



California Public Employees' Retirement System

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

May 26, 2025

Subject: Anticompetitive Regulations Task Force Press Release (Docket No. ATR-2025-0001)

Dear Assistant Attorney General Slater,

On behalf of the California Public Employees' Retirement System (CalPERS), I am writing in response to the Antitrust Division's request for comment on the work of the Anticompetitive Regulations Task Force. We appreciate the Task Force's efforts to identify barriers to competition, especially in health care markets. We agree that health care consolidation continues to drive up health care costs and believe federal action to address anticompetitive consolidation is vital.

With more than 1.5 million members, CalPERS is the largest commercial health benefits purchaser in California and the second largest commercial purchaser in the nation after the federal government. We 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 believes that increased competition promotes lower prices and higher quality while providing greater value to our members.

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

- **Strengthen Antitrust Enforcement**
 - Increase oversight of mergers and acquisitions among health care entities and require more transparency and data reporting of market activities to better track spending and identify inefficiencies, unnecessary costs, and waste;
 - Conduct more state-federal joint investigations into alleged anticompetitive behavior among health care entities;
 - Prohibit the use of anti-tiering and anti-steering clauses in contracts between health plans and health care providers; and
- **Increase Federal Trade Commission (FTC) Action Against Pharmaceutical Anticompetitive Practices**

- Address abuses such as “product hopping” and “sham citizen petitions” that are filed with the Food and Drug Administration (FDA) to create regulatory burden and delay the entry of generic drugs into the market.

Health Care Consolidation in California

In California, hospital competition at the county level has remained low since 2010 and competition among specialist and primary care providers has decreased.¹ Physician groups in California are becoming increasingly vertically consolidated. As of 2018, 52 percent of specialists and 42 percent of primary care physicians were in practices owned by a health system.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 gain leverage to demand price markups, and insurers are hesitant to enter these highly concentrated provider markets, further curtailing competition and perpetuating higher prices for the cost of care. Insurers who do participate in these markets are forced to concede to higher provider contracting rates that are typically passed on to members in the form of higher premiums.

High hospital prices in Monterey County highlight the negative effects of health care consolidation.⁴ From 2018 to 2020, prices paid by employer plans for hospital inpatient and outpatient services were 4.45 times that of Medicare prices and 1.65 times that of median California hospital prices. This disproportion is also demonstrated by geographic price variation. For example, 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.⁵ These stark price disparities underscore the need for policy interventions aimed at controlling health care costs.

Recommendation: Strengthen Antitrust Enforcement

CalPERS offers the following recommendations to address anticompetitive practices in the health care market:

First, CalPERS encourages the Department of Justice (DOJ) and the FTC to strengthen oversight of mergers and acquisitions by health care entities and increase transparency and information reporting regarding potentially anticompetitive transactions. For example, the DOJ and FTC should establish quantitative thresholds for potentially illegal mergers that violate merger guidelines. Clear and objective guidance will support enforcement and potentially discourage anticompetitive mergers. Having these checks and balances in place can reduce the negative consequences that

¹ 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>.

² See CHCF, *Markets or Monopolies? Considerations for Addressing Health Care Consolidation in California*, available at <https://www.chcf.org/publication/markets-monopolies-health-care-consolidation-california/>.

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 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/>.

⁵ Ibid.

often results from anticompetitive mergers, while allowing for increased competition, avoiding unpredictability, and wide variation in the cost of care.

Various state agencies in California have authority to combat anticompetitive behavior across the health care industry. However, a gap exists in state authority to oversee mergers specifically between for-profit hospitals and other providers. As such, CalPERS depends on federal antitrust laws and federal agencies, including the DOJ and the FTC, to address these health care mergers.⁶ Additionally, California's oversight of anticompetitive practices is limited to business in California. Large PBMs are vertically integrated with nationwide health insurers, making federal oversight of these entities essential.

Second, CalPERS urges the DOJ and FTC to conduct more joint investigations, and more state-federal partnerships, into alleged anticompetitive behavior. 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 authority of the state Attorney General (AG). For example, a joint effort by FTC and the state AG resulted in the termination of John Muir Health's anticompetitive acquisition of San Ramon Regional Medical Center, LLC from Tenet Health Care Corporation.⁷ However, given the legal constraints of the state AG and limited public resources at both the state and federal levels, we further recommend the DOJ and FTC authorize state attorneys general to enforce federal consumer protection laws and bolster antitrust enforcement against increasing health care consolidation.

Third, CalPERS recommends the DOJ and FTC remove contractual barriers to market competition by prohibiting the use of anti-tiering and anti-steering clauses in contracts between health plans and health care providers, including vertically integrated health systems. These clauses restrict plans from directing patients to use specific providers and facilities with higher quality and lower prices. Such prohibitions should include enforcement mechanisms that promote compliance.

Recommendation: Increase FTC Action Against Pharmaceutical Anticompetitive Practices

CalPERS offers the following recommendations to address anticompetitive practices in the pharmaceutical market:

CalPERS believes that the FTC's authority should be leveraged to ensure timely market access for low-cost generic drugs. We recommend that the FTC intervene when a petition to the FDA for a generic drug approval has been delayed by over a year due to a sham citizen petition to request a particular action against a pending generic application. The FTC has previously investigated such complaints as potential violations of federal antitrust law, as with the case of Shire ViroPharma, in which the FTC claimed the pharmaceutical company illegally maintained its monopoly power through the citizen petition process.⁸

⁶ See Office of the Attorney General, Attorney General Bonta Combats Anticompetitive Hospital Consolidations, Fights for Affordable and Accessible Health care, available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-combats-anticompetitive-hospital-consolidations-fights>.

⁷ See FTC, Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Health care, available at <https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-john-muir-takeover-san-ramon-regional-medical-center-tenet>.

⁸ See FTC, Shire ViroPharma, available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/121-0062-shire-viropharma>.

Brand name drug manufacturers often use this tactic to create regulatory burden and delay generic drug market entry. The use of such petitions has resulted in generic drug approval delays that well exceed the FDA's 180-day statutory timeframe to review petitions. In some cases, approvals have been delayed by as much as two years.⁹ For instance, between 2011 and 2015, brand-name manufacturers filed 92 percent of the citizen petitions submitted to the FDA. Of these, 92 percent were denied and only eight percent were approved. The low rate at which the FDA grants petitions supports the argument that they are often filed to hamstring the FDA and delay generic entry rather than raise legitimate safety concerns.¹⁰

The FTC also has authority to take legal action against product hopping, another tactic used by brand-name manufacturers to delay generic entry to market. Product hopping occurs when a brand-name pharmaceutical company shifts demand from a brand-name drug that faces generic competition to newly patented and/or exclusivity protected drugs that do not face generic competition.¹¹

In California, a state law to prohibit drug companies from paying competitors to keep generic drugs off store shelves, known as pay-for-delay agreements, was struck down by a district court because it would have unconstitutionally regulated agreements involving parties or pharmaceutical sales that had no link to California.¹² This decision further demonstrates the need for federal intervention to address anticompetitive practices of pharmaceutical manufacturers. As such, the DOJ and FTC, within their legal authority to prosecute violations of the Sherman Act and the Clayton Act, can put an end to these abuses and ensure that lower-cost drugs are readily available to consumers in a timely manner.

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, or Danny Brown, Chief of our Legislative Affairs Division, at (916) 795-2565, if we can be of any assistance.

Sincerely,

Marcie Frost
Chief Executive Officer

⁹ See Bradley Merrill Thompson at Epstein, Becker, Green. Unpacking Averages: FDA's Extraordinary Delay in Resolving Citizen Petitions, *available at*: <https://www.healthlawadvisor.com/unpacking-averages-fdas-extraordinary-delay-in-resolving-citizen-petitions>.

¹⁰ See American University Law Review. Citizen Petitions: Long, Late-Filed, and At-Last Denied, *available at*: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1956&context=aulr>.

¹¹ See FTC, Report on Pharmaceutical Product Hopping, *available at*: https://www.ftc.gov/system/files/ftc_gov/pdf/p223900reportpharmaceuticalproducthoppingoct2022.pdf.

¹² See Courthouse News Service, California Judge Knocks Down State Law Barring 'Pay-for-Delay' Drug Industry Deals, *available at*: <https://www.courthousenews.com/california-judge-knocks-down-state-law-barring-pay-for-delay-drug-industry-deals/>.