Illinois Health and Hospital Association

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
950 Pennsylvania Avenue, NW Washington, DC 20580

The Honorable Lina Khan
Chair
Federal Trade Commission
Washington, DC 20580

Re: FTC-2023-0043: Draft Merger Guidelines

Dear Chair Khan and Assistant Attorney General Kanter:

On behalf of our more than 200 hospital and nearly 40 health system members, the Illinois Health and Hospital Association (IHA) appreciates the opportunity to comment on the Draft Merger Guidelines (Draft Guidelines) issued on July 18, 2023, by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the "Agencies").

IHA agrees with other commenters that the Draft Guidelines reflect significant overreach by the Agencies, and IHA requests the Agencies withdraw or substantially revise them. As an initial matter, the Draft Guidelines come on the heels of the withdrawal of other antitrust enforcement statements, which the Agencies withdrew earlier this year without notice. The sudden withdrawal of these industry-specific antitrust enforcement statements thrust our member hospitals into a regulatory vacuum. Unfortunately, as discussed below, the Draft Guidelines are a poor replacement for the withdrawn statements.

First, the Draft Guidelines are predicated on outdated or incorrectly-decided law. Specifically, the Draft Guidelines establish a low structural presumption of harm that is arbitrary and unsupported by case law. For example, in analyzing hospital markets, the FTC historically relied on geographic models which focused on hospital, rather than patient, locations. In 2022, the FTC reversed course in the Hackensac Meridian case, opting instead for a model that defined markets around patient location. The Draft Guidelines do not expressly repudiate this error in Hackensac Meridian and leave open the possibility that either the Agencies or future courts could define hospital markets based on patient location. The Agencies' narrow approach to defining hospital markets contributes to concentration thresholds that are far too low for hospital-related transactions.

Second, the Draft Guidelines undervalue efficiencies and other economic benefits of hospital mergers or joint ventures, particularly for small and rural hospitals. Among other things, hospital mergers can increase geographic coverage by bringing more specialized care to underserved markets. Additionally, they can result in upgraded facilities and more advanced information technology systems, the need for which is becoming increasingly more critical as the threat of cyberattacks on the healthcare industry continues to rise. The Draft Guidelines fail to adequately recognize these efficiencies.

Finally, the Draft Guidelines permit hospitals to raise financial distress only in the context of a "failing firm" defense. As is well known, the hospital industry has and continues to face numerous economic challenges caused by, among other things, increased costs and workforce shortages. It is not unheard of that a strategic partnership or merger might offer a struggling hospital the only means of keeping its doors open. However, by considering financial distress only as a part of a hospital's "failing firm" defense, the Agencies essentially encourage hospitals to seek a merger at the last possible moment, when financial failure is imminent. Financial distress should be a factor that the Agencies proactively consider, rather than solely an affirmative

defense that hospitals must raise themselves.

In summary, while IHA welcomes guidance on how the Agencies will conduct antitrust reviews and future enforcement operations, IHA encourages the Agencies to take a more measured, incremental, and industry-specific approach.

Chair Khan and Assistant Attorney General Kanter, thank you again for the opportunity to comment on these Draft Guidelines.

Sincerely,

Karen K. Harris
Senior Vice President and General Counsel
Illinois Health and Hospital Association

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