Deal to Create Shale Giant," Collin Eaton and Benoit Morene, October 11, 2023, <https://www.wsj.com/business/energy-oil/exxon-buys-pioneer-in-60-billion-deal-to-create-shale-giant-207c168b>.
- ² Wall Street Journal, "Chevron to buy Hess for \$53 Billion," Collin Eaton and Peter Stiff, October 23, 2023, <https://www.wsj.com/business/energy-oil/chevron-to-buy-hess-for-53-billion-fl373362>.
- ³ Government Accountability Office, "Mergers and Other Factors That Influence Gasoline Prices," May 23, 2007, <https://consumerwatchdog.org/resources/GAOEnergyMarketsTestimony5-23-07.pdf>.
- ⁴ James W. Brock, "Antitrust Policy and the Oligopoly Problem," 51 Antitrust Bull. 227 (2006), https://heinonline.org/HOL/Page?handle=hein.journals/antibull51&div=22&g_sent=1&casa_token=&collection=journals.
- ⁵ James W. Brock, "Antitrust Policy and the Oligopoly Problem," 51 Antitrust Bull. 227 (2006), https://heinonline.org/HOL/Page?handle=hein.journals/antibull51&div=22&g_sent=1&casa_token=&collection=journals.
- ⁶ Senate Permanent Subcommittee on Investigations, "Gas Prices: How Are They Really Set," Report of the Majority Staff, p. 435, May 2002, <https://www.govinfo.gov/content/pkg/CHRG-107shrg80298/pdf/CHRG-107shrg80298.pdf>.
- ⁷ Senate Permanent Subcommittee on Investigations, "Gas Prices: How Are They Really Set," Report of the Majority Staff, p. 439, May 2002, <https://www.govinfo.gov/content/pkg/CHRG-107shrg80298/pdf/CHRG-107shrg80298.pdf>.
- ⁸ Associated Press, "Alaskan Crude Exports Hurt West Coast Consumers," January 7, 2001.
- ⁹ Government Accountability Office, "Effects of Mergers and Market Concentration in the U.S. Petroleum Industry," May 2004, <https://www.gao.gov/assets/gao-04-96.pdf>.
- ¹⁰ Business Week, "Those Exploding Gas Prices," March 2003.
- ¹¹ Wall Street Journal, "Awash in a Gusher of Cash, Oil Firms Are Reluctant Investors," August 26, 2004.
- ¹² James W. Brock, "Antitrust Policy and the Oligopoly Problem," 51 Antitrust Bull. 227 (2006), https://heinonline.org/HOL/Page?handle=hein.journals/antibull51&div=22&g_sent=1&casa_token=&collection=journals.
- ¹³ Public Citizen, "Hot Profits and Global Warming: How Oil Companies Hurt Consumers and the Environment," Tyson Slocum, September 2006, <https://www.citizen.org/wp-content/uploads/hotprofitsglobalwarming.pdf>.
- ¹⁴ Public Citizen, "Hot Profits and Global Warming: How Oil Companies Hurt Consumers and the Environment," Tyson Slocum, September 2006, <https://www.citizen.org/wp-content/uploads/hotprofitsglobalwarming.pdf>.
- ¹⁵ U.S. Energy Information Administration, "U.S. Regular All Formulations Retail Gasoline Prices," https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=emm_epmr_pte_nus_dpg&f=m.
- ¹⁶ Reuters, "White House blasts Exxon over historical \$56 bln annual profit," Trevor Hunnicutt and Steve Holland, February 2023, <https://www.reuters.com/business/white-house-outraged-by-exxons-record-profits-2023-01-31/>.
- ¹⁷ Reuters, "Chevron annual profit hits record but Q4 miss hits shares," Sabrina Valle, January 27, 2023, [https://www.reuters.com/business/energy/chevron-annual-profit-doubles-record-365-bln-misses-estimates-2023-01-27/#:~:text=HOUSTON%2C%20Jan%2027%20\(Reuters\).asset%20writedowns%20and%20rising%20costs](https://www.reuters.com/business/energy/chevron-annual-profit-doubles-record-365-bln-misses-estimates-2023-01-27/#:~:text=HOUSTON%2C%20Jan%2027%20(Reuters).asset%20writedowns%20and%20rising%20costs).
- ¹⁸ Reuters, "Exxon smashes Western oil majors' profits with \$56 billion in 2022," Sabrina Valle, January 31, 2023, <https://www.reuters.com/business/energy/exxon-smashes-western-oil-majors-earnings-record-with-59-billion-profit-2023-01-31/>.
- ¹⁹ Politico, "Biden asks FTC to investigate oil and gas companies," Lorraine Woellert, November 17, 2021, <https://www.politico.com/news/2021/11/17/biden-ftc-investigate-oil-gas-companies-522804>.
- ²⁰ New York Times, "Wonking Out: Rockets, Feathers and Prices at the Pump," Paul Krugman, July 8, 2022, <https://www.nytimes.com/2022/07/08/opinion/inflation-oil-biden-monopoly.html>.
- ²¹ Bloomberg, "Exxon's Blockbuster Pioneer Merger Needs Biden's Blessing First," Leah Nylen and Ari Natter, October 8, 2023, <https://www.bloomberg.com/news/articles/2023-10-07/exxon-s-blockbuster-pioneer-merger-needs-biden-s-blessing-first#xj4y7vzkg>.
- ²² Bloomberg, "Exxon's \$64.5 Billion Shale Deal Doesn't Need Antitrust Scrutiny," Liam Denning, October 11, 2023, <https://www.bloomberg.com/opinion/articles/2023-10-11/exxon-s-64-5-billion-shale-deal-doesn-t-need-antitrust-scrutiny#xj4y7vzkg>.
- ²³ 15 U.S.C. 18.
- ²⁴ ExxonMobil, "ExxonMobil boosts fuel supply with \$2 billion Beaumont refinery expansion," March 16, 2023, https://corporate.exxonmobil.com/news/news-releases/2023/0316_exxonmobil-boosts-fuel-supply-with-2-billion-dollar-beaumont-refinery-expansion.
- ²⁵ ExxonMobil, "QatarEnergy and ExxonMobil to independently market Golden Pass LNG," October 27, 2022, https://corporate.exxonmobil.com/news/news-releases/2022/1027_qatarenergy-and-exxonmobil-to-independently-market-golden-pass-lng.
- ²⁶ ExxonMobil, "Expansion Initiative: Projects in Texas and Louisiana," 2020, <https://corporate.exxonmobil.com/locations/united-states/growing-the-gulf>.
- ²⁷ S&P Global, "Chevron buys Hess in \$53 billion Guyana, US shale expansion," Nick Coleman, October 23, 2023, <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/102323-chevron-buys-hess-in-53-billion-guyana-us-shale-expansion>.
- ²⁸ Pew Research Center, "What the data says about Americans' views of climate change," Alec Tyson, Cary Funk, and Brian Kennedy, August 9, 2023, <https://www.pewresearch.org/short-reads/2023/08/09/what-the-data-says-about>

[americans-views-of-climate-change/#:~:text=Nearly%20eight%2Din%2Dten%20Democrats.identical%20to%2010%20years%20ago.](#)

²⁹ Axios, "Chevron buys Hess for \$60B as Big Oil deals reshape industry," Ben Geman, October 23, 2023, <https://www.axios.com/2023/10/23/chevron-snags-hess-in-60b-deal-as-oil-dominoes-fall>.

³⁰ New York Times, "Exxon Mobil's Pioneer Acquisition Is a Direct Threat to Democracy," Jeff Colgan, October 18, 2023, <https://www.nytimes.com/2023/10/18/opinion/exxon-pioneer-climate-change.html>.

³¹ Federal Trade Commission, "FTC Requires ENCAP to Sell Off EP Energy Corp.'s Entire Utah Oil Business amid Concerns that Deal would Increase Pain at the Pump," press release, March 25, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-requires-encap-sell-ep-energy-corps-entire-utah-oil-business-amid-concerns-deal-would-increase>.

³² Standard Oil Co. of New Jersey v. United States, 31 S. Ct. 502 (1911).

December 20, 2023

Dear Chairwoman Khan:

We are writing to urgently request that the Federal Trade Commission opens a full and rigorous investigation into data brokerage firms that are actively selling sensitive personal data belonging to United States service members, veterans and their families. A recent 12-month Duke University investigative study commissioned by the United States Military Academy¹ examined this issue and uncovered deeply troubling realities that warrant your office's immediate oversight.

Researchers systematically documented how expansive data on service members and veterans is being marketed and sold through U.S.-based data broker middlemen to purchasers both domestic and foreign with minimal verification procedures. This includes private financial statements, detailed health records, geographic locations and other data that could enable adversaries to exploit or harm those who have served our country.

The study found that purchasing non-public, highly sensitive information pertaining to individually identified active-duty and veteran populations was inexpensive and simple. For instance, private health data and records of financial liabilities were easily obtained for as low as \$0.12 per person. The procedures used by data brokers to authenticate purchasers were wildly inconsistent and devoid of sensible safeguards against fraudulent or dangerous actors acquiring such data.

Most concerning, according to the study, "the inconsistencies of controls when purchasing sensitive, non-public, individually identified data about active-duty members of the military and veterans extends to situations in which data brokers are selling to customers outside the United States." For example, in this study, the researchers used a .asia domain name, email address, and a Singaporean IP address to purchase individually identified information on 5,000 active-duty military service members and veterans. The dataset included name, home address, phone number, email, age, sex, marital status, homeowner status, estimated home value, charitable donations, interest in current affairs/politics, interest in gambling/casinos and other highly valuable personal information. Access to this data could be used by foreign and malicious actors to target active-duty military personnel, veterans and their families for profiling, blackmail, targeting with information campaigns, and more.

This largely unregulated environment that these firms operating in is alarming; U.S. authorities are allowing the wholesale trading of service members' confidential information without proper oversight. A solution would be to pass S.1029, Protecting Military Service Members' Data Act of 2023, which would prohibit data brokers from selling, reselling, trading, licensing, or otherwise providing for consideration lists of military service members to adversarial nations,² including China, Russia, Iran, and North Korea.

¹ <https://techpolicy.sanford.duke.edu/data-brokers-and-the-sale-of-data-on-us-military-personnel/>

² <https://www.congress.gov/bill/118th-congress/senate-bill/1029/text>

We urge the FTC to leverage its full investigative power on this urgent matter given the threats posed to both national security and the privacy rights of the military community. Your inquiry should pursue several key aims:

- identifying the specific U.S. data broker firms involved in these dangerous practices;
- establishing what categories of service member and veteran data are being actively marketed;
- determining what foreign state or non-state entities have purchased said data;
- ascertaining whether and to what extent existing privacy or consumer protection laws limit the data brokers' actions;
- exploring policy solutions to regulate this industry and prevent future breaches.

The risks associated with the exposure of U.S. service members' sensitive personal data through unregulated data brokers cannot be overstated. Allowing this practice to continue unimpeded puts the safety, security and civil liberties of American heroes and their loved ones in jeopardy. We urge the FTC to launch a full investigation without delay and our offices stands ready to assist your essential work toward rectifying this untenable status quo.

Please advise if we can provide any additional supporting materials on this issue for the Committee's review as you examine next steps. Thank you for your swift attention on this urgent matter.

Sincerely,

Senator Bill Cassidy

Senator Elizabeth Warren

Washington, DC 20515

October 3, 2023

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

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

Dear Assistant Attorney General Kanter and Chair Khan:

We are writing regarding our concerns with the ongoing consolidation and vertical integration in the health care industry and its impact on health care costs and quality of care in the United States. UnitedHealth Group's proposed \$3.3 billion acquisition of home health and hospice provider Amedisys¹ is the latest example of massive health care conglomerates using anti-competitive mergers to increase their market dominance, reducing competition, hurting patients, and increasing health care costs. Consistent with the proposed Department of Justice (DOJ) and Federal Trade Commission (FTC) merger guidelines, we urge DOJ and FTC to closely scrutinize UnitedHealth's proposed acquisition of Amedisys, and oppose the growing trend of insurers buying up health care providers to reduce competition and pad their profits at the expense of their patients.

UnitedHealth Group and the Corporatization of Health Care

UnitedHealth Group (UHG) is the largest health care conglomerate in the United States,² with business lines spanning health insurance, pharmacies, pharmacy benefits, surgical centers, primary care clinics, hospice agencies, mental health agencies, home health agencies, and many other services.³ UHG's massive market power has made the company the largest employer of

¹ Health Care Dive, "UnitedHealth acquirers Amedisys for \$3.3B after home health provider reneges on Option deal," Rebecca Pifer, June 26, 2023, <https://www.healthcaredive.com/news/unitedhealth-optum-amedisys-acquisition-option-care/653870/>.

² CNBC, "How UnitedHealth Group grew bigger than the nation's biggest banks," Charlotte Morabito May 20, 2023, <https://www.cnbc.com/2023/05/20/how-unitedhealth-group-grew-bigger-than-the-nations-biggest-banks.html>; CBS, "Fortune releases list of top 10 biggest U.S. companies," Khristopher Brooks, June 5, 2023, <https://www.cbsnews.com/news/fortune-500-list-biggest-companies-walmart-amazon-apple/>.

³ U.S. Securities and Exchange Commission, UnitedHealth Group, Form 10-K for FY2022, p. 1-5, https://www.sec.gov/ix?doc=/Archives/edgar/data/731766/000073176623000008/unh-20221231.htm#i6b660947fab7488cb4d33baca2cb3a37_196; The American Prospect, "Health Care's Intertwined Colossus," Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>.

physicians in the country⁴ and one of the three largest pharmacy benefit managers in the country.⁵ As the second-biggest provider of health savings accounts with \$20 billion in assets,⁶ UHG even operates its own bank.⁷ Without regulatory intervention, UHG has been able to reap excessive benefits by owning numerous components of the health care system and incentivizing its subsidiaries to maximize profit over care.⁸

In doing so, UHG has consistently denied care to patients, mistreated workers, and allegedly overcharged the government to grow its profits even more. In one egregious example, UHG reportedly used an automated review system to reject patients' health insurance claims without a doctor's review,⁹ leaving patients undertreated, at risk of severe health consequences, or facing unexpected medical bills.¹⁰ Most recently, the company announced plans to require prior authorizations for colonoscopies¹¹ at a time when colorectal cancer has been on the rise among young people,¹² leading providers and medical groups to condemn the move for "harm[ing] patients, limit[ing] access to care for vulnerable populations, delay[ing] diagnosis of colorectal cancer in younger populations, and needlessly increas[ing] physician and practice burden."¹³ While UHG ultimately revised this policy and will not require prior authorization, the company

⁴ Becker's Payer Issue, "Meet America's Largest employer of physicians: UnitedHealth Group," Jakob Emerson, February 16, 2023, <https://www.beckerspayer.com/payer/meet-americas-largest-employer-of-physicians-unitedhealth-group.html>.

⁵ Purchaser 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/>.

⁶ The American Prospect, "Health Care's Intertwined Colossus," Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>.

⁷ *Id.*

⁸ Medium, "Breaking Down the Playbook at UnitedHealth Group: the Original Full-Stack Healthcare Company," Nisarg Patel, July 14, 2022, <https://medium.com/@nxpatel/breaking-down-the-playbook-at-unitedhealth-group-the-original-full-stack-healthcare-company-51e687950ff3>.

⁹ STAT News, "Denied by AI: How Medicare Advantage plans use algorithms to cut off care for seniors in need," Casey Ross and Bob Herman, March 13, 2023, <https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/>; STAT News, "How UnitedHealth's acquisition of a popular Medicare Advantage algorithm sparked internal dissent over denied care," Casey Ross and Bob Herman, July 11, 2023, <https://www.statnews.com/2023/07/11/medicare-advantage-algorithm-navihealth-unitedhealth-insurance-coverage/>.

¹⁰ ProPublica, "How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading Them," Patrick Rucker, Maya Miller, and David Armstrong, March 25, 2023, <https://www.propublica.org/article/cigna-pdx-medical-health-insurance-rejection-claims>; Empire Financial Research, "A Dark Side of Combining AI and Medicine," Herb Greenberg, March 20, 2023, <https://empirefinancialresearch.com/articles/a-dark-side-of-combining-ai-and-medicine>.

¹¹ CNN, "UnitedHealthcare shifts colonoscopy requirements from controversial 'prior authorization' to 'advance notification'," Jacqueline Howard, June 1, 2023, <https://www.cnn.com/2023/06/01/health/unitedhealthcare-colonoscopy-requirements/index.html>.

¹² CNN,

"Colorectal cancer is rising among younger adults and scientists are racing to uncover why," Jacqueline Howard, March 24, 2023, <https://www.cnn.com/2023/03/24/health/colorectal-cancer-young-age-mystery>.

¹³ CNN, "UnitedHealthcare shifts colonoscopy requirements from controversial 'prior authorization' to 'advance notification'," Jacqueline Howard, June 1, 2023, <https://www.cnn.com/2023/06/01/health/unitedhealthcare-colonoscopy-requirements/index.html>.

nevertheless maintained advanced notification requirements that will similarly deny care outright and delay timely care for patients in pursuit of higher profits.¹⁴

UHG's dominance and vertical consolidation also presents harms to physician autonomy, and reimbursement rates. As of 2020, less than half of U.S. physicians worked in physician-owned practices, and UHG alone employs 70,000 physicians, making it the largest employer of physicians in the U.S.¹⁵ The company also operates a predatory payday loan system that individual physicians rely on to operate their practice while waiting for reimbursement from insurers like UHG – and UHG charges physicians a whopping 35 percent interest rate.¹⁶ Faced with no good options, physicians may have to choose between paying UHG an exorbitant amount to maintain cash flow for delays caused by UHG insurance, or sell to UHG's subsidiary Optum and become an Optum-owned practice to stay in business. UHG has also repeatedly failed providers, utilizing unfair and anticompetitive tactics to boost profits and stock buybacks. The company has a history of forcing providers out of network by offering extremely low reimbursement rates, only to pay out-of-network providers even lower rates in an effort to steer providers into UHG-owned Optum practices, which the company reimburses at a much higher amount.¹⁷ For example, the troubled medical group Envision, which competes with Optum in primary care and surgical specialty,¹⁸ has sued UHG multiple times for “underpayment of essential medical care”¹⁹ and “forcing [competitors] out of network as a part of a scheme to inflate United's profits and grow its Optum business.”²⁰ While Envision has problems of its own

¹⁴ *Id.*

¹⁵ The American Prospect, “Health Care's Intertwined Colossus,” Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>.

¹⁶ *Id.*

¹⁷ *Envision Healthcare Corp. v. United HealthCare Insurance Co.*, No. CACE-22-006403, Complaint, pp. 7-9, Fla. Broward County Ct. May 2, 2022, https://www.docketalarm.com/cases/Florida_State_Broward_County_Seventeenth_Circuit_Court/CACE22006403/

[Envision Healthcare Corp. et al Plaintiff vs. United HealthCare Insurance Co. et al Defendant/05-02-2022 Complaint%20%28eFiled%29/](https://www.docketalarm.com/cases/Florida_State_Broward_County_Seventeenth_Circuit_Court/CACE22006403/Envision_Healthcare_Corp._et_al_Plaintiff_vs._United_HealthCare_Insurance_Co._et_al_Defendant/05-02-2022_Complaint%20%28eFiled%29/); Becker's Healthcare, “UnitedHealth policies drive physicians to Optum, lawsuit claims,” May 9, 2022, <https://www.beckersasc.com/asc-news/united-policies-drive-physicians-to-optum-lawsuit-claims.html>.; Health Leaders Media, “UnitedHealth Sued Over Low Reimbursement Rate for Physicians,” Jay Asser, May 11, 2022, <https://www.healthleadersmedia.com/revenue-cycle/unitedhealth-sued-over-low-reimbursement-rate-physicians>.

¹⁸ Becker's Healthcare, “UnitedHealth policies drive physicians to Optum, lawsuit claims,” May 9, 2022, <https://www.beckersasc.com/asc-news/united-policies-drive-physicians-to-optum-lawsuit-claims.html>.

¹⁹ *Envision Healthcare*, “Envision Healthcare Awarded \$91.2M in Judgment Against UnitedHealthcare,” May 2, 2023, <https://news.envisionhealth.com/envision-healthcare-awarded-in-judgment>.

²⁰ *Envision Healthcare Corp. v. United HealthCare Insurance Co.*, No. CACE-22-006403, Complaint, p. 7, Fla. Broward County Ct. May 2, 2022, https://www.docketalarm.com/cases/Florida_State_Broward_County_Seventeenth_Circuit_Court/CACE22006403/

[Envision Healthcare Corp. et al Plaintiff vs. United HealthCare Insurance Co. et al Defendant/05-02-2022 Complaint%20%28eFiled%29/](https://www.docketalarm.com/cases/Florida_State_Broward_County_Seventeenth_Circuit_Court/CACE22006403/Envision_Healthcare_Corp._et_al_Plaintiff_vs._United_HealthCare_Insurance_Co._et_al_Defendant/05-02-2022_Complaint%20%28eFiled%29/); Healthcare Finance, “Envision Healthcare receives \$91.2M in judgment against UnitedHealthCare,” Jeff Lagassee, May 3, 2023, <https://www.healthcarefinancenews.com/news/envision-healthcare-receives-912m-judgment-against-unitedhealthcare>.

– including by treating its own physicians poorly and being owned by private equity²¹ – the behavior of Optum is unacceptable.

Additionally, whistle-blowers, the DOJ, and the Department of Health and Human Services Office of Inspector General have accused UHG of exploiting Medicare Advantage (MA), including by overcharging the program.²² UHG is the largest MA insurer with over 27 percent of the market,²³ and it is estimated that in 2020 alone, UHG overcharged the government for MA by at least \$12 billion.²⁴

UHG’s profiteering has led to a windfall for the company. In 2022, UHG spent over \$16 billion in stock buybacks enriching their shareholders and executives.²⁵ So far in 2023, UHG has brought in record revenue of \$91.9 billion and profit of \$5.8 billion in the first quarter,²⁶ spent over \$3.5 billion in stock buybacks,²⁷ and completed yet another multi-billion-dollar acquisition.²⁸

Profiteering Opportunities Driving Consolidation in Health Care

UHG’s enormous reach and vertically integrated structure has allowed the company to profit off of every part of the health care system, controlling and steering patients, workers, and taxpayers into more profitable services for UHG. UHG’s conglomerate model is extremely successful in pulling out profits from its own subsidiaries, with current estimates finding that 25 percent of UHG’s total company revenue comes from subsidiaries alone.²⁹ Now, as the U.S. population ages and more people become eligible for Medicare, UHG and other large insurers are looking to

²¹ The American Prospect, “Envision Healthcare it’s the Skids,” Eileen Appelbaum and Rosemary Batt, March 14, 2022, <https://prospect.org/health/envision-healthcare-hits-the-skids/>.

²² The New York Times, “‘The Cash Monster was Insatiable’: How Insurers Exploited Medicare for Billions,” Reed Abelson and Margot Sanger-Katz, October 8, 2022, <https://www.nytimes.com/2022/10/08/upshot/medicare-advantage-fraud-allegations.html>.

²³ Kaiser Family Foundation, “Medicare Advantage in 2023: Enrollment Update and Key Trends,” Nancy Ochieng, Jeannie Fuglesten Biniek, Meredith Freed, Anthony Damico, and Tricia Neuman, August 9, 2023, <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2023-enrollment-update-and-key-trends/>.

²⁴ MedPac, “Report to the Congress: Medicare Payment Policy, March 2022, p. 413, https://www.medpac.gov/wp-content/uploads/2022/03/Mar22_MedPAC_ReportToCongress_Ch12_SEC.pdf; The New York Times, “‘The Cash Monster was Insatiable’: How Insurers Exploited Medicare for Billions,” Reed Abelson and Margot Sanger-Katz, October 8, 2022, <https://www.nytimes.com/2022/10/08/upshot/medicare-advantage-fraud-allegations.html>.

²⁵ U.S. Securities and Exchange Commission, UnitedHealth Group, Form 10-K for FY2022, p. 28, <https://www.sec.gov/ix?doc=/Archives/edgar/data/731766/000073176623000008/unh-20221231.htm>.

²⁶ Healthcare Dive, “UnitedHealth notches record revenue in first quarter,” Rebecca Pifer, April 14, 2023, <https://www.healthcarediver.com/news/unitedhealth-first-quarter-earnings-optum-unitedhealthcare-growth/647598/>.

²⁷ Substack, Healthcare Un-Covered, “Q1 2023: UnitedHealth Group Made \$27.8 billion from the drug supply chain; spent \$3.5 billion buying back their own stock,” Wendell Potter, April 19, 2023, <https://wendellpotter.substack.com/p/q1-2023-unitedhealth-group-made-278>.

²⁸ Reuters, “US drops appeal of UnitedHealth acquisition of Change Healthcare,” Rami Ayyub, March 21, 2023, <https://www.reuters.com/legal/us-drops-appeal-unitedhealth-acquisition-change-healthcare-2023-03-21/>.

²⁹ The American Prospect, “Health Care’s Intertwined Colossus,” Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>; Gist Healthcare, “UnitedHealth Group hits a milestone in vertical integration,” April 7, 2023, <https://gisthealthcare.com/unitedhealth-group-hits-a-milestone-in-vertical-integration/>.

cash in on the booming home health industry, allowing them to keep more premium dollars in-house from treating patients at insurer-owned facilities.³⁰

UHG has been able to amass such significant market power due to lax antitrust enforcement and serial acquisitions.³¹ These acquisitions often fall below the *Hart-Scott-Rodino Act* (HSR) threshold³² that would require UHG to inform DOJ and FTC about the transactions. For example, UHG has purchased at least 28 physician and provider groups since 2010, and an additional eight in 2011 and 2012, all under the HSR threshold.³³

UHG has used its market power to further entrench itself in the entire health care ecosystem. Between 2020 and 2023, UHG spent more than \$32 billion to acquire numerous businesses,³⁴ including home health giant LHC Group³⁵ for \$5.4 billion,³⁶ health care technology company Change Healthcare for \$13 billion,³⁷ health care technology company NaviHealth for over \$1 billion,³⁸ and the physician group Crystal Run Healthcare for an undisclosed amount.³⁹ UHG's health care services provider Optum has also continued to expand its vertical footprint with acquisitions of pharmacy benefit manager Catamaran,⁴⁰ ambulatory surgery center Surgical Care Affiliates,⁴¹ physician-led medical groups,⁴² and other health care organizations.⁴³ Optum's

³⁰ Healthcare Dive, "UnitedHealth closes \$5.4B buy of home health business LHC," Rebecca Pifer, February 22, 2023, <https://www.healthcaredive.com/news/unitedhealth-lhc-group-closes-buy-home-health/643200/>.

³¹ The American Prospect, "Health Care's Intertwined Colossus," Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>.

³² U.S. Federal Trade Commission, "HSR threshold adjustments and reportability for 2023," February 16, 2023, <https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023>.

³³ The American Prospect, "Health Care's Intertwined Colossus," Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>.

³⁴ U.S. Securities and Exchange Commission, UnitedHealth Group, Form 10-K for FY2022, p. 28, <https://www.sec.gov/ix?doc=/Archives/edgar/data/731766/000073176623000008/unh-20221231.htm>.

³⁵ MedCity News, "Why UnitedHealth Group is Going All in on Amedisys," Marissa Plescia, July 2, 2023, <https://medcitynews.com/2023/07/unitedhealth-optum-acquisition-home-care/>.

³⁶ Fierce Healthcare, "UnitedHealth, LHC Group close \$5.4B merger deal," Paige Minemyer, February 22, 2023, <https://www.fiercehealthcare.com/payers/unitedhealth-lhc-group-close-54b-merger-deal>.

³⁷ Fierce Healthcare, "DOJ, state attorneys general drop appeal to UnitedHealth-Change Healthcare deal ruling," Paige Minemyer, March 21, 2023, <https://www.fiercehealthcare.com/payers/doj-state-ags-drop-appeal-unitedhealth-change-healthcare-deal-ruling>.

³⁸ Fierce Healthcare, "Optum scoops up post-acute care company NaviHealth," Heather Landi, May 26, 2020, <https://www.fiercehealthcare.com/payer/optum-scoops-up-post-acute-care-software-startup-navihealth>.

³⁹ Fierce Healthcare, "UnitedHealth quietly scoops up New York physician group Crystal Run," Paige Minemyer, April 10, 2023, <https://www.fiercehealthcare.com/payers/unitedhealth-quietly-scoops-new-york-physician-group-crystal-run>.

⁴⁰ Healthcare Dive, "Optum a step ahead in vertical integration frenzy," Jeff Byers, April 12, 2018, <https://www.healthcaredive.com/news/optum-unitedhealth-vertical-integration-walmart/520410/>.

⁴¹ Healthcare Finance, "Secret Weapon: UnitedHealth's Optum business is laying waste to old notions about how payers make money," Susan Morse, May 10, 2017, <https://www.healthcarefinancenews.com/news/secret-weapon-unitedhealths-optum-business-laying-waste-old-notions-about-how-payers-make-money>.

⁴² Lohud, "NY Physician groups merge, feds wary of potential cost increases for patients," David Robinson, August 8, 2022, <https://www.lohud.com/story/news/health/2022/08/08/what-do-health-care-mergers-in-new-york-mean-for-patients/65391916007/>.

⁴³ Fierce Healthcare, "Optum to acquire Atrius Health as it continues to grow physician network," Heather Landi, March 4, 2021, <https://www.fiercehealthcare.com/practices/optum-to-acquire-atruius-health-to-grow-its-physician->

proposed acquisition of Amedisys would further entrench the company's dominance, as Amedisys and LHC Group are two of the largest home health groups in the country.⁴⁴ UHG's previous home health acquisition – LHC Group – already allowed the company to expand to 964 locations in 37 states, while the acquisition of Amedisys will allow UHG to expand to 522 locations in 37 states.⁴⁵ And new reporting reveals that UHG's acquisition of Amedisys will result in “at least 172 overlaps of [LHC and Amedisys] within 15 miles of each other in the southeastern U.S., Pennsylvania, Massachusetts, and West Virginia.”⁴⁶ This deal is clearly anticompetitive as it would result in consolidation of home health and hospice services in some regions.⁴⁷

Vertical Integration Could Reduce Competition, Raising Costs and Threatening Adverse Outcomes for Patients

The growth in enrollment in MA – the government program that allows private insurers to provide Medicare coverage to seniors and people with disabilities⁴⁸ – has attracted the attention of health care conglomerates, which have singled out MA as a particularly lucrative growth market. Over 50 percent of people eligible for Medicare are enrolled in MA plans,⁴⁹ and this trend is likely to grow.⁵⁰ UnitedHealth is the largest provider of MA plans in the country, accounting for 29 percent of the market in 2023.⁵¹

It is well-documented that large health care conglomerates, including UHG, have overcharged the government for the coverage it provides. In MA, the federal government pays a fixed fee to the insurance company to cover the health care services that an individual may need.⁵² The amount paid to insurers can be increased if the plan can demonstrate that the patient is in poorer health and may use more health care services. This information is captured in a patient's “risk

network.

⁴⁴ Home Healthcare News, “Top 10 Largest Home Health, Hospice Providers in 2020,” Andrew Donlan, February 9, 2021, <https://homehealthcarenews.com/2021/02/the-top-10-largest-home-health-hospice-providers-in-2020>.

⁴⁵ Advisory Board, “The race for home-based care assets: Optum bids for Amedisys,” Miriam Szynger-Taub and Blake Zissman, June 7, 2023, <https://www.advisory.com/daily-briefing/2023/06/07/amedisys-bid>.

⁴⁶ Capitol Forum, “UnitedHealth/Amedisys: Deal Would Create Significant Overlaps in Home Health Care, Hospice Services in Southeast, Pennsylvania, Massachusetts,” September 21, 2023, p. 1, <https://library.thecapitolforum.com/docs/72z84brf1d9t?u=68j7qbabagx1>.

⁴⁷ *Id.*

⁴⁸ NerdWallet, “What is a Medicare Advantage Plan?” Liz Weston and Kate Ashford, May 30, 2023, <https://www.nerdwallet.com/article/insurance/medicare/what-is-a-medicare-advantage-plan>.

⁴⁹ Kaiser Family Foundation, “Medicare Advantage in 2023: Enrollment Update and Key Trends,” Nancy Ochieng, Jeannie Fuglesten Biniek, Meredith Freed, Anthony Damico, and Tricia Neuman, August 9, 2023, <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2023-enrollment-update-and-key-trends/>.

⁵⁰ Chartis, “In a Shifting Market, Medicare Advantage Shows Continued Growth,” March 23, 2023, <https://www.chartis.com/insights/shifting-market-medicare-advantage-shows-continued-growth>.

⁵¹ Kaiser Family Foundation, “Medicare Advantage in 2023: Enrollment Update and Key Trends,” Nancy Ochieng, Jeannie Fuglesten Biniek, Meredith Freed, Anthony Damico, and Tricia Neuman, August 9, 2023, <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2023-enrollment-update-and-key-trends/>.

⁵² Stat News, “Upcoding: one reason Medicare Advantage companies pay clinicians to make home health checkups,” Robert Kaplan and Paul Tang, January 19, 2023, <https://www.statnews.com/2023/01/19/rein-in-upcoding-medicare-advantage-companies/>.

score” and is based on the number of medical diagnoses in a patient’s medical record.⁵³ The higher the risk-score, the more money the insurance company gets to cover that individual’s care. But this doesn’t always translate into the delivery of more health care services. That’s because, whatever the insurance companies don’t pay out in health claims, they get to keep – and watchdogs have discovered that they keep a lot of it.⁵⁴

This payment structure has incentivized insurance companies to add as many diagnosis codes as possible to patients’ medical charts through a practice known as upcoding for MA patients.⁵⁵ UHG has been accused of failing to remove invalid diagnoses after becoming aware of them and telling workers to mine old medical records for additional illnesses, for which the company is set to face a civil trial this year.⁵⁶ Insurers often send chart review companies to individuals’ homes to collect these diagnoses, raising serious questions about whether insurers’ moves to acquire home health companies may exacerbate these tactics.⁵⁷ Ninety audits conducted by the Centers for Medicare and Medicaid Services between 2011 and 2013 further revealed that UHG has extracted overpayments from the government at least 8 times in 2007, with auditors finding that UHG and other plans received \$22.5 million in overpayments.⁵⁸ CMS has requested nearly \$800,000 in refunds from UHG as a result.⁵⁹

Through vertical integration, UHG and other health care conglomerates can more easily use practices like upcoding to evade other federal regulations that protect consumers. The Affordable Care Act requires health insurers to spend at least 85 percent of premium revenues on clinical care and quality improvements.⁶⁰ This requirement, also known as the medical loss ratio (MLR)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*; Center on Budget and Policy Priorities, “Medicare Advantage Upcoding, Overpayments Require Attention,” Paul N. Van de Water, October 30, 2018, <https://www.cbpp.org/blog/medicare-advantage-upcoding-overpayments-require-attention>.

⁵⁶ The New York Times, “‘The Cash Monster was Insatiable’: How Insurers Exploited Medicare for Billions,” Reed Abelson and Margot Sanger-Katz, October 8, 2022, <https://www.nytimes.com/2022/10/08/upshot/medicare-advantage-fraud-allegations.html>.; U.S. Department of Justice, “United States Intervenes in Second False Claims Act Lawsuit Alleging that UnitedHealth Group Inc. Mischarged the Medicare Advantage and Prescription Drug Programs,” press release, May 16, 2017, <https://www.justice.gov/opa/pr/united-states-intervenes-second-false-claims-act-lawsuit-alleging-unitedhealth-group-inc>.

⁵⁷ Healthcare Dive, “UnitedHealth closes \$5.4B buy of home health business LHC,” Rebecca Pifer, February 22, 2023, <https://www.healthcaredive.com/news/unitedhealth-lhc-group-closes-buy-home-health/643200/>.; U.S. Department of Health and Human Services, Office of Inspector General, “Some Medicare Advantage Companies Leveraged Chart Reviews and Health Risk Assessments to Disproportionately Drive Payments,” September 2021, <https://oig.hhs.gov/oei/reports/OEI-03-17-00474.pdf>.

⁵⁸ Kaiser Family Foundation Health News, “Audits – Hidden Until Now – Reveal Millions in Medicare Advantage Overcharges,” Fred Schulte and Holly K. Hacker, November 21, 2022, <https://kffhealthnews.org/news/article/audits-hidden-until-now-reveal-millions-in-medicare-advantage-overcharges/>.

⁵⁹ U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, “Medicare Advantage Risk Adjustment Data Validation Audits Fact Sheet,” June 1, 2017, p. 2, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/recovery-audit-program-parts-c-and-d/Other-Content-Types/RADV-Docs/RADV-Fact-Sheet-2013.pdf>.

⁶⁰ U.S. Department of Health and Human Services, Federal Register Final Rule, “Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act,” December 7, 2011, <https://www.federalregister.gov/documents/2011/12/07/2011-31289/medical-loss-ratio-requirements-under-the>

requirement, was created to “restrain premium growth by limiting the profits and administrative costs of health insurers.”⁶¹ However, UHG has relied on vertical integration and expansion into other sectors of the health care industry to game this limit by shifting profit-capped insurance revenues into its other divisions.⁶² These profit-shifting strategies may serve to evade MLR requirements, while allowing UHG to appear to be in compliance.⁶³

As UHG’s revenue has grown, so have payments from one division of UHG to another. UHG has accelerated payments to itself over the past ten years, allowing the company to substantially increase profitability.⁶⁴ And as one industry expert has noted, UHG subsidiary Optum has been “the leader in showing how a managed care organization with an ambulatory care delivery platform and a pharmacy benefit manager all in house can lower or maintain and bend cost trend[s] and then drive better market share gains in their health insurance business.”⁶⁵

Antitrust Regulators’ Role

The FTC and DOJ’s proposed merger guidelines clarify that the antitrust agencies, acting pursuant to antitrust law, will examine deals that would “entrench or extend a dominant [company] position”⁶⁶ or “further a trend toward concentration,”⁶⁷ and will examine “the whole series”⁶⁸ of acquisitions a company makes. Under the guidelines, regulators will therefore focus on conglomerates – which should include UHG – to holistically examine their anticompetitive effects, and potentially halt rampant vertical integration in health care.

UHG’s past acquisitions in many cases have not triggered automatic antitrust review under the HSR Act due to UHG’s piecemeal approach, but they have nevertheless allowed UHG to achieve market dominance. For example, in 2011 and 2012, UHG purchased eight physician groups in transactions whose value was below the threshold for mandatory pre-merger notification.⁶⁹ These

patient-protection-and-affordable-care-act.

⁶¹ NAIC, “Medical Loss Ratio,” October 26, 2022, <https://content.naic.org/cipr-topics/medical-loss-ratio> .

⁶² Gist Healthcare, “UnitedHealth Group hits a milestone in vertical integration,” April 7, 2023, <https://gisthealthcare.com/unitedhealth-group-hits-a-milestone-in-vertical-integration/>.

⁶³ Brookings Institute, “Related businesses and preservation of Medicare’s Medical Loss Ratio rules,” Richard Frank and Conrad Milhaupt, June 29, 2023, <https://www.brookings.edu/articles/related-businesses-and-preservation-of-medicares-medical-loss-ratio-rules/>.

⁶⁴ Gist Healthcare, “UnitedHealth Group hits a milestone in vertical integration,” April 7, 2023, <https://gisthealthcare.com/unitedhealth-group-hits-a-milestone-in-vertical-integration/>; Health Justice Monitor, “Insurers Avoid Loss Ratio Limits by Shifting Profits to Provider Subsidiaries,” Bob Herman, July 16, 2021, <http://healthjusticemonitor.org/2021/11/02/421/>.

⁶⁵ Healthcare Dive, “Optum a step ahead in vertical integration frenzy,” Jeff Byers, April 12, 2018, <https://www.healthcaredive.com/news/optum-unitedhealth-vertical-integration-walmart/520410/>.

⁶⁶ U.S. Department of Justice and Federal Trade Commission, “Merger Guidelines,” July 19, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf, p. 18-21, Guideline 7.

⁶⁷ U.S. Department of Justice and Federal Trade Commission, “Merger Guidelines,” July 19, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf, p. 21-22, Guideline 8.

⁶⁸ U.S. Department of Justice and Federal Trade Commission, “Merger Guidelines,” July 19, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf, p. 22, Guideline 9.

⁶⁹ The American Prospect, “Health Care’s Intertwined Colossus,” Krista Brown and Sara Sirota, August 2, 2023, <https://prospect.org/health/2023-08-02-health-cares-intertwined-colossus/>.

and similarly anticompetitive tactics have resulted in the company being the largest employer of doctors⁷⁰ and the largest insurer in MA,⁷¹ while also being the world's largest health care company⁷² and eleventh-largest company by revenue.⁷³ UHG also "looks to capture revenue from medical care increasingly delivered outside of hospitals"⁷⁴ by moving into home health and hospice companies.

In recent years, regulators have increased scrutiny on UHG and other anticompetitive health care transactions: DOJ sued to block UHG's acquisition of Change Healthcare in 2022⁷⁵; FTC requested additional information regarding UHG's acquisition of LHC Group in 2022⁷⁶; and FTC required UHG to completely divest DaVita Medical Group's Healthcare Partners of Nevada⁷⁷ before it would allow UHG's acquisition of DaVita Medical Group, one of the largest providers of dialysis services in 2019.⁷⁸ In August, DOJ requested additional information from UHG and Amedisys surrounding the proposed deal.⁷⁹ Further, the FTC recently filed a lawsuit against U.S. Anesthesia Partners, Inc. alleging strategic consolidation of health care markets, including through the use of serial acquisition.⁸⁰ These actions, together with the proposed merger

⁷⁰ Christensen Institute, "The secret to UnitedHealth Group's power," Ann Somers Hogg, August 4, 2022, <https://www.christenseninstitute.org/blog/the-secret-to-unitedhealth-groups-power/>.

⁷¹ Healthcare Dive, "UnitedHealth acquirers Amedisys for \$3.3B after home health provider reneges on Option deal," Rebecca Pifer, June 26, 2023, <https://www.healthcaredive.com/news/unitedhealth-optum-amedisys-acquisition-option-care/653870/>; New York Times, "'The Cash Monster was Insatiable': How Insurers Exploited Medicare for Billions," Reed Abelson and Margot Sanger-Katz, October 8, 2022, <https://www.nytimes.com/2022/10/08/upshot/medicare-advantage-fraud-allegations.html>.

⁷² Investopedia, "How UnitedHealth Group Makes Money," Greg McFarlane, December 19, 2022, <https://www.investopedia.com/articles/markets/043015/how-unitedhealth-group-makes-its-money-unh.asp>.

⁷³ Fortune, Global 500, 2022, <https://fortune.com/ranking/global500/2022/>.

⁷⁴ Healthcare Dive, "UnitedHealth acquirers Amedisys for \$3.3B after home health provider reneges on Option deal," Rebecca Pifer, June 26, 2023, <https://www.healthcaredive.com/news/unitedhealth-optum-amedisys-acquisition-option-care/653870/>.

⁷⁵ U.S. Department of Justice, "Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare," press release, February 24, 2022, <https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare>; Healthcare Dive, "Done deal: UnitedHealth completes \$13B Change Healthcare Buy," Samantha Liss, October 3, 2022, <https://www.healthcaredive.com/news/unitedhealth-completes-13b-change-healthcare-buy-doj/633154/>.

⁷⁶ Healthcare Dive, "FTC hits UnitedHealth, LHC with another request for information on \$5.4B buy," Rebecca Pifer, June 13, 2022, <https://www.healthcaredive.com/news/regulators-unitedhealth-lhc-request-merger/625343/>.

⁷⁷ U.S. Federal Trade Commission, "Analysis of Agreement Containing Consent Orders to Aid Public Comment," p. 5, https://www.ftc.gov/system/files/documents/cases/181_0057_united_davita_aapc_6-19-19.pdf.

⁷⁸ U.S. Federal Trade Commission, "FTC Approves Final Order Imposing Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group," press release, August 22, 2019, <https://www.ftc.gov/news-events/news/press-releases/2019/08/ftc-approves-final-order-imposing-conditions-unitedhealth-groups-proposed-acquisition-davita-medical>; Decision and Order, UnitedHealth Group Inc., Docket No. C-4677, August 12, 2019, https://www.ftc.gov/system/files/documents/cases/181_0057_c4677_united_davita_order.pdf.

⁷⁹ Medical Device Network, "Signal: UnitedHealth's Amedisys acquisition under further DOJ scrutiny," Isaac Hanson, August 15, 2023, <https://www.medicaldevice-network.com/news/unitedhealth-acquisition-under-doj-scrutiny/>.

⁸⁰ U.S. Federal Trade Commission, "FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas," press release, September 21, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>.

guidelines, highlight antitrust agencies' commitment to enforcing antitrust law against anticompetitive practices.

Despite this progress, antitrust agencies must do more to uphold our antitrust laws and protect competition. Specifically, antitrust agencies should block anticompetitive deals, as they should have done in UHG's acquisition of LHC Group, and refuse to accept remedies, as they did in the case of DaVita's Healthcare Partners of Nevada. Contrary to their objectives, structural and behavioral remedies have proven to be ineffective because they are difficult to enforce and fail to maintain competitive conditions.⁸¹ Blocking anticompetitive deals and rejecting the use of remedies will safeguard competition, and in turn protect patients and health care workers.

DOJ and FTC Should Carefully Scrutinize UHG's Acquisition of Amedisys

We are encouraged by DOJ and FTC's efforts to tackle consolidation by proposing updated merger guidelines that are more consistent than prior guidelines with the statutory text and Congressional intent of antitrust law.⁸² In line with these efforts, it remains important that DOJ and FTC closely assess health care industry transactions in the context of the industry's increasing consolidation to stop massive, profit-seeking health care conglomerates from further limit competition and increasing health care costs to the detriment of patients and taxpayers. The acquisition of Amedisys by UHG is one such transaction that the agencies should examine, though by no means the only one of its kind. We therefore urge the agencies to closely scrutinize this and other similar acquisitions and block any activity found to be illegal under antitrust law.

Sincerely,



Elizabeth Warren
United States Senator



Pramila Jayapal
Member of Congress

⁸¹ CPI Antitrust Chronicle, "Structural vs. Behavioral Remedies," Frank Maier-Rigaud and Benjamin Loertscher, April 2020, p. 4, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf; U.S. Department of Justice, "Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunication Institute's Conference in Mexico City," November 7, 2018, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute>; Institute for Local Self-Reliance, "Strengthening Enforcement Against Illegal Mergers: Updating the Merger Guidelines," April 21, 2022, p. 29, <https://cdn.ilsr.org/wp-content/uploads/2022/04/ILSR-Merger-Guidelines-Comment-Letter.pdf>.

⁸² U.S. Federal Trade Commission, "FTC and DOJ seek comment on Draft Merger Guidelines," press release, July 19, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines>.



Office of the Chair

October 30, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your letter regarding UnitedHealth Group's proposed acquisition of Amedisys and sharing your concerns about consolidation and vertical integration in the health care industry. To avoid duplication and maximize the effectiveness of concurrent federal antitrust jurisdiction, the Commission and the Department of Justice's Antitrust Division have long divided responsibility for antitrust review based on statutory authority and other factors. Pursuant to that arrangement, the FTC expects that the Antitrust Division will decide in the first instance how best to proceed with any potential investigation of UnitedHealth Group's proposed acquisition of Amedisys.

The FTC vigorously pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market. I am committed to ensuring the FTC is faithfully discharging its obligations and challenging illegal mergers without fear or favor.

The Agencies are committed to reviving merger enforcement to be consistent with the mandate Congress has given us and the existing legal precedent. In July, the FTC and DOJ released Draft Merger Guidelines that support open, competitive, and resilient markets that have been the bedrock of America's economic success and dynamism throughout our nation's history.¹ Several of these guidelines address concerns about acquisition strategies that rely on rolling up small competitors, and explain how these smaller acquisitions may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.²

Last month, the FTC sued U.S. Anesthesia Partners, Inc., the dominant provider of anesthesia services in Texas, and private equity firm Welsh, Carson, Anderson & Stowe, alleging

¹ See Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines>.

² For instance, draft Guideline 8 addresses ways in which mergers that cause even small increases in market share may raise concerns that they will further a trend toward concentration, and draft Guideline 9 outlines how the Agencies will examine a series of acquisitions by a firm that engages in a pattern or strategy of multiple small acquisitions in the same or related business lines. See FED. TRADE COMM'N AND DEPT. OF JUSTICE, DRAFT FTC-DOJ MERGER GUIDELINES FOR PUBLIC COMMENT at 4 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

that they engaged in a multi-year anticompetitive scheme to consolidate anesthesiology practices in Texas, including through a roll-up strategy to buy up nearly every large practice in Texas and raise prices.³ To better identify and investigate such roll-up schemes, the Agencies have proposed to amend the information contained in Hart-Scott-Rodino premerger notification forms to require merging parties to report prior acquisitions over the past ten years, regardless of the size of the transactions.⁴

Given the high stakes for American consumers, local communities, and the nation's economy, policing merger activity and other forms of potentially anticompetitive conduct in health care continues to be a top Commission priority. As such, the FTC remains active in the health care space.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,



Lina M. Khan
Chair
Federal Trade Commission

cc: The Honorable Pramila Jayapal
United States House of Representatives
Washington, DC 20515

The Honorable Jonathan Kanter
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³ Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>.

⁴ Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.