

MEMORANDUM

FOR: Hon. Dan Rayfield (Attorney General)
FROM: Larry Kirsch and John McAnulty, MD
CC: Hon. Lisa Udland (Deputy Attorney General), Tim Smith, Jenn Baker
SUBJECT: The DoJ and the Review of the OHSU-Legacy Transaction
DATE: January 1, 2025 (revised January 23, 2025)

This memorandum discusses various critical roles we respectfully urge the DoJ to play in conjunction with the 180 day OHA/HCMO review of the OHSU-Legacy transaction. It addresses fundamental antitrust issues (including market definition), the analysis of statutory cost, quality, access, and equity criteria, and the tensions between transparency and public engagement and trade secret protection. All of these matters reflect aspects of the DoJ's core missions and competencies. The memorandum stresses the constructive contribution the DoJ is authorized to make to assure a robust and holistic overview of healthcare market consolidations. It underscores the DoJ's capacity to mitigate diminished public trust in state oversight. The memorandum covers procedural questions and does not take any position on the merits of the transaction itself.

By way of introduction, Larry Kirsch, an economist, has decades of experience consulting, teaching, and writing about healthcare regulation and consumer protection. His consulting clients have included numerous state attorneys general, insurance commissioners, local public agencies, trade unions, and state and national consumer organizations. John McAnulty MD, a cardiologist and senior internal medicine specialist, has received the Oregon Medical Association's Doctor-Citizen Award for his contributions to community health and public policy. Most recently, he has focused his public policy participation on issues relating to medical testing.¹

I. Overview

In 2021, the Oregon Legislature enacted one of the most robust, sweeping, and supple legislative safeguards against medico-economic challenges arising from health sector mergers and acquisitions.² The Governor and Legislature, however,

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² HB 2362, codified at ORS 415.500 et. seq. "Oregon has established one of the strongest merger oversight programs in the country". Davison, R. et. al. "A Step Forward for Health Care Market

put administration of the project on a starvation budget where it remains to this day. Implementation of the review process-- OHA's Health Care Market Oversight (HCMO) program—has been stymied, in part, by resource constraints. The complex and contentious OHSU-Legacy acquisition transaction, now in the 180 day comprehensive phase of review, threatens to overwhelm the HCMO process. The DoJ can help forestall that outcome. The Oregon AG's Office is authorized and well-situated to contribute to a robust and coherent HCMO review.³ There are numerous ways the Office could help strengthen the process in the public interest. We discuss several.

The proposed acquisition of Legacy by OHSU promises to have significant—but uncertain-- consequences for individual Oregonians, healthcare institutions, and markets. The novelty and complexity of the pending transaction are likely to pose serious challenges to the capacity of the existing OHA/HCMO review process.⁴ This memorandum argues that the DoJ has the capacity to make important contributions to the breadth and rigor of the OHA/HCMO review process consistent with its broad public interest missions.

Our governance-oriented argument is predicated on three propositions:

- The DoJ is specially equipped to analyze the knotty issues (law and fact) presented by the proposed acquisition. The OHA/HCMO review process will be guided by the criteria defined in the Merger Guidelines promulgated by the U.S. Department of Justice and the Federal Trade Commission and will take advantage of the competitive impact tools related to the Guidelines.⁵ The DoJ has the antitrust expertise and access to the resources needed to contribute to a holistic analysis of the proposed consolidation.

Oversight: Oregon Health Authority's Health Care Market Oversight Program". *Milbank Memorial Fund Report* (March 2023).

³ The Oregon Department of Justice is explicitly authorized to assist OHA with the review of material transactions and may retain external experts, as necessary, at the expense of the Applicants. ORS 415.501(14).

⁴ For a brief discussion of HCMO's restricted capacity, see Kirsch, Larry et. al. Strengthening HCMO: An Issue Paper (September 20, 2024). https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO_Issue_Paper.pdf

⁵ [Antitrust Division | 2023 Merger Guidelines | United States Department of Justice](https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf). "For horizontal transactions under preliminary review, HCMO will use the HHI thresholds specified in the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines to identify transactions that may have anticompetitive effects." See, OHA/HCMO Analytic Framework (@21). <https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf>

- The DoJ has broad legal authority and is in a position to contribute to the analysis of the public health, safety, and community benefits (equity) associated with the proposed transaction.⁶
- The DoJ is most qualified to advise HCMO on the transparency and civic engagement goals (articulated in the HCMO rules) and the applicability of HCMO practices and interpretations related to public records and trade secret protections.

II. DoJ and Competitive Impact Issues

The proposed consolidation of OHSU and Legacy embodies potentially important and diverse competitive consequences for cost, quality, access, and equity-- the HCMO public interest factors---in addition to community benefits, medical education and training, the workforce, and the state’s contribution to medical research and innovation.⁷

Because excess market concentration can trigger systemic dysfunction, the competitive effects of the consolidation call for the most rigorous analysis and enforcement measures. The federal Merger Guidelines that OHA/HCMO has embraced as part of its review process call for three initial determinations: (1) a designation of the products that are presumed to compete with one another, (2) a corresponding determination of relevant geographic markets, and (3) an identification of direct competitors.

We believe DOJ can make significant contributions to each one of these determinations. We draw DOJ’s attention to some of the specific issues we believe are especially noteworthy.

II.A. Product Markets

Conceptually, analysis of product markets calls for a comparison of goods and services that are the same or similar to one another (e.g., apples vs. apples). Economists generally argue that valid analysis of competition requires that rival products be reasonably substitutable for one another as viewed from the buyer’s

⁶ The interest of the state was recently expressed in its amicus brief in the Albertson-Kroger merger. That statement is equally relevant in the context of the instant transaction. <https://www.DoJ.state.or.us/wp-content/uploads/2022/11/2022.11.09-Full-Filing-Documents-Amicus.pdf>

⁷ In its Preliminary Report on this matter (November 4, 2024) HCMO summarized its central objective as being an assessment of “the scale and scope of the entities’ operations and services in Oregon, how the transaction could potentially affect consolidation and competition in Oregon’s health care markets, and implications for access to services, health care costs, health equity and quality” (@24). The primary conclusion reached by HCMO was: “More analyses are needed to fully understand all the statewide impacts of the proposed transaction on Oregon residents” (@27). <https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-Preliminary-Report.pdf>

perspective.⁸ In the healthcare context, patients in need of gall bladder surgery may respond to a price or insurance copayment increase, a perceived decline in quality (e.g. brought about by a nursing shortage), or reduced convenience (scheduling delays) by switching their patronage (at least for gall bladder surgery) to a neighboring hospital and staff known to offer comparable services. When product comparisons come closer to “apples vs. oranges”, patients find it difficult to make cost-benefit evaluations and to adjust demand and price offers to reflect differences in perceived quality and cost.⁹ The result is an attenuation of market constraints.

The OHSU-Legacy transaction involves the acquisition of a community hospital network (Legacy) by an Academic Medical Center (AMC). This horizontal consolidation raises issues relating to the definition of reasonably homogeneous (substitutable) products and the empirical determination of whether OHSU produces an amalgam of product (services) that are substantially the same or similar and are directly competitive with those of community hospitals in its service area. Calculation of market shares and assessment of competitive conditions before and after consolidation hinges, crucially, on the validity of product and product market definitions. The Applicants involved in this transaction have argued that OHSU, Legacy, and rival community hospitals in OHSU’s service area produce substantially homogeneous, substitutable products. In furtherance of that proposition, they define and measure the products produced and subject to calculation of market share as “total hospital discharges”.¹⁰

This proposition and the metric proposed by Applicants are based on questionable assumptions. First, total hospital discharges as a comparative metric may be overinclusive: OHSU offers certain unique “quaternary” services such as Level I trauma care, experimental cancer protocols, and high acuity care that are not provided by other area hospitals.¹¹ Including these services in the aggregate unit of comparison undermines the bedrock principles of homogeneity and product comparability. Further, data comparing differences in the complexity, cost and other essential facets of hospital discharges strongly suggest that the “products” (services) offered by AMCs and community hospitals are not usually homogeneous

⁸ For a brief survey, see Gaynor and Pflum (2017). “Getting Market Definition Right: Hospital Merger Cases and Beyond”. *CPI Antitrust Chronicle*, 1(1).

⁹ As used here, buyers include individuals, commercial and other health plans, government purchasers, etc.

¹⁰ See, HCMO Notice Question 16 - Exhibit 1: Market Shares and Herfindahl Hirschman Concentration Index Data <https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-HCMO-Notice-Question-16-Exhibit-1.pdf>. For state and national data on hospital market shares based on hospital discharges, see, Grover, Atul. “Why Market Power Matters for Patients, Insurers, and Hospitals” <https://www.aamcresearchinstitute.org/our-work/data-snapshot/why-market-power-matters>

¹¹ Certain tertiary level services may also be unique at OHSU. This is clearly an empirical question.

and that sufficiently valid comparisons (and market share analyses) call for refinements to control for significant product differences.¹²

One approach taken in transactions involving AMC's and Community Hospitals has been to define and compare products restricted to the subset of hospital discharges that are overlapping. Making an adjustment of that sort would recognize that community hospitals directly compete with AMC's for certain categories of services—e.g., less complex inpatient services-- but not others—e.g., highly specialized tertiary and quaternary services.¹³ One potentially significant consequence of a modification of the sort proposed would be a change in the market share calculation for OHSU-Legacy as reflected in the HHI.

We are not aware of any other OHA/HCMO Preliminary or Comprehensive Review that has considered the fundamental question of product homogeneity in its Product Market analysis. The Comprehensive Review of OHSU-Legacy should examine the issue and the feasibility of improving the analysis. We suggest that the expertise of the DoJ could make a very significant contribution to a determination whether a refinement of this type is called for from an antitrust perspective and how it should proceed.¹⁴

II.B. Geographic Markets

Definition of the relevant geographic market poses a related set of issues. HCMO has adopted a frequently used methodology: defining a hospital's Primary Service Area as one that represents a 75% cumulation of contiguous zip coded hospital discharges.

A key issue in this case is whether "total hospital discharges" or some subset of discharges (e.g. "overlapping hospital discharges") is the appropriate unit to be incorporated in geographic market analysis. As discussed above (product market

¹² See, for an example, the California Department of Health Care Access and Information. [https://data.chhs.ca.gov/dataset/case-mix-index#:~:text=The%20Case%20Mix%20Index%20\(CMI,by%20the%20number%20of%20discharges](https://data.chhs.ca.gov/dataset/case-mix-index#:~:text=The%20Case%20Mix%20Index%20(CMI,by%20the%20number%20of%20discharges)

¹³ For an example, see *ProMedica Health System v. FTC*, 749 F. 3d 559 (2014). And, FTC Complaint in the Matter of RWJ Barnabas Health and Saint Peter's Healthcare System (Docket No. 9409) https://www.ftc.gov/system/files/ftc_gov/pdf/D09409RWJP3ComplaintPublic.pdf (June 2, 2022). The *ProMedica* case provides an extended template for analyzing questions about homogeneity and casemix variation in the hospital market. Nevertheless, as Capps and colleagues pointed out in a law review article discussing *ProMedica*, most antitrust litigants have accepted aggregate output measures such as "total hospital discharges", "inpatient days", or "hospital admissions" and have not taken the additional step of refining these metrics. Capps, "The Continuing Saga of Hospital Merger Enforcement". 82 *Antitrust Law Journal* 2 (2019). Administrative convenience is probably the best single explanation.

¹⁴ See the appendix to this memorandum titled: Note: The Practical Indicia Approach to Hospital Product Definition.

definition), we believe total discharges may be over-inclusive and thus suggest that some refinement such as overlapping discharges might be more appropriate.¹⁵

DoJ is well situated to contribute to the analysis of the PSA/geographic market issue from an antitrust perspective. Using a subset of discharges might shrink the number of zip codes and make the relevant geographic market more compact and contiguous to the competing hospitals. This would have important implications for the calculation of market concentration, legal presumptions about anticompetitive impact, and conclusions.¹⁶

II.C. Competitor Identification

The Applicants presume that Kaiser hospitals should be included as competitors in the market share and concentration analyses. HCMO did not question this assumption in its preliminary review. Since Kaiser is a closed-panel system, its hospitals do not serve non-Kaiser patients and its insurance does not offer non-emergency coverage in non-Kaiser owned hospitals. The question is whether Kaiser or other closed-panel providers (e.g. the VA Hospital) should be considered as direct competitors. We recognize that the question may raise issues of law that are appropriate for DoJ determination.

II.D. Alternatives to Full Consolidation

Depending on the overall objectives of the Applicants, numerous alternatives to the outright acquisition of Legacy by OHSU may be available for satisfying their priorities. In a recent matter involving the proposed merger of the SUNY Upstate Medical Center (NY State Medical School) with the Crouse Hospital System (a community entity) in the Syracuse, NY region, staff of the FTC provided extensive critical commentary to the New York State Health Department related to the merger.¹⁷ A year later, the Applicants opted to accept a more limited working agreement to achieve some portion of their objectives in lieu of pursuing a full consolidation. Should OHSU and Legacy decide to follow a similar course of action, the DoJ would be well-positioned to provide information about models that would minimize the risk of antitrust liability.

III. DoJ and Quality of Care Issues

In the Comprehensive Review phase, OHA/HCMO will be called upon to make determinations relating to the “likely impact” of the proposed consolidation on

¹⁵ We have been unable to identify a single instance in which OHA/HCMO has defined a hospital PSA as being a subset of total hospital discharges such as overlapping hospital discharges.

¹⁶ There are data, software, and methodologies DoJ and the OHA/HCMO analysts could draw on to explore this issue.

¹⁷ Federal Trade Commission Staff Submission to New York State Health Department Regarding the Certificate of Public Advantage Application of State University of New York Upstate Medical University and Crouse Health System, Inc. (October 7, 2022).

quality of care.¹⁸ We fully recognize that quality of care definitions and measurements are complex and challenging. For that reason, making optimal use of the various internal and external programs—professional, public, and voluntary—that are designed to spot quality problems, assay corrective strategies, and track, monitor, and report quality trends at OHSU and Legacy, will be essential.¹⁹

Without getting into excessive detail, we would simply point out that a tabulation of quality of care performance metrics compiled by the OHSU-Legacy Applicants and submitted to OHA/HCMO suggests that quality of care appears to be a significant problem area. The most relevant exhibit provided by Applicants reveals that OHSU currently fails its own performance standards in more than half the fifteen categories reported; Legacy fails its goals in a third of them.²⁰

The challenges facing OHA/HCMO in the Comprehensive Review will be to: (1) fully understand the nature and extent of the quality problems at-hand, (2) critically evaluate the case made by Applicants that consolidation is the key to an effective remedial strategy, (3) determine if there are reasonable methods for evaluating and reporting outcomes at periodic checkpoints, and (4) determine if OHA/HCMO have developed an effective compliance mechanism.

To obtain a better understanding of how OHA/HCMO has approached quality of care in the past,, we reviewed the Falcon Hospice and the Amazon-One Medical transactions (the most relevant cases for this purpose)--both of which have already completed the 1-year follow-up stage.

III.A. Falcon Hospice

In the Preliminary Review, OHA/HCMO raised general concerns about quality of care among hospices owned by private equity investors and committed itself to monitor and to make specific findings starting with the Year 1 Follow-Up Review.

¹⁸ Based on the literature of healthcare quality, it is more than likely that the OHSU-Legacy consolidation will have a mixture of positive, negative, and neutral effects on quality of care. For that reason, isolating the separate components and developing a composite estimate of their impact should be a focal point of the quality review process.

¹⁹ They include, among others, the NCQA and the Joint Commission (hospital accreditation), the Centers for Medicare and Medicaid Services, the quality improvement programs and survey data (e.g. CAHPS) at the respective hospitals, departments, and professional levels. Additional compilations are noted in HCMO Notice Question 15 - Exhibit 1: Current OHSU and Legacy Health Performance on Quality Metrics.

²⁰ See, HCMO Notice Question 15 - Exhibit 1: Current OHSU and Legacy Health Performance on Quality Metrics

In its First Year Follow-Up Review, OHA/HCMO failed to report or analyze quality metrics and deferred this aspect of its review until Year 2. The second year review is currently in-progress.²¹

III.B. Amazon-One Medical

OHA/HCMO approved the transaction conditioned on a semi-annual reporting of quality metrics for the first five years of operation. It committed to analyzing the impact of the consolidation on quality of care starting with the first follow-up review. It identified threats emanating from an over-reliance on virtual care and the potentially adverse impact of the business model's cost-cutting efforts. It also reported concerns about the capability and operation of the electronic health record system.

In its First Year Follow-Up Report, OHA/HCMO reported that the Applicants provided a limited subset of tracking data.²² OHA/HCMO did not report a quantitative analysis of those data and limited itself to several qualitative and word-of-mouth observations as well as an indication drawn from a commercial patient satisfaction survey.²³ It stopped far short of reporting the impact of the consolidation on quality of care; it did not comment on future plans for stepping-up performance reporting; nor on specific intentions for holding Applicants accountable for meeting their initial undertakings and commitments.

We believe this brief overview of quality of care analysis at baseline and one-year follow-up suggests some of the more extensive challenges OHA/HMO will face in the Comprehensive Phase of the OHSU-Legacy transaction. This is relevant to the DoJ because it has the broad public-interest and citizen and consumer protection perspectives needed to strengthen the review process and to provide meaningful public safeguards.

IV. DoJ and Access Issues

OHSU's mission and the stated "access" goals for this transaction---"improve access to high quality, affordable health care for the people of Oregon, and in particular for

²¹ OHA/HCMO claims that its review process has improved since Falcon was initially reviewed. We look forward to the second follow-up review to test that proposition.

²² It reported having received just a few of the quality indicators had committed to track.

²³ It should be noted OHA/HCMO indicated that the Applicants claimed unconditional data confidentiality and that their claim was un-challenged. We are unable to rule out the possibility that OHA/HCMO has had access to further reporting and has reached unpublished conclusions about the impact of the transaction on quality. Given the concerns cited at the preliminary stage and the subsequently reported volatility of Amazon-One Health operations in Oregon, we believe there is a non-trivial public interest argument to be made for full disclosure of quality related information.

underserved populations”—seem to align with corresponding access goals adopted by the Legislature and embraced by OHA.²⁴

Based on our review of the public documents made available in the preliminary filing, it is far from clear specifically what access-improving actions the Applicants are committed to initiate, to what extent they will reach underserved populations, and whether they will add, materially, to services that would otherwise be provided in the absence of the proposed acquisition. Whether and how the Applicants propose to integrate their teaching, research, and community service resources to achieve the goal of greater access to underserved populations is one area that calls for more detailed definition. For instance, will the Applicants commit to an expansion of community-based clinics, workforce opportunities, teaching and training rotations, access to cutting edge clinical research protocols?

As part of the HCMO authorizing legislation, the Legislature suggested the importance it ascribed to expanded access when it created a balancing test that involved expanded access and improved health outcomes on the one-hand versus elevated levels of merger-driven market concentration on the other. It contemplated that the balancing would take place during the Comprehensive Review phase of the transaction.²⁵

It goes without saying that the actual process of conducting a balancing test of this sort would be elusive and highly controversial as a matter of public policy. At a minimum, the DoJ would do well to advise whether such a balancing procedure would demand a separate rulemaking and how, if at all, the Community Review Board would be able to engage in this conversation.

V. DoJ and Civic Engagement, Transparency, and Trade Secrets Issues

OHA/HCMO faces acute tensions between the competing objectives of transparency and active citizen involvement in the various stages of the review process on the one hand and the protection of legitimate non-public and trade secret information on the other.²⁶

The basic framework governing OHA/HCMO’s Material Change filings allows Applicants to file data and information under a self-designated claim of confidentiality and/or trade secret protection. Claims are to be recorded in a

²⁴ OHA/HCMO Preliminary Review Report <https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-Preliminary-Report.pdf> @ 20; ORS 415.501(9) https://oregon.public.law/statutes/ors_415.501; OAR 409-070-0060(6).

²⁵ *Id.* OAR 409-070-0060(6). Another way to understand the balancing provision is to consider it as an explicit inducement to get hospitals and healthcare providers to expand services to underserved populations.

²⁶ HCMO Criteria for Convening a Community Review Board <https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Community-Review-Board-Criteria.pdf>

publicly available redaction log accompanied by a short summary of the basis for the claim. OHA/HCMO enjoys the right to challenge any claim on its merits and/or to counteract the claim on the basis of countervailing public interest.

In the Preliminary Review Phase of this transaction, the Applicants heavily redacted portions of their filing as well as their responses to numerous information requests submitted by OHA/HCMO. Redactions covered a wide range of topics including but not limited to the scope and objectives of the proposed acquisition of Legacy Health, financing and financial projections, clinical quality, governance arrangements, services and service areas, and others. It is reasonable to assume that the redacted data contain information that is at least relevant—if not dispositive—in terms of the evaluation of the proposed M&A.

In response to a public records request filed by one of the co-authors of this memorandum, OHA/HCMO reported that in the Preliminary Stage of its review, it had not challenged the substance of any claimed redaction. Nor had it required a modification, denied or required the unmasking of any redactions, or asserted a countervailing public interest in the disclosure of redacted information. It did commit itself, however, to pursuing a more thoroughgoing consideration of these issues in the Comprehensive Phase of the process.

In further response to a public records request, OHA/HCMO asserted that it would not undertake to share non-public information with members of the Community Review Board (CRB) slated for appointment pursuant to statute. The mission of the CRB is to provide critical external evaluation and recommendations concerning all facets of the M&A proposal. In an earlier communication, the suggestion was made to OHA/HCMO that it might designate members of the CRB as “advisors or consultants” much as any other specialists retained to provide analyses or advice in this matter. The obvious point was that the CRB could not possibly perform its designated review functions without access to the data and information redacted by the Applicants. OHA/HCMO has not replied to that suggestion; nor has it offered any alternative.

This set of issues bearing on public records and trade secrets is plainly in the DoJ’s wheelhouse.²⁷ Because this case presents so many questions vital to the public interest in the consolidation of hospitals, we suggest that the DoJ take a forward looking role in clarifying and balancing the interests and tensions between transparency and public engagement and confidentiality and trade secret protection.²⁸

²⁷ See, Oregon Sunshine Committee Special Projects Subcommittee Recommendations regarding trade secrets March 16, 2022; the Sunshine Committee also approved a recommendation from a member at its meeting of March 20, 2024 to take up the specific issue of trade secret redactions in the context of OHA/HCMO reviews. To our knowledge, there has been no progress made on that recommendation.

²⁸ We also draw your attention to the following statement made by OHA/HCMO in its report of the one-year follow-up of the Falcon Hospice transaction (August 2024). “The entity has asserted that much of the information it provided in its submissions to OHA is confidential and unconditionally

Appendix

Note: The Practical Indicia Approach to Hospital Product Definition²⁹

A central issue addressed in this memorandum has to do with the definition of the relevant product market consistent with the application of the 2023 Merger Guidelines as well as medical care and industry financial practices. The definitional issue is likely to have an important bearing on the way OHA/HCMO understands the market power of the Applicants and the competitive effects of the proposed consolidation in the relevant geographic area. It reflects a situation in which both hospital systems produce a cluster of inpatient services at differing levels of care (ranging from “primary” to “quaternary”) and where the respective clusters are not necessarily perfectly fungible.³⁰

The immediate question for OHA/HCMO is how to define the cluster of products that should go into the calculation of market share for purposes of competitive market analysis.³¹ The Applicants proposed a cluster of acute inpatient care at all levels of care (primary-to-quaternary) with the exclusion of discharges for normal newborn, mental health, substance abuse, and rehabilitation services. Clark and Cowlitz County Washington hospitals were included along with acute care hospitals in Oregon.

In general terms, the available options for defining product markets range from a fully inclusive product definition along the lines of “total inpatient hospital discharges” sold by each Applicant in the relevant geographic market to narrower ones such as the subset of inpatient discharges sold by both Applicants (“overlapping inpatient hospital discharges”) and/or the overlapping discharge option with various exclusions.³² The alternative renderings tend to give different readings of competitive conditions in the market and affect the calculation of market shares.

The purpose of this Note is to draw the DoJ’s attention to several hospital merger cases in which a more inclusive definition of product markets— “total hospital

exempt from release to the public pursuant to ORS 415.501(13)(c) and ORS 192.345(2). This report only includes information that has not been designated as confidential.”

<https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/002-Falcon-Hospice-1-Year-Follow-Up-Report.pdf> This statement about unconditional exemptions (and the Authority’s failure to challenge or comment on it) raises important questions about OHA/HCMO’s understanding of the public record and trade secret exemptions available to Applicants.

²⁹ Co-authors of this Note are: Hannah Kim and Mia Barrett (Members of the State Policy Advocacy Clinic, Cornell University) and Larry Kirsch

³⁰ Services other than inpatient hospital care are not considered here.

³¹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) remains the leading case on the definition of product markets.

³² For a discussion of principles that some courts have considered to inform their analysis of clustering algorithms, *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

discharges from competing general acute care hospitals (GAC)”—was rejected in favor of one of several narrower definition limited to discharges for a cluster of services produced by both hospitals.³³ This note will refer to the narrower approach as the “practical indicia” approach following terminology referred to in §4.3(C) of the 2023 Merger Guidelines.

The 2023 Guidelines state that in lieu of a broad measure such as “total GAC discharges”, the “relevant market may be identified more narrowly from evidence on observed market characteristics (“practical indicia”) such as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Various practical indicia may identify a relevant market in different settings”.³⁴

The 2023 Merger Guidelines contemplate a reasonable degree of flexibility in the choice of product market definitions. They acknowledge a range of potential tradeoffs including those between precision and administrative simplicity. They provide options for defining product markets that aim to balance practicality consistent with the preservation of market competition.

The purpose of this Note is not to suggest that given the facts alleged in the proposed consolidation, OHA/HCMO or DoJ should favor one approach over another. Rather it is to urge the DoJ in consultation with OHA/HMCO critically evaluate the spectrum of product market definitions available under the Merger Guidelines and appropriate to the case at hand.

Appendix 1. The Practical Indicia Approach in Selected Hospital Merger Cases

Various court decisions and administrative actions have highlighted the practical indicia approach to product market definition in the hospital environment. This Note will identify three such cases:

- *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).
- *In the Matter of RWJ Barnabas Health/Saint Peter's Healthcare System, Federal Trade Commission*. Merger withdrawn. (See, Docket Number 9409 Order Dismissing Complaint, June 23, 2022).
- *FTC and State of Illinois v. Advocates Healthcare Network*, 841 F.3d 460 (7th Cir. 2016).

³³ Another common proviso is that the GAC cluster is covered by commercial insurance carriers including managed care organizations. May and Noether, “Unresolved Questions Relating to Market Definition in Hospital Mergers”. 59(3) *The Antitrust Bulletin* (Fall, 2014).

³⁴ For a collection of cases and an extended discussion of the spectrum of product market definitions that have meet the approval of various courts, see, *Staley et. al. v. Gilead Sciences, Inc.* Amicus Brief of the Federal Trade Commission (USDC ND California, Case No. 3:19-cv-02573-EMC filed 10/25/19).

Appendix 2. ProMedica Health System v. FTC

This complex case posed a myriad of issues ranging all the way from structural remedies (divestiture) to product market definition.³⁵ The case involved two competing GAC systems (ProMedica and St. Luke's) in a four hospital geographic market-- the Lucas County area (Toledo, OH). The product market definitional issue turned primarily on differing concepts of clustering. The 6th Cir. upheld the position asserted by the FTC and the decision of the trial court, finding that a cluster could be defined by reference to the comparability of underlying competitive conditions.

The competitive conditions for hospital services include the barriers to entry for a particular service— *e.g.*, how difficult it might be for a new competitor to buy the equipment and sign up the professionals necessary to offer the service—as well as the hospitals' respective market shares for the service and the geographic market for the service. If these conditions are similar for a range of services, then the antitrust analysis should be similar for each of them. Thus, if the competitive conditions for, say, secondary inpatient procedures are all reasonably similar, then we can cluster those services when analyzing a merger's competitive effects. (Internal citations omitted).

The Appeals Court determined that a narrower, practical indicia definition of clustering, was consistent with competitive conditions in the Lucas County hospital market. Tertiary services and quaternary services were excluded from the cluster because of differing supply (including professional services), demand (patient preferences) and industry factors (insurance contracting practices) applicable to these categories. The same logic applied to inpatient obstetrics where demand (and the decisive constraint of distance to service) was singled out for special attention as a basis for exclusion from the overall GAC cluster.

Appendix 3. Barnabas-St. Peters v. FTC

This case directly involved the proposed purchase of the St. Peter's Hospital (a nonprofit community provider in New Brunswick, N.J) by the Robert Wood Johnson System, a dominant academic medical center also located in New Brunswick. Following the proposed consolidation, two other hospitals were slated to remain in Middlesex County, the Hackensack and Penn-Princeton Hospitals.

In its complaint against the merger Applicants, the FTC defined the relevant product market as all overlapping GAC inpatient services in which competitive conditions were generally comparable. As distinct from ProMedica, tertiary, quaternary, and obstetrics services were incorporated in the cluster while inpatient psychiatric, substance abuse, and rehab services were excluded on the grounds of unique marketplace conditions.

³⁵ See, Capps, "The Continuing Saga of Hospital Merger Enforcement". 82(2) *Antitrust Law Journal* (2019) for an analysis of this case.

Using these practical indicia, the FTC calculated the HHI concentration ratio and determined that the hospital acquisition was likely to have a substantial adverse impact on competition in the relevant geographic market area. Ultimately, the Applicants withdrew their proposed consolidation proposal.

Appendix 4. FTC v . Advocates Health Network

In the third case, the FTC and the State of Illinois filed for injunctive relief from a proposed merger between Advocates Healthcare Network and the NorthShore Health System, both large multi-hospital networks offering service in Chicago’s Cook and Lake County service area. I

As in the ProMedica matter, the product market was clustered broadly to include overlapping inpatient services marketed under common competitive conditions. Excluded services included some tertiary and quaternary services as well as psychiatric inpatient, substance abuse, and rehab.

Appendix 5. FTC v. Wilhelmsen Holding

In the Wilhelmsen matter (involving the definition of product markets in the marine product industry), the U.S. District Court cited *ProMedica* favorably for the proposition that “clustering multiple types of hospital services for the purposes of analytical convenience where competitive conditions were similar” was one of many pro indicia approaches available to the FTC. In Willhelmsen, the FTC alleged that excluding certain products from the competition-relevant cluster was not unreasonable because specialized marine services firms created separate and unique market dynamics. In the hospital context, the same argument could be made for services that insurers carve out of their general inpatient hospital packages and rate, negotiate, and sell separately.

Appendix 6. Conclusion

This brief note discusses the application of a flexible practical indicia approach to the definition of product markets in the context of the OHSU-Legacy consolidation. Although this approach offers a pragmatic way to balance actual market considerations with the preservation of competitive conditions, making the balance work in practice calls for independent, expert analysis of market conditions and institutional practices.

We believe it would be desirable for the DoJ—as part of its general oversight of antitrust—to contribute to the analysis of market definitions, taking advantage of the resources and expertise as contemplated in the statute.

In Closing

We respectfully submit these comments for your attention and request an early opportunity to discuss these matters with you and your team. We stand ready to assist the DoJ and other stakeholders however we can and to bring public attention to important stakes involved.

