

April 20, 2022

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

Re: FTC-2022-0003-0001

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

Re: Request for Information on Merger Enforcement

Dear Chair Khan and Mr. Kanter,

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On behalf of our 40,000 members, the American College of Emergency Physicians (ACEP) appreciates the opportunity to provide comments on the “Request for Information on Merger Enforcement” issued by the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ). ACEP is the national medical society representing emergency medicine. Through continuing education, research, public education, and advocacy, ACEP advances emergency care on behalf of its members and the more than 150 million patients they treat on an annual basis.

We were pleased to see that the FTC and DOJ are looking to modernize enforcement of the antitrust laws regarding mergers, and, in doing so, recognized that the current guidelines for assessing mergers may “underemphasize” or “neglect” the “labor market effects and non-price elements of competition like innovation, quality, potential competition, or any ‘trend toward concentration.’”

ACEP has been carefully monitoring how the rapidly growing acquisition of emergency medicine (EM) practices has affected EM physicians and the patients they serve. In less than ten years, the number of emergency physicians working in large, national groups increased from one in seven in 2012 to one in four in 2020.¹ Particularly, ACEP has been hearing about labor-related impacts of the acquisitions and mergers and the effect they have had on physician wages, non-wage benefits and other aspects of EM physicians’ contracts with their employers, and physician autonomy in their medical decision-making. Our overall goal is to support EM physicians and ensure that they are treated fairly by their employer and practice in an environment where they can serve their patients to the best of their abilities.

¹ Pollock JR, Hogan JS, Venkatesh AK, et al. Group Practice Size Consolidation in Emergency Medicine. *Annals of Emergency Medicine*. 2022;79(1):2-6. doi:10.1016/j.annemergmed.2021.07.122

Background

While mergers and acquisitions are occurring across the health care sector, it is important for the FTC and DOJ to understand the unique qualities of the EM market. EM physicians serve the essential role of strengthening the health care safety net for our communities. They treat all patients who come through our doors, regardless of their insurance status or ability to pay. Over the years, certain laws have been put into place to help enforce and protect patients and the emergency healthcare safety net, including the Emergency Medical Treatment and Labor Act (EMTALA), which requires hospitals to provide a medical screening examination to every individual who “comes to the emergency department” seeking examination or treatment. The “prudent layperson” (PLP) standard, first established under the Balanced Budget Act of 1997, is another such law which allows people who reasonably think they are having an emergency to come to the emergency department (ED) without worrying about whether the services they receive will be covered by their insurance. Given this vital responsibility that EM plays in our health care system, ensuring that EDs across the country are appropriately staffed so they can provide care 24 hours a day, 7 days a week, 365 days a year is essential. Hospitals and EM groups have tried to achieve this goal in different ways, and as described below, mergers and acquisitions have at times come into play.

EM physicians work in a variety of employment models. While some are employed directly by hospitals, many are employed by independent entities that contract with the hospital to provide 24/7 ED coverage. These independent entities range in size, from small, independent democratic (i.e., owned by the physicians) groups that serve only one or two local hospitals to larger groups that staff EDs (and sometimes service lines of other specialties) nationwide. In recent years, physician practices, including independent EM practices, have been acquired by hospitals, health systems, and corporate entities (such as private equity and health insurance companies) at a relatively high rate. [A recent study in Health Affairs](#) found that between 2014 and 2018, there was an 89 percent increase in hospital and health system ownership of physician practices. The pressures of staying financially viable during the COVID-19 pandemic seems to have accelerated this trend even further. According to [a report from the Physicians Advocacy Institute \(PAI\)](#), there was a sharp rise in the number of physician practices being acquired by hospitals and corporate entities throughout 2019 and 2020—especially in the first half of 2020 as the pandemic began. Now, PAI reports that 70 percent of physicians are employed by hospital systems or other private entities—meaning that only 30 percent of physicians practice independently.

There have been numerous assessments conducted to determine the effect of this consolidation on both health care costs and quality of patient care. For example, a couple of years ago, Congress commissioned the Medicare Payment Advisory Commission (MedPAC) to assess whether provider consolidation has led to higher health care costs and impacted quality of care. In 2020, MedPAC issued a [report](#) which looked at all of the available research at the time and concluded that consolidation leads to higher prices for commercially insured patients. While provider consolidation leads to higher prices, MedPAC found that in areas where insurers have more market power, prices decrease—but those savings are not necessarily passed on to consumers in the form of lower premiums. MedPAC also looked at whether provider consolidation affects the quality of care that hospitals and clinicians provide but could not draw any definitive conclusions.

Impacts of Consolidation on Emergency Physicians

To gain specific and up-to-date information on how consolidation is impacting emergency physicians in particular, we used the opportunity of the FTC and DOJ’s call for comment to ask our members a series of structured and open-ended questions about their experiences with mergers and acquisitions. Specifically, for those members whose practice had undergone a merger recently, we asked questions about the merger, such as how they were notified about it, along

with how that merger impacted their wages, non-cash benefits, right to due process, and autonomy for medical decision making. We also asked for their general views about the labor-related impacts of mergers or acquisitions in emergency medicine. We received over 110 responses to this questionnaire.

The questionnaire results, including both quantitative analyses and actual anecdotal quotes directly from emergency physician responders (all italicized), are embedded in our response to the FTC and DOJ's Request for Information questions. Our responses, found below, are limited to those questions that focus on the labor-related impacts of mergers.

9. Monopsony Power and Labor Markets

d. and e. Do the guidelines set forth a sufficient framework to analyze mergers that may lessen competition in labor markets and thereby harm workers?

In addition to employers' ability and incentive to exert downward pressure on wages via employment restrictions, what other signs of an uncompetitive labor market should the guidelines consider?

The results of our questionnaire revealed numerous examples of where mergers have had a significant effect on competitiveness in the EM labor market and harmed the emergency physician, notably in terms of their wages, workload and hours, and their ability (or lack thereof) to find or keep employment.

Wages

Overall, the impact on wages from these acquisitions seemed to vary. Sixty percent of respondents reported that their wages had been reduced, with around forty percent of them indicating a pay cut of more than 20 percent. Forty percent of respondents indicated that they experienced no change in pay or a pay raise after the merger. However, although these respondents' pay itself stayed the same or increased, in many instances their overall hours were cut, ultimately resulting in an overall wage decrease. Examples of responses included:

"Roughly 25-30% reduction due to lowered hourly rate and fewer hours."

"Compensation has remained flat or down. Under the democratic group, there were yearly cost of living and performance based increases. Those disappeared. Benefits like CME were cut. Performance demands increased, with productivity going from 1.9 patients per hour to 2.0 to 2.2 in the course of two years."

"Actually a slight improvement with improved collections from insurance companies, they were screwing us before."

"Increased current, decreased later earning potential"

"Hourly rate increased but overall much worse when factoring in benefits, insurance, retirement."

Workload and Staffing

In addition to more direct wage impacts, physicians reported they were seeing more patients per hour without a commercial pay increase.

For example:

“Huge pushes regarding patient disposition and turnaround times. I’m forced to see patients in the waiting room, violating HIPAA, due to these pushes, given that the hospital will not provide sufficient staff/ space to bed them within the emergency department in order to maximize profits.”

“There are endless cuts to staffing and hours that cause significant patient safety concerns and poor patient experiences and outcomes. I feel like my medical license is being exploited by private equity to maximize profits to shareholders at the expense of my patients and coworkers.”

“[...] the schedule changed for the worse as there was significantly less physician coverage. It became very dangerous for the patients.”

“They incorporated metric based pay on items we do not control, such as length of stay in the ED. We do not control many things that affect length of stay, such as nursing, radiology, labs, etc. This has led to a metric that is impossible to meet, and in effect, a pay cut.”

Ability to Find or Keep a Job

When asked how mergers and acquisitions affect competition in the local job market for EM physicians, 63 percent of respondents to our questionnaire indicated that the presence of larger national groups (often called contract management groups, or CMGs) made it more difficult to find and/or keep a job.

“Merger made it harder to find jobs since the new group monopolized the market in my area. The monopoly essentially lowered over market value and drove down the pay significantly.”

Many respondents remarked that they in fact had no job options other than the large national group that had acquired their practice due to regional consolidation and horizontal integration. Respondents felt pressured to conform to patient care practices that they believed were substandard and feared for their job security if they spoke out against the directives of the group:

“[Large national group] own[s] nearly all of the contracts in emergency departments within driving distance to my home. I essentially have no choice but to work for them as I have a family and cannot travel. I do not agree with their practices, but have to comply due to this CMG having a regional monopoly of ED contracts.”

“Shortly after taking over, the corporation moved to cut physician hours [...] By cutting hours, it made it more difficult to get a job in the local area because there were not as many physicians required to perform the same services.”

Signs of an Uncompetitive Labor Market the Guidelines Should Consider

The ability (or lack thereof) to find employment, the transition to less skilled employees, and the impact on wages are all factors that the FTC and DOJ must consider when assessing mergers and determining whether they create an uncompetitive labor market. Furthermore, it is important to assess the effects on other terms and conditions of employee contracts (described in the response to question “g” below), particularly the right to due process. Finally, the FTC and DOJ should consider the conditions by which employees were notified of the merger and the overall role they had in the process. Fifteen percent of respondents to our questionnaire stated that no rationale for the acquisition was ever provided. Many respondents received very little warning about the merger, and,

in one case, the respondent was only notified three days prior to the new contract taking effect. Other respondents provided examples such as:

“Hospital administration misled my group, false point of meeting, to an offsite location and informed us our contract would not be renewed. Then the new company was waiting to try and recruit us on the spot.”

“I was on vacation [overseas] and got an email saying I worked for [large national group] now. That's how I found out. We did not have any notice about it or say in the takeover [...] Within a year, 8 of the 14 doctors I worked with left the group. The people who stayed were tied down by family or a year from retirement.”

Furthermore, EM physicians do not have much of a choice but to go along with the terms of the merger. In some cases, their current EM group is their only employment option in the area. Further, some EM physicians are forced to sign noncompete clauses in their contracts and told they cannot work at other health systems. From several respondents to our questionnaire:

“[Large national group A] within a year began cutting pay and hours and making weekly changes in working hours. Incredibly hard to find a job in this market due to 80-90% of all EP jobs in the greater [metropolitan area in large state] area controlled by two entities, [large national groups A and B] (both beholden to private equity) [...] The two have engaged in anti-competitive behavior to drive wages artificially low, force the integration and supervision of non-physician providers (PAs and NPs) in roles beyond their training, and incorporate restrictive covenants within contracts to limit any possible competition (non-compete agreements for emergency physicians, indemnification agreements, accelerated termination clauses, elimination of due process for termination, and proscriptions against directly competing for emergency department staffing contracts).”

“Just before the merger, the previous CMG had us sign contracts with fairly vicious non-compete clauses, in attempt, I suspect, to keep their contract with the hospital.”

These are all definitive signs of uncompetitive behavior and must be addressed in the FTC and DOJ guidelines.

f. What characteristics of labor markets are most likely to be associated with transactions that risk substantially lessening competition? What lessons about relevant labor markets can be taken from enforcement cases against identified anticompetitive restraints on competition for workers?

The need to stay profitable and have leverage in negotiations with insurance companies make the EM labor market, and the market for health care providers (including both clinicians and facilities) in general, prime candidates for mergers and acquisitions and the potentially anti-competitive behavior that follows these transactions.

Hospital Consolidation

Responses to our questionnaire suggested a pattern of acquisition of many emergency physician groups being triggered by the *hospital* first being acquired by another entity. This pattern points towards a growing trend of vertical integration in addition to the ongoing horizontal integration. Some respondents noted the following:

“Very successful single contract of truly democratic EM physician group at the same hospital for 21 years. Hospital was acquired by a larger hospital system, and soon after, they replaced our group with a national corporate entity backed by

private equity because this entity offered to provide hospitalist services at a substantially lower stipend than the existing hospitalist group as long as the hospital gave the entity the ED physician contract as well.”

“My nonprofit hospital was taken over by [large for-profit hospital chain...] We were subsequently forced to sell our group to a contract medical group, which is backed by private equity.”

“Big private equity group bought the hospital, contracted a private equity CMG for ED physicians.”

“New hospital administration essentially forced the acquisition of our single democratic group that had provided services to the same hospital for over 20 years. CMG that provided services at the hospital system’s other facilities was brought in.”

“Our hospital wanted a bigger EM group with more resources. They allowed us to research and choose which group with which to merge.”

It is a struggle for hospitals, especially those in rural areas, to remain solvent, much less profitable. Over 130 hospitals in rural areas have closed since 2010, and this number is growing due the effects of the COVID-19 pandemic. Nearly 900 rural hospitals — over forty percent of all rural hospitals in the country — have been identified as at risk of closing in the near future.²

Negotiation with Insurers

There are some major factors in the current EM practice environment that make it extremely difficult for smaller, independent EM practices to stay in business. With respect to our questionnaire, nearly 27 percent of respondents cited profit as the primary reason for acquisition – and these same individuals were often concerned that this came at the expense of quality of patient care.

The inability to negotiate fair contracts with insurance companies that have a large market share is at the top of the list of reasons that smaller EM practices struggle to stay in business. Ten percent of respondents employed by a large national physician group said that the main rationale for their smaller group moving forward with its acquisition was the inability to negotiate with insurers. Some independent practices struggle to even have insurance companies respond to exploratory inquiries, much less agree to work with them. Respondents noted that:

“Our independent EM group (120 providers) had our contract with the hospital system for 50 years. We managed 12 EDs in [state]. The hospital no longer wanted (could afford) to subsidize our services with a stipend at their hospitals. As part of this contract many of the EDs were small volume and included several critical access hospitals and most were not profitable. Because we were a smaller to medium size independent group, the insurance companies would not negotiate or give us better rates/payments. As such, we were forced out of our 50-year contract and the majority of our providers were forced to join the EM Mega group that won the contract and has the ability to negotiate better payment rates from insurers and is able to take bigger risks.”

² Center for Healthcare Quality and Payment Reform. The Crisis Facing Rural Healthcare. <https://ruralhospitals.chqpr.org>. Accessed Apr 2022.

“We were a democratic group of only boarded EM physicians. We were finding it increasingly difficult to acquire cost effective benefits, malpractice insurance and dealing with insurance companies.”

“Because we were a small group, insurers gave us very poor contract rates which led to low reimbursement and difficulty recruiting. Now our pay rates and benefits are better and we are competitive in our market.”

The significant consolidation of health insurance companies has made contract negotiations even more difficult. The American Medical Association (AMA) published a [comprehensive study](#) last year of health insurance concentration for 384 metropolitan statistical areas (MSAs), the 50 states, and the District of Columbia. The report detailed some stark, but not shocking, results about the level of concentration of many health care markets across the country. ACEP encourages you to read the report, but overall, the AMA finds that:

- 73 percent of the MSA-level markets were considered highly concentrated according to [federal guidelines](#) set by the DOJ and FTC.
- 46 percent of MSA-level markets and [fourteen states](#) had one insurer with a share of 50 percent or more of the commercial health insurance market.
- 57 percent of markets became more concentrated in 2020 compared to their concentration level in 2014.

According to the AMA’s report, health insurer consolidation can lead to monopsony power.

Transition to a Less Skilled Workforce

Many EM physicians noted that larger national groups tended to hire advanced practice providers (APPs) over EM physicians. This may be due in part to an attempt to cut labor costs: for example, physician assistants (PAs) have a [median annual pay of \\$115,390](#), whereas EM physicians have a [median annual pay of around \\$350,000](#). However, there is a vast difference in the education and training of physicians versus other health care professionals, including PAs. The well-proven pathways of education and training for physicians include medical school and residency, and years of caring for patients under the expert guidance of medical faculty. Physicians complete 10,000-16,000 hours of clinical education and training during their four years of medical school and three to seven years of residency training. Physician assistant programs are two years in length and require only 2,000 hours of clinical care—and these PA programs do not include a residency requirement. Anecdotally, EM physicians found that when APPs were hired over physicians after mergers, patient safety decreased, and although labor cost to the hospital decreased, cost to the patient often increased due to over-testing and over-consultation. Some examples of respondents’ concerns include the following:

“[...] staffing policies that were extremely dangerous to the patients with over staffing of APPs and understaffing of physicians. Patients were hurt and likely killed because of these staffing policies by these contract management groups.”

“Shortly after taking over, the corporation moved to cut physician hours and instead increase the use of non physician providers in the emergency department such as PAs and NPs. By cutting hours, it made it more difficult to get a job in the local area because there were not as many physicians required to perform the same services.”

“They are intentionally understaffing emergency departments as a driver of profit. Patient care is being dangerously impacted, as the physicians are being asked to see an unsafe number of patients because they do not want to staff the emergency departments appropriately.”

g. In addition to wages, salaries, and other financial compensation, what aspects of workers' terms and conditions of employment should be considered?

Medical Decision-Making

As noted above, EM physicians complete 10,000-16,000 hours of clinical education and training during their four years of medical school and three to seven years of residency training. Therefore, they should be trusted to have the utmost expertise in medical decision-making, especially in the most urgent situations. However, 53 percent of respondents indicated that their medical decision-making autonomy was curtailed following the merger or acquisition of their practice. They noted that there was now “pressure to take short cuts [and] give inappropriate and potentially harmful care” to meet profit-driven metrics, that patients “are treated as numbers rather than individuals,” and care is no longer patient-centered but “metric-centered.” Some further examples from questionnaire responses include:

“There are pressures from administration to avoid admitting certain patients that appear to relate to reimbursement reasons.”

“Worsened in that heavy handed pressure placed on meeting nonclinical metrics and removal of RVU payment for non-billable patients seen in the ER. Pressure on hospitalist to discharge all patients in 4 days which has led to significant increase in return visits and readmissions. Not to mention poor care and sicker patients in the community.”

“Directly, no change. Indirectly by increasing the required patients per hour, Press Gainey results, etc it resulted in a pressure to take short cuts, give inappropriate and potentially harmful care in the name of ‘customer satisfaction’.”

“Worsen. We have already had several emails from our more recent director re: test utilization. Instead of getting to the root cause of why these tests were ordered, such as looking at the patients that the physicians felt required them and why, these remains essentially targeted the physicians who ordered the most of whatever test they would like us to perform less.”

“Worsened my ability to do medical decision-making. The rate at which we see patients, now in the 5-7 patients per hour sustained for up to 8 hours at a time is too much. We do not have the mental bandwidth to make so many decisions on so many patients in that short of a period of time. In addition, we are unable to spend any time at bedside with patients to elucidate histories or physicians that would help our MDM.”

Due Process Rights

Over fifty percent of respondents indicated that their due process rights worsened or were eliminated after the merger, which can result in physicians being left unable to advocate for their patients or for their own mental well-being in fear of employer retaliation.

Due process plays a foundational role in ensuring a physician can carry out their promise to patients without fear of retribution or termination by their employer, so further erosion in contracts following acquisition is a significant concern. One respondent noted that their contract was terminated after attempting to address their practice’s lack of personal protective equipment (PPE) in the midst of the COVID-19 pandemic. Among other questionnaire responses:

“[The acquisition] worsened our right to due process because the corporate entity’s contract with the hospital eliminated our rights as hospital medical staff physicians to be the same as other members of the medical staff with regard to a fair hearing before the medical staff’s executive committee as our democratic group previously had.”

“The contracts with the new group have a clause that I will not resolve any “disagreements” in court, but through a mediator.”

“We used to have due process but the acquisition forced us to give up those rights through a 3rd party agreement between the hospital and [large national group].”

“[The acquisition] worsened our right to due process because the corporate entity’s contract with the hospital eliminated our rights as hospital medical staff physicians to be the same as other members of the medical staff with regard to a fair hearing before the medical staff’s executive committee as our democratic group previously had.”

Physician Burnout

Even before the COVID-19 crisis, emergency physicians have historically had higher rates of career burnout and post-traumatic stress disorder (PTSD) than other medical specialties. According to a [2017 study](#) published in the *Annals of Emergency Medicine*, upwards of 65 percent of emergency physicians and emergency medicine resident physicians report experiencing burnout during their careers. Further, approximately 15 to 17 percent of EM physicians and upwards of 20 percent of EM residents met the [diagnostic criteria for PTSD](#) in 2019. During the pandemic, these unsettling trends in emergency medicine have gotten worse. A [poll](#) from ACEP and Morning Consult released on October 26, 2020 found that more than eight in 10 (87 percent) of emergency physicians reported feeling more stress since the start of the pandemic, with an additional 72 percent experiencing burnout on the job.

Consolidation in the EM market may also contribute to this high rate of burnout. Overall, respondents associated consolidation with decreased morale and burnout among physicians. Many EM physicians are citing the current working conditions at large national groups as reasons for quitting medicine altogether, for they feel that they are trapped in a system that does not respect their autonomy or mental well-being and that there are no other options for their employment in the EM sector. The potential of a significant exodus of EM physicians from the workforce threatens the maintenance of the healthcare safety net that emergency medicine provides. The following responses exemplify the frustration that many EM physicians are experiencing now:

“I no longer feel that the medicine I practice is safe or good, and that I am pushed to see more patients in less time to turn a profit. I feel this is at odds with the oaths I took as a physician, and sadly, am actively searching for ways out of medicine.”

“These corporations taking over medicine need to be stopped. They are taking away basic rights employees should have and they are mandating profit related changes that are bad for patients and physicians making the burn out worse than it already is.”

“Medicine has changed for the worse with the rise of these stockholder driven corporate groups. I don’t recommend being a doctor to young people.”

“We are continually asked to do more with less resources, for less income, and work in unsafe environments, yet with the same liability. I am actively pursuing career opportunities outside of clinical medicine.”

Conclusions and Recommendations

The personal anecdotes shared in this letter truly reflect the non-financial-related effects of mergers and acquisitions on emergency medicine. All in all, with some notable exceptions, it appears that the current practice of consolidation

in EM detrimentally affects physicians' interests and well-being, which in turn may impact their ability to serve their patients.

ACEP hopes that our responses to the questions above—which reflect our members' experiences with mergers and acquisitions—provide the FTC and DOJ with a comprehensive view of the labor-related impacts of mergers in emergency medicine and perhaps in health care more broadly. Based on these responses, we provide the following conclusions and recommendations:

1. While there are some benefits to acquisitions and mergers, including the ability for EM practices to stay profitable and negotiate fairly with insurance companies, **the potential anti-competitive labor-related effects must not be ignored—since they could impact wages, non-cash benefits, right to due process, autonomy for medical decision-making, and the ability to serve patients.**
2. **The FTC and DOJ must ensure that their guidelines for evaluating mergers include a detailed assessment of these labor-related impacts.**
3. **Based on the revised guidelines, the FTC and DOJ must investigate those mergers and acquisitions that have led directly to anti-competitive and harmful practices, including, but not limited to:**
 - a. Reduced wages and/or non-cash benefits;
 - b. Infringement of the right to due process;
 - c. Interference with provider autonomy to make independent medical decisions that benefit their patients;
 - d. Inability to find a job or undue imposed restrictions on ability to switch jobs;
 - e. Practices, such as the use of a less-skilled health care workforce, that put profits over patient care.

ACEP is proud to have its own [antitrust policy](#) in place to ensure that as a medical society it does not play any role in the competitive decisions of its members or their employees, nor in any way restrict competition among members or potential members. Rather, it serves as a forum for a free and open discussion of diverse opinions without in any way attempting to encourage or sanction any particular business practice.

We appreciate the opportunity to share our comments. **We would also be more than happy to meet with the FTC and DOJ to discuss our findings and our comments in greater detail and share the raw results of our questionnaire.** If you have any questions, please contact Laura Wooster, ACEP's Senior Vice President of Advocacy and Practice Affairs at wooster@acep.org.

Sincerely,



Gillian R. Schmitz, MD, FACEP

ACEP President