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The Honorable Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

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

The Honorable Xavier Becerra, Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

May 22, 2024

Subject: Request for Information on Consolidation in Health Care Markets (Docket No. ATR 102)

Dear Attorney General Garland, Madam Chair, and Secretary Becerra,

On behalf of the California Public Employees' Retirement System (CalPERS), I am writing in response to your request for information (RFI) on consolidation in health care markets. We appreciate the Biden-Harris Administration's cross-government approach to address anticompetitive transactions and practices in health care markets. As increasing health care consolidation continues to drive up health care costs, the need for federal attention to promote competition in health care markets is vital.

CalPERS is the largest purchaser of public employee health benefits in California and the second largest group purchaser in the nation after the federal government. We purchase health benefits for approximately 1.5 million active and retired state, local government and school employees and their family members. We contract with numerous large health insurance companies to provide our members with a variety of health plan offerings that include health maintenance, preferred provider, and exclusive provider organization (HMO, PPO, and EPO) plans. CalPERS recognizes the need for affordable health plans and the continuity of health care coverage for our members and their dependents, and we believe greater competition promotes lower prices, higher quality, and greater value to our members. We believe consolidated health care markets reduce competition and increase health care costs.

We are responding to the RFI's questions on the effects of consolidation (question 1) and the need for government action (question 4).

In brief, CalPERS offers the following recommendations for your consideration:

- Provide oversight of mergers and acquisitions by health care entities and increased transparency and information regarding market activities that can help contain costs;
- Conduct more joint federal-state investigations into alleged anticompetitive behavior among health care entities; and
- Prohibit the use of anti-tiering clauses and anti-steering clauses in contracts between health plans and health care providers.

Question 1. Effects of Consolidation

In general, prices are highest in areas with limited competition. Horizontal hospital consolidation (in which hospitals consolidate into larger systems), horizontal physician consolidation (in which physicians consolidate into larger groups), and vertical consolidation (in which hospital systems acquire physician practices) stifle price competition among providers. Highly concentrated health care markets drive significant price increases and substantial price variation across counties. Cross-market mergers, including mergers between large health systems and smaller rural hospitals, increase prices with no discernible impact on quality of care.[1]

In California, hospital competition at the county level has remained low since 2010 and competition among specialist and primary care providers has decreased.[2] Additionally, the number of physicians that work in practices owned by hospital or health systems increased by over 75 percent from 2010 to 2018.2 In markets with fewer hospital choices, this type of consolidation was associated with a 12 percent increase in premiums, a 9 percent increase in specialist prices, and a 5 percent increase in primary care prices from 2013 to 2016.[3]

Without competition, dominant providers have leverage to demand price markups, and insurers are hesitant to enter highly concentrated provider markets, further curtailing competition and perpetuating higher prices. Insurers who participate in these markets concede to higher prices that are typically passed on to members in the form of higher premiums. In several northern and rural California counties, there is little or no competition; hospital markets in most California counties, especially in rural areas, are approaching monopoly levels of concentration.[4] In 15 out of 58 counties, the lack of competition means CalPERS members

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[1] *See* Health Services Research: New evidence on the impacts of cross-market hospital mergers on commercial prices and measures of quality, *available* at https://pubmed.ncbi.nlm.nih.gov/38652542/
[2] *See* California Health Care Foundation (CHCF), The Sky's the Limit: Health Care Prices and Market Consolidation in California, *available* at https://www.chcf.org/wp-content/uploads/2019/09/SkysLimitPricesMarketConsolidation.pdf
[3] *See* Health Affairs, Consolidation Trends In California's Health Care System: Impacts On ACA Premiums And Outpatient Visit Prices, *available* at https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2018.0472
[4] *See* CHCF, Markets or Monopolies? Considerations for Addressing Health Care Consolidation in California, *available* at https://www.chcf.org/wp-content/uploads/2021/11/MarketsMonopoliesHCConsolidation.pdf

cannot choose an HMO plan, which typically provide care at a lower cost, as it is difficult for HMO plans to enter counties where they cannot negotiate favorable rates.[5]

High hospital prices in Monterey County, for example, highlight the negative effects of health care consolidation. Monterey County is considered a highly concentrated market with a Herfindahl-Hirschman Index (HHI) greater than 2,500 – ranging from 3,339 (according to University of California Berkeley Petris Center), to 6,000 to 8,000 (based on estimates by the Yale Tobin Center for Economic Policy).[6] From 2018 to 2020, prices paid by employer plans for hospital inpatient and outpatient services in Monterey County were 4.45 times Medicare prices and 1.65 times median California hospital prices.[7] As an example of the geographic variation, employer plan prices for a vaginal childbirth without complications in 2016 in Monterey County and neighboring San Benito County were at least $14,000 more than the average price in San Francisco or San Mateo Counties.6

We believe high consolidation and increased bargaining leverage is a primary cause of disruptive contract negotiations between providers and health plans, and subsequent contract disputes are becoming increasingly public. In an attempt to sway public opinion in their favor, providers and health plans present their side of the negotiations in mailers to members, newspaper advertisements, and press releases. The increasingly lengthy negotiations are often not resolved until the last possible hour before the expiration of a contract. As a result, members and their families may be uncertain and anxious about their ability to continue seeing their physicians and access care. One recent example of a now-resolved contract dispute that affected CalPERS members occurred between Anthem Blue Cross and University of California (UC) Health. Anthem members were at risk of losing in-network access to UC Health's vast network of hospitals and medical facilities, which could have left them with much higher out-of-pocket expenses or no ability to access covered care from UC Health providers and facilities at all. Both Anthem and UC Health sent members communications regarding this impasse, which was not resolved until the last minute, illustrating this trend in which individuals are caught in the middle of protracted negotiations and left worrying about losing access to their providers.[8,9]

To this end, CalPERS has developed a policy to set expectations with our members on potential provider disruptions.[10] CalPERS believes that it is inappropriate for providers and health plans to involve members in contract disputes. Our policy is to allow the parties to continue negotiations and work toward resolution, without advantaging one side over the other by intervening or allowing members to change plans during the negotiations. To do otherwise might result in a health plan conceding to an unreasonable reimbursement demand that could eventually result in higher premiums for members. We closely follow the progress of

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[5] *See* 2022 Health Benefits Program Annual Report, *available* at https://www.calpers.ca.gov/docs/forms-publications/health-benefits-program-annual-report-2023.pdf

[6] *See* UC Berkley Labor Center, Why are health care prices so high for workers in Monterey County?, *available* at https://laborcenter.berkeley.edu/why-are-health-care-prices-so-high-for-workers-in-monterey-county/

[7] Ibid.

[8] *See* Fierce Healthcare, In California, face-off between major insurer and health system shows hazards of consolidation, *available* at https://www.fiercehealthcare.com/payers/california-faceoff-between-major-insurer-and-health-system-shows-hazards-consolidation

[9] *See* CalPERS, 2024 Anthem Blue Cross UC Health System Contract Updatez, *available* at https://news.calpers.ca.gov/2024-anthem-blue-cross-uc-health-system-contract-negotiations-frequently-asked-questions-for-calpers-members/

[10] *See* CalPERS, CalPERS Policy on Health Provider Disruptions, *available* at https://www.calpers.ca.gov/docs/policy-health-provider-disruptions.pdf

negotiations and will act appropriately to mitigate disruption of care if a contract termination occurs.

In line with our efforts to provide our active members and retirees and their families with access to equitable, high-quality, affordable health care, CalPERS has implemented various efforts to spur provider competition and increase competition with its health plan offerings. For example, CalPERS commissioned a competition study to help determine key changes to health plans to maximize competition among insurers. In 2021, based on the results of the study, various health plan service expansions, including lower-cost HMO plans, were implemented to increase competition within the CalPERS insurance marketplace, putting downward price pressure on CalPERS health insurance premiums and positively impacting CalPERS members and employers.[11,12]

We also mitigate medical trend increases through cost and quality-conscious actions, such as employing narrow provider networks. In the case of Sutter Health, the largest hospital system in Northern California, CalPERS members enrolled in Blue Shield of California HMO plans have access to 12 of 24 Sutter Health hospitals. To the extent systems like Sutter Health are vertically integrated with hospitals, physician groups, and health plan components, adopting cost and quality conscious actions can also aid in addressing the effects from those types of arrangements. Other strategies include adding narrow health plan networks, using Centers of Excellence for procedures with high variation in cost across regions, increasing the use of telehealth in areas with fewer providers, and moving routine services outside of the hospital setting to urgent care, clinics, and ambulatory surgery centers.

Question 4. Need for Government Action

Various state agencies combat anticompetitive behavior across the health care industry. However, a gap exists in state authority to oversee mergers involving for-profit hospitals and other providers. California depends on federal antitrust law and federal agencies to address these mergers.[13]

The California Attorney General (AG) has the legal authority to oversee mergers and acquisitions involving nonprofit entities. The California AG regularly challenges anticompetitive practices that include business-to-business collusion, illegal monopolization, and anticompetitive mergers, as shown by the successful litigation against California-based Sutter Health. The AG's lawsuit challenging Sutter Health's anticompetitive practices resulted in a landmark settlement that requires Sutter Health to pay $575 million in compensation, prohibits anticompetitive conduct (e.g., all-or-nothing contracting deals), and stipulates additional requirements.[14]

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[11] *See* CalPERS, Pension & Health Benefits Committee Agenda Item 7a, *available* at https://www.calpers.ca.gov/docs/board-agendas/202103/pension/item-7a_a.pdf

[12] *See* CalPERS, Competition Study & 2022 New Plans, Area Expansion, and Benefit Changes, *available* at https://www.calpers.ca.gov/docs/board-agendas/202103/pension/item-7a-attach-2_a.pdf

[13] *See* OAG, Attorney General Bonta Combats Anticompetitive Hospital Consolidations, Fights for Affordable and Accessible Healthcare, *available* at https://oag.ca.gov/news/press-releases/attorney-general-bonta-combats-anticompetitive-hospital-consolidations-fights

[14] *See* OAG, Attorney General Bonta Announces Final Approval of $575 Million Settlement with Sutter Health Resolving Allegations of Anti-Competitive Practices, *available* at https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-final-approval-575-million-settlement-sutter

With for-profit entities, state oversight is more fragmented. The California Department of Insurance is authorized to approve any mergers involving insurers, while the California Department of Managed Health Care (DMHC) is authorized to approve any mergers involving health plans. Pharmacy benefit managers (PBMs) are required to register with DMHC; however, DMHC's authority to regulate PBMs is limited. Given that large PBMs are vertically integrated with nationwide health insurers, additional federal oversight would be helpful.

That said, California is taking steps to expand its ability to oversee the health care industry. The new Office of Health Care Affordability (OHCA) will assess market consolidation to further inform state antitrust enforcement.[15] Through cost and market impact reviews, OHCA will analyze transactions that are likely to significantly impact market competition, the state's ability to meet statewide spending targets, or affordability for consumers and purchasers. Based on results of the review, OHCA will then coordinate with other state agencies to address consolidation as appropriate. Because the cost and market impact reviews took effect in April 2024, we are unable to comment on its effectiveness at curbing health care consolidation. We can follow up with additional information when it is available.

CalPERS offers the following recommendations for consideration:

First, CalPERS encourages the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to establish, through rulemaking, policies that: provide oversight of mergers and acquisitions by health care entities, and increase transparency and information regarding market activities, to help maintain costs. CalPERS recommends the agencies include measurable guidance wherever practicable to identify anticompetitive practices that warrant increased scrutiny. For example, DOJ and FTC should establish quantitative thresholds for potentially illegal mergers that violate the Merger Guidelines. Clear and objective guidance will support robust enforcement and potentially discourage anticompetitive mergers.

Second, CalPERS urges DOJ and FTC to conduct more joint federal-state investigations into alleged anticompetitive behavior among health care entities, a strategy that has proven successful. In California, close collaboration between federal and state antitrust enforcement agencies is imperative for combatting anticompetitive practices among for-profit hospitals that fall outside the state AG's authority. For example, a joint effort by FTC and the California AG resulted in the termination of John Muir Health's anticompetitive acquisition of San Ramon Regional Medical Center, LLC from Tenet Healthcare Corporation.[16] State legislators have unsuccessfully attempted to expand the California AG's authority to oversee mergers and acquisitions involving for-profit health care entities. Senate Bill 977, introduced in the 2019-2020 session, would have required for-profit health care systems, private equity groups, and hedge funds to provide advance written notice to the state AG and obtain prior approval for acquisitions and changes of control.[17] Given the legal constraints of the state AG and limited public resources, we urge DOJ and FTC to authorize state attorneys general to enforce federal

[15] *See* HCAI, Assess Market Consolidation, *available* at https://hcai.ca.gov/assess-market-consolidation/

[16] *See* FTC, Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Healthcare, *available* at https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-john-muirs-takeover-san-ramon-regional-medical-center-tenet

[17] *See* California Senate Bill 977, *available* at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB977

consumer protection laws and bolster antitrust enforcement against increasing health care consolidation.

Third, CalPERS recommends DOJ and FTC issue regulations expressly prohibiting the use of anti-tiering and anti-steering clauses in contracts between health plans and health care providers (including vertically integrated health systems) that restrict plans from directing patients to use specific providers and facilities with higher quality and lower prices. Such regulations should include enforcement mechanisms that promote compliance. We believe that increasing health care competition and discouraging anticompetitive practices will help drive down the cost of care for our employers and members.

We thank you for your consideration and we welcome the opportunity to work with you on our shared goals to promote competition and improve health care affordability. Please do not hesitate to contact Donald Moulds, Chief Health Director, at (916) 795-0404 if we can be of any assistance.

Sincerely,

Marcie Frost
Chief Executive Officer