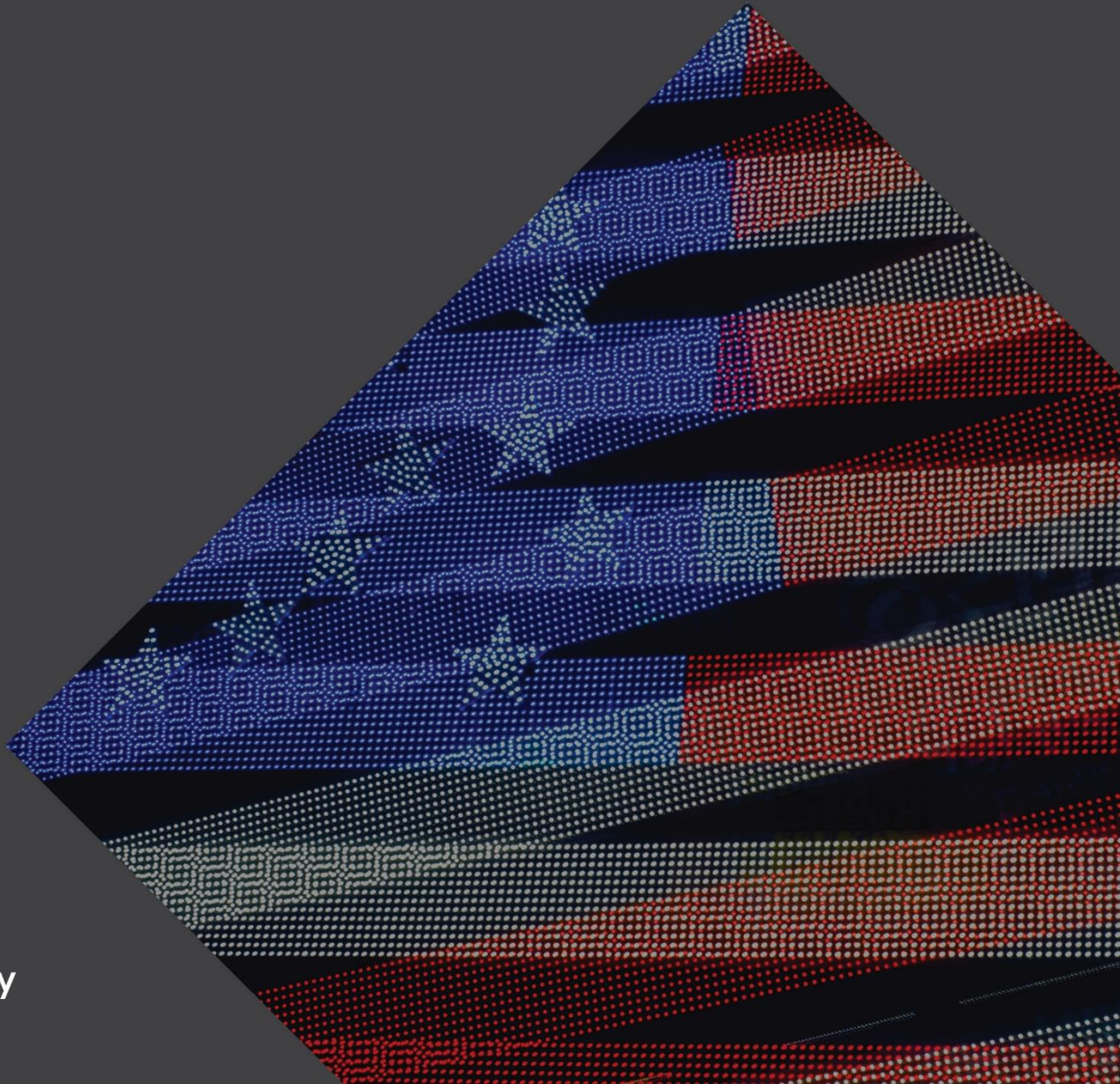




SPECIAL REPORT

# EXECUTIVE ORDER ENCOURAGES FTC, DOJ TO ADDRESS HOSPITAL CONSOLIDATION, VIGOROUSLY ENFORCE ANTITRUST LAWS

July 2021



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## INTRODUCTION

President Biden recently issued an [executive order](#) affirming his administration's policy of enforcing the antitrust laws to "combat the excessive consolidation of industry" and cited healthcare markets as one of several priorities. The Federal Trade Commission (FTC) and US Department of Justice (DOJ) already have been actively enforcing the antitrust laws in provider consolidation matters. The FTC is currently [challenging](#) the proposed merger of two health systems in New Jersey, and in the past year unsuccessfully challenged the combination of Jefferson Health and Einstein Health in Philadelphia and successfully challenged the proposed combination of two health systems (Methodist Le Bonheur and Saint Francis) in Memphis.

The executive order follows a proposed bill to increase budgets for the FTC and DOJ, FTC resolutions on compulsory process in healthcare investigations, congressional calls to investigate the use of COVID-19 Provider Relief Fund payments for acquisitions, the FTC physician practice acquisition retrospective and other health antitrust developments.

## BIDEN EXECUTIVE ORDER ON COMPETITION

On July 9, 2021, President Biden issued an [executive order](#) and [fact sheet](#) affirming the administration’s policy of enforcing the antitrust laws to “combat the excessive consolidation of industry, the abuses of market power and the harmful effects of monopoly and monopsony” in the healthcare, labor and agricultural markets and the tech sector. In the order, Biden encourages DOJ and FTC to enforce the antitrust laws “fairly and vigorously” and to review and consider revising their [Horizontal Merger Guidelines](#) and [Vertical Merger Guidelines](#) to ensure that patients are not harmed by hospital mergers. The agencies last revised their Horizontal Merger Guidelines in 2010, but the Vertical Merger Guidelines were only issued in 2020. The order also reaffirms the agencies’ legal authority to challenge consummated mergers retrospectively.

The order focuses on four areas in healthcare: prescription drugs, hearing aids, hospitals and health insurance. The order encourages the FTC to exercise its rulemaking authority to ban pay-for-delay agreements between branded and generic manufacturers of pharmaceuticals. Biden directs the US Department of Health and Human Services (HHS) to publish proposed rules to allow hearing aids to be sold over the counter. Biden also directs HHS to standardize plan options on the health insurance exchange so consumers can comparison shop plans more readily.

With respect to the hospital sector, the fact sheet cites “unchecked mergers” leading to the “ten largest healthcare systems now control[ing] a quarter of the market,” and references research showing that “hospitals in consolidated markets charge far higher prices than hospitals in markets with several competitors.” The order notes that “[h]ospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options.” Biden directs HHS to support the hospital price transparency rules and finish implementing legislation on surprise hospital billing.

A new White House Competition Council will monitor progress on the initiatives in the executive order.

On the same day that Biden announced his executive order, FTC Chair Lina Khan and Acting Assistant Attorney General of the DOJ Antitrust Division Richard A. Powers issued a [statement](#) that the current Horizontal and Vertical Merger Guidelines “deserve a hard look to determine whether they are overly permissive,” and that they were jointly launching a review of the Horizontal Merger Guidelines “with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.”

## FTC POLICY ACTIONS

On July 1, 2021, in a 3–2 vote along party lines, the FTC passed several [resolutions](#) directing agency staff to use civil investigative demands and subpoenas to investigate key industries, including healthcare and pharmaceuticals. At its meeting, the FTC also [rescinded](#) a 2015 policy that limited its ability to pursue “unfair methods of competition” cases under Section 5 of the FTC Act that didn’t otherwise implicate the Sherman or Clayton Acts.

## POTENTIAL INCREASED BUDGETS AND CHANGES IN ANTITRUST LAWS

On February 4, 2021, Senator Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act of 2021. If enacted, the law would increase federal antitrust enforcement agency budgets and shift the burden of proof to the merging parties.

The [proposed legislation](#) would strengthen existing prohibitions against anticompetitive mergers by altering the legal standard by which mergers are assessed and shifting the burden of proof to the



merging parties for certain types of transactions. The bill would amend Section 7 of the Clayton Act to prohibit mergers that “create an appreciable risk of materially lessening competition,” in contrast to the current standard, which prohibits only mergers that “substantially lessen competition.” “Materially” is defined as “more than a *de minimis* amount.” The risk-based standard and the clarification that only a relatively small amount of competitive harm must be proved would make it easier for antitrust enforcers to block mergers that raise any competitive issues.

The bill would shift the burden of proof to the merging parties when transactions are valued over \$5 billion, involve significant increases in market concentration or involve the acquisition of a nascent competitor by a dominant firm. The bill would also increase resources to the DOJ’s antitrust division and the FTC, and establish a new independent FTC division to conduct market studies and merger retrospectives.

On June 6, 2021, the US Senate passed the [Merger Filing Fee Modernization Act of 2021](#), which would substantially increase the filing fees for large mergers, while effectuating a slight decrease in Hart-Scott-Rodino filing fees for smaller mergers. The bill has wide bipartisan support and is expected to pass the Democratic-controlled US House of Representatives and be signed into law by President Biden.

## COVID-19 RELIEF FUND AND PROVIDER CONSOLIDATION INVESTIGATION

On May 21, 2021, two members of the House sent a [letter](#) to HHS Secretary Xavier Becerra and Kelly Slaughter, then-acting chair of the FTC, expressing concerns that providers used COVID-19 relief funds to finance mergers, and asking that an investigation be conducted and a hearing be held prior to August 30, 2021.

As reported in the [New York Times](#), Representatives Katie Porter (D-CA) and Rosa DeLauro (D-CT) noted that \$100 billion in relief funds—intended to help struggling healthcare providers cope with increased costs and decreased revenues caused by the COVID-19 pandemic—were instead disproportionately allocated to large hospital systems to finance mergers and acquisitions. The letter claimed that healthcare consolidation leads to increased prices and does not improve quality of patient care. The congresswomen cited statistics showing healthcare provider mergers and acquisitions in 2020 keeping pace with 2019, despite large health systems’ claimed financial struggles. The letter calls out specific health systems that received as much as \$1.5 billion in COVID-19 relief funds that failed to provide adequate care and shut down necessary services, all while funding acquisitions of ambulatory surgery centers and hospital systems. The letter requests that the FTC hold a public hearing with the CEOs and CFOs of these identified health systems to review whether COVID-19 relief funds were used to engage in consolidation or anticompetitive behavior.

## PHYSICIAN PRACTICE ACQUISITION RETROSPECTIVE

In early January 2021, [the FTC announced](#) that it was conducting a retrospective study of physician practice acquisitions. The FTC issued subpoena-like data demands to many major health insurers, ordering them to produce their last six years’ volumes of detailed, patient-level claims data for provider services in 15 states. The agency said the data would “help the FTC assess the impact of physician consolidation during this period, including physician practice group mergers and hospital acquisitions of physician practices,” as well as healthcare facility consolidation.

FTC staff have said publicly that one of the purposes of this initiative is to enable the FTC to learn how prices for physician services within specialties and for outpatient procedures have changed since 2015,

relative to the pace and sizes of horizontal and vertical provider consolidation over that period. Staff have further commented that the FTC has a good deal of empirical evidence on how horizontal mergers (especially between hospitals) can affect price in concentrated markets, but is looking to build its knowledge in the non-hospital provider sectors and in vertical transactions.

A similar retrospective on hospital deals in the early 2000s led to much more aggressive enforcement on hospital mergers, including an FTC challenge a few years later to a completed merger (Evanston-Highland Park). This new FTC study likely foreshadows more enforcement activity in the future on physician and outpatient facility M&A. It also could drive post-merger investigations of physician practice groups.

This is one more indication of the FTC’s interest in physician group consolidation. In 2017, the FTC successfully challenged Sanford Health’s acquisition of Mid Dakota Clinic. The parties abandoned the transaction after the US Court of Appeals for the Eighth Circuit upheld the district court’s grant of a preliminary injunction blocking the deal pending an administrative trial. The antitrust agencies also are focused on vertical integration of health systems with provider groups, as shown by the passage of the Vertical Merger Guidelines in June 2020. The Guidelines discuss potentially anticompetitive vertical transactions where they have the likelihood of foreclosing rivals or creating market power to raise rivals’ costs.

Physician practice groups should be aware that both the federal agencies and state attorneys general have increased investigations and inquiries into past and current mergers and acquisitions. The FTC retrospective study indicates that the increased focus will continue.

## NEW JERSEY HOSPITAL MERGER PRELIMINARY INJUNCTION HEARING

The preliminary injunction hearing in the FTC’s challenge of the proposed merger of Hackensack Meridian Health and Englewood Health lasted from May 10, 2021, to June 2, 2021. The FTC alleged that the two hospital systems were important competitors in Bergen County and that the loss of competition would drive up costs for insurers—and subsequently patients.

The outcome of this matter will likely depend on the definition of the geographic market. The FTC maintains that the market is properly limited to Bergen County, while the hospitals argue that the county line is a meaningless political barrier and that the market should include other healthcare providers in other New Jersey counties and health systems in New York City. The FTC lawyers argued that insurers, patients and the hospitals themselves view Bergen County as a specific market where Hackensack and Englewood are substitutes for one another. The hospitals countered that the only insurer that testified at the proceeding indicated that the merged entity would not be able to force a “small but not insignificant price increase” (the hypothetical monopolist test).

US District Court Judge Michael Vazquez’s decision whether to grant the preliminary injunction blocking the deal will likely arrive in several weeks, and an appeal is expected by either side depending on the outcome. The result of preliminary injunctive hearing likely will determine the fate of the transaction, as counsel for Englewood indicated at trial that a loss would prompt them to call off the deal. The court’s decision on whether Bergen County is a proper geographic market likely will influence hospital merger review going forward.

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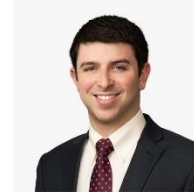
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