May 5, 2021

Richard Powers
Acting Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Antitrust Review of UnitedHealth Group's Proposed Acquisition of Change Healthcare

Dear Acting Assistant Attorney General Powers:

The American Antitrust Institute (AAI) has long advocated for promoting competition and protecting consumers in healthcare, including the pharmaceutical, hospital, health insurance, and healthcare intermediary sectors.[1] AAI writes to express concern that the proposed acquisition of independent digital healthcare technology rival, Change Healthcare, by UnitedHealth Group (UHG) is likely to harm competition and consumers. Such harm could result from the effects of eliminating competition between UHG's information and technology-enabled health services subsidiary, Optum, and Change Healthcare. AAI is also concerned that a larger and more powerful Optum could enhance UHG's incentives to favor its dominant health insurer, UnitedHealthcare, to the disadvantage of rivals. This letter highlights important issues that arise from the unique characteristics of competition in digital technology markets and, more specifically, in digital healthcare technology markets.

I. The Acquisition is a Takeover of an Independent, Disruptive Rival by a Large, Vertically Integrated Health Insurer Seeking to Reinforce and Extend a Position in the Digital Healthcare Technology Market

UHG will pay almost $8 billion in cash and $5 billion in debt to acquire Change Healthcare.[2] At the time of Change Healthcare's IPO in mid-2019, the company was valued at about $1.5 billion.[3] Currently, its market capitalization is about $7 billion, or over a 350% increase in value over the last two years.[4] The premium on the deal is about 40%, which falls within the range of average acquisition premiums in healthcare mergers and acquisitions.[5]

[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, *see,* www.antitrustinstitute.org.
[2] Heather Landi, *UnitedHealth Group's Optum to buy Change Healthcare for $13B*, FIERCE HEALTHCARE, Jan. 6, 2021.
[3] Change Healthcare, Financials, IPO & Stock Price, CRUNCHBASE.COM (queried May 2, 2021).
[4] Change Healthcare Inc., YAHOO FINANCE, Apr. 30, 2021.
[5] Landi, *supra* note 2. The premium is based on acquisition price per share of $25.75 and share price on the acquisition announcement date of $18.75. *See also, OptumInsight and Change Healthcare Combine to Advance a More Modern, Information and Technology-Enabled Health Care Platform*, UNITEDHEALTH GROUP, Jan. 6, 2021 ("UHG Press Release"). Change

UHG is a diversified healthcare company that ranked seventh, by total revenue, in the Fortune 500 in 2020.[6] UHG's revenues in 2020 were $242 billion.[7] UnitedHealthcare is the health insurance subsidiary of UHG. It is the largest health insurance company in the U.S.[8] It sells a variety of commercial and Medicare and Medicaid insurance plans and has a national market share that is one-and-a-half times larger than the next largest health insurance rival, Kaiser.[9] UnitedHealthcare is the first or second largest health insurer in over 20 states, with a vast network of healthcare providers, pharmacies, hospitals, and others.[10]

Optum is a subsidiary of UHG and is an "information and technology-enabled health services" business.[11] Optum features three major business units: OptumRx, OptumHealth, and OptumInsight.[12] OptumHealth focuses on care delivery, care management, wellness and consumer engagement, and health financial services. OptumRx provides pharmacy care services and is one of the three largest, vertically integrated health insurer-pharmacy benefit managers (PBMs), along with CVS-Aetna and Express Scripts-Cigna. The Antitrust Division allowed both of these deals to proceed in 2018 and 2019 without any remedies, or remedies that addressed only horizontal competitive concerns.[13]

OptumInsight provides healthcare data, analytics, research, consulting, technology and managed services solutions.[14] OptumInsight has been UHG's most profitable business unit over the last two years, with revenue and earnings increasing due to growth in technology and managed services.[15] For example, the operating margin for OptumInsight in fiscal 2020 was 25%, almost three times UHG's consolidated operating margin.[16] Optum is considered one of the top players in the healthcare analytics market, along with Allscripts Healthcare Solutions, Cerner Corp., IBM, McKesson, and others.[17] In 2017, UHG/Optum purchased The Advisory Board Company's data analytics and population health technology and consulting division for $1.3 billion, reportedly to "further strengthen its data analytics portfolio."[18]

Change Healthcare is an independent healthcare technology company. It offers products and services in three major areas: software and analytics, network solutions, and technology-enabled

---

Healthcare's debt-equity ratio is about average for the healthcare services industry. *See Health Services: average industry financial ratios for U.S. listed companies*, READYRATIOS.COM. *See also, Average merger and acquisition (M&A) premiums to four-week stock price in the United States (US) in 2017 and 2018, by industry*, STATISTA.

[6] *Fortune 500*, FORTUNE, 2020 (queried May 2, 2021).

[7] *Id.*

[8] *Ten Largest Health Insurers*, BECKERS HOSPITAL REVIEW, Feb. 4, 2020,

[9] *Id.*

[10] COMPETITION IN HEALTH INSURANCE: A COMPREHENSIVE STUDY OF U.S. MARKETS, AMERICAN MEDICAL ASSOCIATION, 2019, at 10-19.

[11] *Form 10-K*, UnitedHealth Group, Inc., 2020, at 1 ("UHG 2020 Form 10-K").

[12] *Id,* at 2.

[13] *See, e.g.,* Letter to Makan Delrahim, Assistant Atty Gen., U.S. Dep't of Justice Re: Competitive and Consumer Concerns Raised by the CVS-Aetna Merger, AM. ANTITRUST INST., Mar. 26, 2018.

[14] UHG 2020 Form 10-K, *supra* note 11, at 2.

[15] *Id.*, at 36.

[16] *Id,* at 38.

[17] *Healthcare Analytics Market Size to Reach USD 40.781 Billion by 2025, CAGR of 23.55%, Valuates Reports*, BLOOMBERG, Apr. 16, 2020. *See also, Top 10 companies in Healthcare Analytics Market*, METICULOUSBLOG.COM, Mar. 4, 2021.

[18] *Top 10 Companies in Healthcare Analytics Market, supra* note 17.

services.[19] Founded in the mid-2000s, Change Healthcare was a startup that proceeded through several rounds of funding, ending with Series D and Venture rounds before an initial public offering (IPO) in mid-2019.[20] Investors in Change Healthcare have included private equity firms Blackstone and Hellman & Freidman.[21] In early 2017, Change Healthcare entered into a joint venture with McKesson, one of the largest medical supplies and information technology distributors, to create a new "healthcare information technology" company.[22] In the process, Change Healthcare took on over $6 billion in debt. In early 2020, only three years after the JV was formed, Change Healthcare bought out McKesson's 70% share.[23] Paying off the debt acquired in the McKesson JV was the major reason Change Healthcare went public in mid-2019.[24]

II. The Acquisition Occurs at the Confluence of Major Disruption and Concerns, Including the COVID-19 Pandemic, Rapid Growth in Digital Healthcare Technology, and High Concentration in Healthcare Markets

UHG's acquisition of Change Healthcare comes at the confluence of several critical developments. AAI has written extensively on the competitive concerns raised by the COVID-19 pandemic.[25] The economic and social disruption spurred by the COVID-19 pandemic has put significant pressure on the profitability of healthcare companies. Indeed, UHG saw a rise in costs in late 2020 as delayed medical visits began to pick up.[26] UHG reported in late 2020 that "As a result of the dynamic situation and broad-reaching impact to the health system, the ultimate impact of COVID-19 on our Optum businesses is uncertain."[27] The full scope of COVID-related effects on health insurers has yet to be seen, but they are likely to be significant. As a result of the pandemic, healthcare insurers are looking to further consolidate to reduce costs. Industry experts note that "Given the financial difficulty that many providers have suffered during the pandemic, this trend is likely to continue, reducing competition and increasing prices."[28]

The burgeoning market for healthcare information technology holds promise to increase efficiency as data analytics—facilitated by artificial intelligence and machine learning and supported by cloud infrastructure—are harnessed to support more efficient exchange of information and support for clinical decision-making. The UHG-Change Healthcare acquisition is riding the wave of growth in digital technology more generally, but in healthcare specifically. Analysts predict the global healthcare analytics market will grow from $11.5 billion in 2019 to almost $41 billion in 2025, or an annual growth rate of 23%.[29] Competition and consumer advocates, such as AAI, have been ringing the warning bells about the wave of consolidation and concentration in many parts of the healthcare

---

[19] Change Healthcare Inc., REUTERS, Apr. 30, 20210.
[20] CRUNCHBASE.COM, *supra* note 3.
[21] Dave Muoio, *Change Healthcare files for $100M IPO to offset debts*, MOBIHEALTHNEWS, Mar. 25, 2019. *See also,* Anca Spanu, *Change Healthcare files for an IPO to cover over $5billion in debts*, HEALTHCARE WEEKLY, Mar. 30, 2019.
[22] *McKesson and Change Healthcare Complete the Creation of New Healthcare Information Technology Company*, MCKESSON.COM, Mar. 2, 2017.
[23] *McKesson Completes Split-off of Its Interest in Change Healthcare*, MCKESSON, Mar. 10, 2020.
[24] Spanu, *supra* note 21.
[25] *See,* AAI resources on competition and COVID-19.
[26] *UnitedHealth's Profit Slips as Health-Care Visits Return*, WALL STREET JOURNAL, Jan. 20, 2021.
[27] UHG 2020 Form 10-K, *supra* note 11, at 33.
[28] Lovisa Gustafsson and David Blumenthal, *The Pandemic Will Fuel Consolidation in U.S. Health Care*, HARVARD BUSINESS REVIEW, Mar. 9, 2021. *See also* *M&A activity expected to surge as independent health systems look for partners*, HEALTHCARE FINANCE NEWS, Aug. 27, 2020.
[29] Bloomberg, *supra* note 17.

supply chain for several years. This includes highlights of failed remedies and unproven efficiencies claims. A recent Harvard Business Review article sums up these well-known concerns: "[s]tudies to date tend to rebut the argument that acquisitions improve efficiencies, reduce costs, and lead to better care coordination. Instead, they show that consolidation increases prices and fails to improve the quality of care."[30]

Moreover, markets in the supply chain cannot be viewed in isolation. Dominant players and oligopolies have bargaining power over upstream suppliers or downstream distributors.[31] This dynamic affects competition, for example, between PBMs in negotiating with health insurers on prescription drug plans, drug manufacturers in negotiating rebates with PBMs, distributors negotiating medical supplies contracts with hospitals, and digital healthcare technology companies bargaining with virtually any participant in the supply chain. In highly concentrated markets along the supply chain, such bargaining produces prices that are set through negotiations between powerful market players, not by a competitive process, to the detriment of healthcare providers and consumers.

These concerns are obvious in the high concentration levels we see in many parts of the supply chain. For example, 3-firm ratios for key segments include: 90% in drug distribution, 80% in health insurance, 75% in PBM, 65% in generic pharmaceuticals, and 40% for branded pharmaceuticals.[32] The quest for bargaining power is a major driver of both horizontal and vertical consolidation as firms seek to "bulk up" to gain leverage over larger rivals or customers and suppliers. Bargaining power is a poor defense for consolidation, yet it continues to surface in merger proposals. The antitrust agencies have not yet tackled this problem in any consistent way.[33] The UHG-Change Healthcare acquisition presents the next challenge for antitrust enforcement in healthcare. That is, namely, the consolidation of digital healthcare technology in the hands of large, vertically integrated healthcare companies, such as UHG.

III. UHG's Acquisition of Change Healthcare Raises Horizontal and Vertical Competitive Concerns That Could Lead to Higher Prices, Lower Quality, Less Innovation, and Increased Healthcare Costs

UHG's acquisition of Change Healthcare raises a panoply of competitive concerns. These include eliminating an important rival in the digital healthcare technology market, but also extending UHG's market power to other markets in its healthcare ecosystem. That ecosystem includes health insurance, pharmacy networks, hospital systems, physician groups, and other assets. Both Change Healthcare and OptumInsight sell products and services to customers in virtually all segments of the healthcare supply chain. Customers include commercial and government payers, employers, hospitals and health systems, physicians and other care providers, life-sciences companies, pharmacies, labs, and consumers.

---

30 Gustafssson and Blumenthal, *supra* note 28.

31 *See,* Laura M. Alexander, *Countervailing Power: a Comprehensive Assessment of a Persistent but Troubling Idea,* AM. ANTITRUST INST., Oct. 15, 2020, *See also*, Germaine Gaudin, *Vertical Bargaining and Retail Competition: What Drives Countervailing Power?*, 128 ECON. J. 2380, 2380 (2018).

32 Diana L. Moss, *From Competition To Conspiracy: Assessing The Federal Trade Commission's Merger Policy In The Pharmaceutical Sector*. AM. ANTITRUST INST., Sep. 3, 2020.

33 But the Obama DOJ blocked the horizontal mergers of Anthem-Cigna and Aetna-Humana. *See*, Complaint at 2, *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) (No. 16-1494) and Complaint at 3, *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017) (No. 16-1493).

Change Healthcare's investor reports note that the company "Compete[s] in the market for data and analytics-driven solutions that help ensure clinically appropriate care, increase efficiency and reduce waste in the healthcare industry."[34] Similarly, OptumInsight offers products and services focused on "healthcare data, analytics, research, consulting, technology and managed services solutions.[35] It is clear, even on the basis of publicly available information, that Change Healthcare provides products and services that compete with those offered by OptumInsight. The acquisition would therefore reinforce a large and growing, strategic digital healthcare technology asset within Optum and UHG's vast healthcare ecosystem. This rests on the collection and enrichment of sensitive patient data and clinical data to facilitate information exchange and transactions among various stakeholders in the healthcare system.

Continued rivalry between OptumInsight and Change Healthcare would, but for the acquisition, likely serve to constrain UHG's exercise of market power in the digital healthcare technology market.[36] Eliminating Change Healthcare could remove this important rivalry. The figure below provides important visual context for what a larger UHG/Optum digital healthcare technology asset would look like. It shows a word cloud based on descriptors for both company's businesses and their more than 20 acquisitions during the period 2011 to 2021 (to date).[37] A larger, post-acquisition Optum would manage myriad data-driven and data-analytic processes to deliver services ranging from revenue- and payment-cycle management, to clearinghouse functions, to support for clinical decision-making, and patient-engagement across physicians, pharmacies, and hospitals.

Products and Services Offered by UHG/Optum and Change Healthcare

An analysis of the specific areas of horizontal overlap between the products and services offered by UHG/Optum and Change Healthcare is not possible without access to confidential information produced as part of DOJ's investigatory process. This fact-finding could reveal that OptumInsight

[34] *Form 10-K*, Change Healthcare, Inc., fiscal year 2020, at 9.
[35] UHG Form 10-K, *supra* note 11, at 2.
[36] Change Healthcare 2020 Form 10-K, *supra* note 34, at 21.
[37] Crunchbase, queried for Change Healthcare, Inc. and Optum.

and Change Healthcare are head-to-head rivals in specific digital healthcare technology products and services, or even a digital healthcare technology "cluster" market.[38] Under either scenario, the acquisition is likely to eliminate Change Healthcare as an important, disruptive rival. If so, UHG/Optum's exercise of market power post-acquisition could adversely affect the price and quality of digital healthcare technology products and services, and reduce choice and innovation for consumers and other stakeholders along the supply chain. Rather than lowering healthcare costs, which are high and rising in the U.S., the acquisition could work to increase them.

Unique features of digital technology markets would "supercharge" UHG/Optum's anticompetitive incentives if it acquires Change Healthcare. For example, reduced incentives to compete could be revealed in less incentive to protect sensitive patient data, and therefore privacy. Protection of personal healthcare data remains a significant concern for patients that are fearful of increases in their insurance premiums, should their insurer obtain adverse information about their health history or medical conditions. But it is well-known that consumers in digital technology markets behave in ways that misalign with the value they place on their privacy. This is because they lack information on how digital ecosystems use their data and the privacy protections available to them.[39] The extraordinary value of "data" is well-known to be central to the value proposition of maximizing profits across the interconnected markets that comprise a digital ecosystem.[40] A larger and more powerful UHG/Optum could have strong incentives to exploit information asymmetries around data and privacy and to reduce quality by violating privacy.

Given UHG's vertical integration into the health insurance market through its UnitedHealthcare subsidiary, expanding Optum's digital healthcare technology capabilities through the acquisition of Change Healthcare creates additional anticompetitive incentives. Post-acquisition, a more powerful Optum could exploit its significantly reinforced and expanded data and data analytics capabilities across a variety of products and services as a healthcare "clearinghouse" to favor its UnitedHealthcare subsidiary, and therefore disadvantage rival health insurers. Here again, the unique characteristics of digital markets could amplify these anticompetitive effects. For example, post-acquisition, Optum could exploit its significantly expanded economies of scale in data and data analytics, and externalities in data.[41] Moreover, Optum could deploy algorithms that create advantages for UnitedHealthcare and disadvantages for rival health insurers. Such an anticompetitive strategy would be very hard for rivals to detect and make it more difficult for them to compete. AAI urges the Antitrust Division to investigate this possibility that, in addition to harming competition and consumers, would create even higher barriers to entry and stymie growth and innovation.

---

[38] Herbert Hovenkamp, *Digital Cluster Markets*, Apr. 15, 2021, COLUMBIA BUS. L. REV. (forthcoming).
[39] *See, e.g.,* Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, 82 Antitrust Law Journal 835 (2019); Thomas C. Redman and Robert M. Waitman, *Do You Care About Privacy as Much as Your Customers Do?* HAR. BUS. REV. (Jan. 28, 2020); Wolfgang Kerber, *Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection*, Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil, 2016; and Agustín Reyna, *The Psychology of Privacy: What can Behavioral Economics Contribute to Competition in Digital Markets?* 8 INT'L. DATA PRIVACY LAW 240 (2018).
[40] Nicholas Economides and Ioannis Lianos, *Antitrust and Restrictions on Privacy in the Digital Economy, 2* CONCURRENCES REVIEW 22 (May 2020).
[41] *See, e.g.,* Emilio Calvano and Michele Polo, *Market Power, Competition and Innovation in Digital Markets: A Survey,* INFO. ECON. & POL., forthcoming, Dec. 1, 2019 and Marc Bourreau, *Some Economics of Digital Ecosystems,* Hearing on Competition Economics of Digital Ecosystems, Directorate for Financial and Enterprise Affairs Competition Committee, OECD, Nov. 13, 2020.

Competition enforcers recognize the types of competitive issues above that are unique to the digital technology markets. For example, in the case of Google's acquisition of Admeld (2011), the DOJ noted the concern that the acquisition would enable Google to extend its market power in Internet search to the display advertising market.[42] Likewise, the European Commission's (EC's) concern in Google's acquisition of fitness wearables maker, Fitbit, was the potential leveraging of Google's enhanced market power in the market for health and fitness data to the broader ad-tech market.[43] AAI encourages the Antitrust Division to consider these similar issues in its investigation of the UHG-Change Healthcare transaction.

IV. UHG's Acquisition of Change Healthcare is Unlikely to Generate Efficiencies That Could Mitigate Harmful Outcomes From the Post-Acquisition Exercise of Market Power

The competitive issues raised by the UHG-Change Healthcare have a number of important implications under the Horizontal Merger Guidelines (HMGs) and Vertical Merger Guidelines (VMGs).[44] The January 6, 2021 announcement lists a number of major efficiencies the parties claim could be obtained through the acquisition. These include: (1) simplifying financial interactions among care providers, payers and consumers and accelerating transition to a real-time and transparent payment system; (2) increasing the speed, accuracy, and informed nature of services with insights drawn from billions of claims transactions and advanced data analytics; and (3) integrating evidence-based clinical criteria and individual health records to deliver clinical decision support at the point of care.[45]

The first two efficiencies claims result directly from combining data and data analytics assets to increase the speed and accuracy of, and thus to simplify transactions and financial interactions between payers, providers, and patients. UHG and Change Healthcare will argue that these improvements could result in merger-specific cost reductions under the HMGs. But such cost savings may well be achievable without the acquisition, through internal reorganization of Optum and more efficient contracting with third parties. Only claimed cost reductions that are achievable through the acquisition *and* provable (i.e., "cognizable") should be carefully vetted. Even then, they must be considered in light of the risk that they can also exacerbate anticompetitive incentives under a fortified and expanded UHG/Optum digital healthcare technology subsidiary.

The parties' third efficiencies claim rests on harnessing the value of clinical evidence and patient data. Enhanced clinical decision support that results from the acquisition is unlikely to materialize in any short-term cost reductions. It is more likely that this type of dynamic efficiency would be achievable only over the longer term, if it is realized at all. There are real questions as to whether these claims are more than speculation. While some industry experts acknowledge the potential for data-intensive and predictive modeling approaches in the healthcare domain, economic and business research reveals that the benefits of data analytics in healthcare are much more limited than in other markets. [46] Studies explain that the healthcare industry "lags behind other major sectors in taking

[42] *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc.*, U.S. Department of Justice, Antitrust Division, Dec. 2, 2011.
[43] *Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions*, EUROPEAN COMMISSION, Dec. 17, 2020.
[44] Horizontal Merger Guidelines, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 2010, at §10 and Vertical Merger Guidelines, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 2020.
[45] UHG Press Release, *supra* note 5.
[46] Gina Neff, *Why Big Data Won't Cure Us,* 1 BIG DATA 117, (2013).

advantage of cutting-edge [data analytics] tools."[47] Moreover, there is "hesitancy about 'overhauling' existing healthcare systems to include data analytics."[48]

Resistance in the healthcare industry to adoption of big data tools reflects the idiosyncratic nature of the healthcare system, but also the significant barriers created by the "unique nature of health care decisions, problematic data conventions, institutionalized practices in care delivery, and the misaligned incentives of various actors in the industry."[49] As another source explained, big data in healthcare faces the formidable "'[F]ive Vs': high volume, complex variety, large velocity, strategic value tradeoffs, and more recently veracity (accuracy, ethics, privacy, socio-cultural meaning)."[50]

The most obvious impediment to the adoption of data analytics in healthcare is in the allocation of responsibility for managing patients between health insurers and providers, which pits the cost-minimization objectives of payers against the quality-of-care maximization objectives of providers.[51] A second concern centers on the role of complexity and the many different stakeholders and professional groups in the healthcare industry. Research finds that healthcare features a professional culture that sees data as potentially posing costs, risks, and liabilities, and additional work, as opposed to a source of value.[52] These biases are likely to vary across the many healthcare professions, each of which has different views about the value and application of big data. Indeed, another study revealed "confusion" and "unrest" among healthcare employees regarding new process standards and analytics capabilities, noting that over time, employees found "workarounds" to new technology.[53]

A third reason to be skeptical of any efficiencies claims in the UHG-Change Healthcare acquisition centers on obtaining and enriching patient data. Experts note that protection of patient confidentiality poses a barrier in obtaining the quality of data needed for predictive analysis.[54] Information collected and exchanged in the healthcare system is highly sensitive. And highly accurate data is required to provide "safer and more personalized care based on patients' medical history, chronic conditions and medications."[55] As noted earlier, patients worry about privacy and data security because it could disadvantage them vis-à-vis insurers. The "life or death consequences" of data and privacy misuse that drive these concerns therefore inherently limit the realization of purported benefits of better data analytic approaches and predictions. Any increased incentives to mis-use patient data and violate privacy would, in fact, not lead to efficiencies, but to *inefficiencies* from the proposed acquisition.

In light of the foregoing concerns, AAI urges the Antitrust Division to scrutinize any claimed benefits surrounding how UHG's acquisition of Change Healthcare will enable better data analytics,

---

[47] Paul B. Ginsburg, Andrés de Loera-Brust, Caitlin Brandt, and Abigail Durak*, The opportunities and challenges of data analytics in health care*, Brookings, Nov. 1, 2018.
[48] Ginsburg, et. al., *supra* note 47.
[49] *Id.*
[50] Kenneth David Strang and Zhaohao Sun, *Hidden big data analytics issues in the healthcare industry*, 26 HEALTH INFORMATICS J. 981 (2020).
[51] Neff, *supra* note 46.
[52] *Id.*
[53] Hillol Bala and Viswanath Venkatesh, *Employees' Reactions to IT-enabled Process Innovations in the Age of Data Analytics in Healthcare*, 23 Bus. Process Mgmt. J. 671 (2017).
[54] Anita Fernandez, *The Opportunities and Challenges of Data Analytics In Healthcare*, ELECTRONIC HEALTH REPORTER, Oct. 22, 2019.
[55] *Id.*

better predictive capability, and enhanced clinical decision-making. Experts note, for example, that "entrenched healthcare delivery systems for some hospitals and institutions that are less likely to support the full adoption of data analytics," with one study revealing that 56% of hospitals have no strategies for data governance or analytics.[56] Given the serious competitive implications of the proposed acquisition, any efficiencies would need to be not only cognizable and merger-specific, but substantial enough to overcome a presumption that the acquisition is illegal under Section 7 of the Clayton Act. UHG and Change Healthcare bear the substantial burden of showing that their deal will not only generate such benefits, but that those benefits will overwhelm adverse effects on consumers from the loss of vital competition.

V. Unique Features of Digital Healthcare Technology Markets Will Make it Difficult to Craft Effective Remedies That Would Fully Restore Competition Lost by UHG's Acquisition of Change Healthcare

AAI urges the Antitrust Division to consider that the significant growth in cloud infrastructure capability through acquisition activity in numerous sectors has proceeded largely unchecked. Forthcoming AAI analysis on digital technology markets emphasizes their unique economic features and the challenges they pose for antitrust analysis. This includes the enormous strategic value of data analytics and cloud infrastructure capabilities that drive the value proposition in digital ecosystems and work to reinforce anticompetitive incentives and the growth of dominant digital players. As the "engine" of growth for any digital ecosystem, cloud infrastructure fuels the exploitation of market failures, economies of scale, and the ability to favor its proprietary products and services through algorithmic processes. These features complicate the crafting of effective remedies that fully restore competition lost by anticompetitive consolidation or conduct.

AAI's forthcoming analysis informs the issues raised by the UHG-Change Healthcare transaction. It indicates that should the DOJ move to challenge the acquisition, finding an effective remedy short of seeking a full-stop injunction will be difficult. Given the strategic value of the acquisition in enhancing market power, any structural remedy requiring the spin-off of all or part of UHG's or Change Healthcare's digital healthcare technology assets would likely "gut" the deal. And conduct remedies would likely run aground given the unique economic characteristics of digital technology markets. It is well known, *even outside the digital context*, that conduct remedies preserve the firm's incentives to exercise market power, encourage workarounds to circumvent the remedy, and require ongoing monitoring and enforcement. This is illustrated, for example, by Live Nation-Ticketmaster's persistent violation of its 2010 consent decree and concerns over post-merger conduct by Comcast and NBCU.

Antitrust conduct remedies are not a good tool for addressing the depth and breadth of problems at issue in the digital technology markets. For example, some have suggested that problematic mergers or conduct be remedied with requirements that the parties keep their databases completely separate, or to establish firewalls between the datasets of suppliers and customers. Others have suggested conditions that require the sharing of data and/or algorithms with rivals. Such conduct remedies would be met with significant resistance by defendants and carry potentially large risks in restoring competition lost by a merger. Combining datasets and data analytics capability is a major strategic reason behind many mergers and acquisitions of digital technology assets. Forcing separations, firewalls, or data-sharing would create strong incentives to find workarounds to the remedies,

---

[56] Ginsberg, et. at., *supra* note 47.

significantly limiting their effectiveness. Such remedies would be extraordinarily difficult for antitrust enforcer and courts to monitor and enforce.

VI. Conclusions

The substantive issues of competition and antitrust analytics raised by UHG's proposed acquisition of Change Healthcare are summarized below. In light of these concerns, AAI urges the Antitrust Division to apply careful scrutiny. The U.S. healthcare system is under siege by consolidation and concentration. The current matter provides an important opportunity for the Antitrust Division to move the ball forward on protecting competition in critically important healthcare markets, but also in leveraging its knowledge of digital technology markets and the unique challenges they pose for competition.

1. The proposed acquisition is a takeover of an independent, disruptive digital healthcare technology company by the largest, vertically integrated health insurer in the U.S. Consolidation in the digital technology sector more broadly has flown under the antitrust "radar" for two decades, including significant and rapid consolidation involving data analytics and cloud infrastructure that is at the heart UHG-Change Healthcare acquisition.[57] The Antitrust Division has an opportunity here to address the problematic accretion of market power in digital healthcare technology markets.

2. The timing of the acquisition occurs at the intersection of COVID-19 disruption, rapid growth in digital healthcare technology markets, and high and rising concentration in critical healthcare markets. This confluence of factors highlights the high stakes nature of the Antitrust Division's investigation into the proposed acquisition of Change Healthcare by UHG/Optum that, among other adverse effects, could stifle innovation in a critical sector.

3. UHG's acquisition of Change Healthcare raises myriad competitive concerns. These include elimination of head-to-head rivalry in digital healthcare technology markets in which UHG's Optum competes. But competition concerns also include stronger incentives for UHG/Optum to favor its own healthcare insurer, UnitedHealthcare, and disadvantage rivals, thus harming competition. Unique economic aspects of digital technology markets significantly exacerbate these competitive concerns.

4. Given the competitive concerns raised by the acquisition, any efficiencies claims should be viewed with extreme skepticism. Such efficiencies are likely to be achievable without the acquisition. And the many unique features of digital healthcare technology markets that amplify anticompetitive incentives and abilities would likely diminish the purported value of claimed efficiencies. This significantly raises the bar for UHG-Change Healthcare to prove their transaction is not anticompetitive.

5. Structural divestiture remedies, if included in a settlement agreement, would gut the gains from the strategic accretion of market power that motivates UHG's acquisition of Change Healthcare

[57] *See, e.g.,* Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AM. ANTITRUST INST., Jul. 8, 2019 and Diana L. Moss, *Update on Digital Technology: The Failure of Merger Enforcement and Need for Reform*, AM. ANTITRUST INST., Mar. 3, 2021.

and likely force the parties to abandon the deal. Given the unique features of digital technology markets, antitrust conduct remedies, applied in the digital healthcare technology markets at issue here, would be highly unlikely to restore competition.

6. The U.S. healthcare system is under siege by consolidation and high and rising concentration, to the proven detriment of consumers and healthcare providers. The current matter presents an important opportunity for the Antitrust Division to advance the ball on protecting competition in critically important healthcare markets, but also to leverage its knowledge of digital technology markets and the unique challenges they pose for competition enforcement.

Sincerely,

Diana L. Moss
President
American Antitrust Institute
1025 Connecticut Ave. NW
Suite 1000
Washington DC 20036
dmoss@antitrustinstitute.org