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September 12, 2023

The Honorable Merrick Garland  
Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

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

**SUBJECT:** Draft Update of Merger Guidelines

Dear Attorney General Garland and Chair Khan:

On behalf of the American Academy of Emergency Medicine (AAEM), thank you for the opportunity to comment on the draft update of the Merger Guidelines, issued on July 19, 2023. AAEM was established in 1993 to promote fair and equitable practice environments necessary to allow emergency physicians to deliver the highest quality of patient care. AAEM has been a leader in protecting board certification in emergency medicine and confronting the harmful influence of the corporate practice of medicine.

AAEM recognizes the harms that anticompetitive mergers can impose, and in particular, we see the detrimental effects of such mergers in the delivery of health care. For 2018, the American Medical Association (AMA) conducted its yearly Physician Practices Benchmark Survey and concluded that, for the first time, more physicians were employees rather than owners of their practices,<sup>1</sup> and the share of employed physicians has continued to rise through 2022.<sup>2</sup> While this may not seem like a significant finding, the systematic consolidation and buy-out of private practice physicians is harmful to both patients and physicians. Physicians take the Hippocratic Oath upon embarking on the practice of medicine, an ethical code of conduct which requires that their duty be first and foremost to their patients. This code obligates physicians to put the needs of the patients first, both in the practice of medicine and their business. In contrast, non-physician owned/operated practices are not bound by this ethical code, which in our experience can lead to poorer patient care and higher costs. Unfortunately, we have repeatedly seen this trend play out with emergency

<sup>1</sup> <https://www.ama-assn.org/system/files/2019-07/prp-fewer-owners-benchmark-survey-2018.pdf>

<sup>2</sup> <https://www.ama-assn.org/press-center/press-releases/ama-examines-decade-change-physician-practice-ownership-and>

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department corporate management groups (CMGs) with private equity backing and/or ownership, as we will discuss further in our comments below.

AAEM appreciates that the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have updated its Merger Guidelines to better protect against the damage that anticompetitive mergers and acquisitions may cause. We particularly note our support for:

- Guideline 9 – When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series, and
- Guideline 11 – When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.

With respect to Guideline 9, we note that CMGs often obtain contracts from hospitals to staff emergency departments on a small scale, but then they turn these contracts into larger consolidations over time, dominating entire hospital networks and geographical regions. Due to the piecemeal nature of the acquisitions, these mergers are often overlooked as a source of anti-competitive and unfair business practices.

While thirty-three states have instituted the corporate practice of medicine (CPOM) doctrine, with laws prohibiting layperson ownership of medical practice, these laws are often not enforced, or they are bypassed through “paper owners.” And even when CPOM laws are enforced, the punitive fines are small and seen as “the cost of doing business.” As a result, CPOM laws are insufficient to curtail abuses, and in fact, the American Academy of Emergency Medicine Physician Group has brought a lawsuit against Envision in the state of California for the illegal corporate practice of medicine.<sup>3</sup> However, further review of medical practice acquisitions and mergers is also needed to further protect patients and physicians. AAEM is therefore hopeful that application of Guideline 9 will support such ongoing review and shine greater light on the non-competitive practices that can result from multiple small acquisitions.

With respect to Guideline 11, AAEM strongly supports examination of effects of non-competitive practices on workers given our experience with CMGs and their effects on the employment and medical practice of physicians. CMGs determine who is hired and how many physicians are staffed at one time. In our experience, however, CMGs commonly understaff physicians and create unsafe patient environments by choosing to replace physicians with less costly, under-trained non-physician practitioners (NPP). Our members report that they also encourage physicians to chart more and up-code patients’ bills, as well as pressure physicians to achieve arbitrary operation metrics that are often antithetical to best practices. Furthermore, they increase patient costs by charging out of network fees and increasing surprise billing,<sup>4</sup> as well as encouraging inappropriate admissions.<sup>5</sup> CMGs can also determine how much the physician is paid by collecting their professional fees directly. In such situations, physicians may be prevented from seeing how much is billed and collected in their names, which can lead to fraudulent billing practices and suppression of wages. Moreover, we are aware of several cases where physicians who inquire about billing have been terminated.

Despite these egregious practices, because of CMG domination of the workplace market (up to 40% of emergency departments are currently staffed by CMGs) in many parts of the country, physicians often experience difficulty finding work options outside of corporate groups. Emergency Physicians (EPs) are

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<sup>3</sup> <https://www.aaem.org/envision-lawsuit/>

<sup>4</sup> <https://www.nytimes.com/2017/07/24/upshot/the-company-behind-many-surprise-emergency-room-bills.html>

<sup>5</sup> <https://www.justice.gov/usao-wdnc/pr/emcare-inc-pay-298-million-resolve-false-claims-act-allegations>

unable to compete with these large CMGs in obtaining Emergency Department contracts and are forced to sign non-interference clauses as a condition of employment. EPs are also forced to sign restricted covenants in their employment contracts barring them from seeking employment at other hospitals in their immediate area. Employment contracts also include clauses waiving due process for physicians, which were originally guaranteed to members of the hospital medical staff through the Healthcare Quality Improvement Act of 1986 and are affirmed by the Joint Commission via the Comprehensive Accreditation Manual for Hospitals; too often, physicians are left with no choice but to sign these contracts, only to later be terminated, often for reasons unrelated to patient care, without a fair hearing of their peers. For example, we have seen time and again cases where physicians were terminated for whistleblowing regarding patient safety issues.<sup>6,7</sup>

We believe examination of potential mergers pursuant to proposed Guideline 11 could help to curb some of the abuses noted above.

\* \* \*

Thank you for your consideration of our comments. AAEM would be pleased to serve as a resource to your organizations as you continue to address unfair and noncompetitive business practices. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan S. Jones, MD, FAAEM', with a stylized flourish at the end.

Jonathan S. Jones, MD, FAAEM  
President

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<sup>6</sup> <https://www.seattletimes.com/seattle-news/aclu-joins-ousted-doctor-ming-lin-in-lawsuit-against-bellingham-hospital/>

<sup>7</sup> <https://www.tampabay.com/news/health/doctor-says-she-was-fired-for-reporting-low-staffing-at-brandon-regional/2218497/>