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FEDERAL TRADE COMMISSION

[File No. 181 0057]

UnitedHealth Group and DaVita; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement; Request for Comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Agreement Containing Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders -- embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: "UnitedHealth Group and DaVita; File No. 181 0057" on your comment, and file your comment online at https://www.regulations.gov by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor,

Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Joshua Smith (202-326-3018), *jsmith3@ftc.gov*, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for June 19, 2019), on the World Wide Web, at https://www.ftc.gov/news-events/commission-actions.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. Write "UnitedHealth Group and DaVita; File No. 181 0057" on your comment. Your comment - including your name and your state - will be placed on the public record of this proceeding, including, to the extent practicable, on the https://www.regulations.gov website.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online through the https://www.regulations.gov website.

If you prefer to file your comment on paper, write "UnitedHealth Group and DaVita; File No. 181 0057" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at https://www.regulations.gov, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential" – as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Website – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from the FTC Website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at http://www.ftc.gov to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see https://www.ftc.gov/site-information/privacy-policy.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from

UnitedHealth Group Incorporated ("UnitedHealth Group"), Collaborative Care Holdings, LLC, DaVita Inc. ("DaVita") and DaVita Medical Holdings, LLC (collectively, "Respondents") to remedy the anticompetitive effects that otherwise would result from UnitedHealth Group's acquisition of DaVita Medical Group ("DMG") (the "Proposed Acquisition") in Clark and Nye Counties, Nevada (the "Las Vegas Area"). The proposed Consent Agreement, among other things, requires UnitedHealth Group to divest DMG assets related to the Healthcare Partners of Nevada ("HCPNV") business to IHC Health Services, Inc. ("Intermountain Healthcare") or another buyer approved by the Commission.

On December 5, 2017, UnitedHealth Group entered into an equity purchase agreement to acquire DaVita's DMG division. The Proposed Acquisition would combine the two largest managed care provider organizations ("MCPOs") in the Las Vegas Area. The Proposed Acquisition would also combine DMG's MCPO with the largest Medicare Advantage insurer in the Las Vegas Area. On June 17, 2019, by a vote of 4-0-1, the Commission issued an administrative complaint alleging that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by (i) removing an actual, direct, and substantial competitor from the Las Vegas Area for MCPO services sold to Medicare Advantage health plans ("MA plans") and (ii) lessening competition in the market for MA plans sold to individuals. The proposed Consent Agreement would remedy the alleged violations by requiring a complete divestiture of DMG's HCPNV assets relating to the HealthCare Partners Nevada business ("HCPNV Assets") and granting certain related licenses. This divestiture will replace the

competition that otherwise would be lost in the Las Vegas Area because of the Proposed Acquisition.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. THE PARTIES

UnitedHealth Group is a for-profit healthcare company headquartered in Minnetonka, Minnesota. UnitedHealth Group is comprised of two business entities: (1) UnitedHealthcare ("United"), which operates as United's health insurance branch; and (2) Optum, which operates as its health services unit. Within Optum is the OptumCare business segment, which includes employed medical groups, independent physicians associations ("IPAs") or affiliated physician networks, ambulatory surgical centers, and urgent care centers. In 2018, United had revenues of $226.2 billion.

DaVita is the parent company to DMG and DaVita Kidney Care, its dialysis division. Headquartered in Denver, Colorado, DaVita had revenues of $11.4 billion in 2018. DMG operates medical groups and affiliated physician networks across six states: California, Colorado, Florida, Nevada, New Mexico, and Washington.

III. THE PRODUCTS AND THE STRUCTURE OF THE MARKET

A. Industry Overview

Individuals age 65 or over are eligible for Medicare, through which the federal government provides health insurance benefits to seniors. The provision of health

insurance to Medicare-eligible beneficiaries is administered through two programs: (1) government-provided Medicare ("Original Medicare"), and (2) privately-provided MA plans funded by the federal government. Under Original Medicare, a beneficiary receives inpatient acute care coverage under Medicare Part A and coverage for physician and outpatient services under Medicare Part B, and the federal government reimburses healthcare providers according to a fee schedule determined by the Centers for Medicare and Medicaid Services ("CMS"). Original Medicare enrollees may obtain care from any healthcare provider that accepts Original Medicare rates.

Rather than enroll in Original Medicare, a senior may choose to enroll in an MA plan sold by a private insurer. Under the Medicare Advantage ("MA") program, the federal government pays private insurers to provide health insurance to Medicare-eligible seniors. Participating insurers, known as Medicare Advantage Organizations ("MAOs"), enter into contracts with CMS, pursuant to which they are permitted to offer MA plans to seniors. Many MA plans also offer vision, dental, hearing, or fitness benefits that are unavailable through Original Medicare.

The amount the federal government pays an MAO for each enrollee is determined by an annual bid process overseen by CMS. To be successful, MAOs need to deliver care at a cost that is below the payments they receive from CMS (plus any additional premiums they charge to enrollees). Accordingly, MAOs control costs by proactively managing the health of their enrollees to reduce the amount of healthcare services required by their enrollees.

Like commercial health insurance plans sold to the under-65 population, MA plans feature negotiations between MAOs and providers, provider networks, and plan

designs that incentivize members to seek care from in-network providers. In order to align providers' financial incentives with their own, MAOs have implemented a number of different reimbursement models in their contracts with providers, and these models vary in the way "risk" is distributed between insurers and providers. In healthcare, "risk" refers to financial liability for unexpected medical expenditures. While some proportion of healthcare spending is predictable (e.g., preventive care), a large proportion of healthcare spending goes to high-cost, low-probability events that are unexpected (e.g., an emergency hospital admission or non-elective surgery). In some cases, those provider relationships are centered on risk-based contracts, which pay providers according to various measures of care quality, outcomes, or the ability to control healthcare costs rather than the volume of services they provide. When these cost control measures are successful, MAOs may funnel the savings back into their MA plans in the form of reduced out-of-pocket costs or additional benefits for members.

B. Relevant Product Markets

The Proposed Acquisition poses substantial antitrust concerns in two relevant product markets. First, the horizontal consolidation of the Optum and DMG MCPOs raises concerns in the market for the sale of MCPO services to MAOs and their members. Second, the vertical integration of DMG's MCPO and United's MAO business raises competition concerns in the market for MA plans sold to individuals.

1. MCPO Services Sold to MAOs

One relevant service market in which to analyze the effects of the Proposed Acquisition is the sale of MCPO services to MAOs. An MAO's provider network—and its primary care physicians in particular—is critical to the success of the MAO. The most

successful MAOs utilize networks of providers willing to work closely together to coordinate patient care and control healthcare costs. MCPOs are collaborative organizations of such healthcare providers. To varying degrees, MCPOs orchestrate networks of owned, employed, and affiliated providers—including hospitals, outpatient clinics, physician groups, and individual physicians—for the purpose of managing the care of an MA plan's patient population. MCPOs often employ a variety of clinical and non-clinical support personnel (e.g., social workers, nurses, care coordinators, and utilization managers) and have developed information technology systems dedicated to managing care utilization and monitoring patient care.

MCPOs can materially affect the attractiveness of an MA plan to seniors. MA members seek MA plans that offer high quality networks at a competitive price. Without an MCPO's cost control and utilization management functions, an MAO faces a significant chance of increased costs, which can in turn increase MA plan prices and decrease the value of the MA plan's benefits. MCPOs also engage the MAO regularly to address performance issues and improve MA Plan quality scores.

2. **Medicare Advantage Health Plans Sold to Individual MA Members**

The second relevant product market implicated by this transaction is the sale of MA plans to individuals. MA plans are meaningfully differentiated from other types of health insurance products, including Original Medicare plans, eligibility-restricted Medicare options (e.g., special needs plans or "SNPs"), employer-group MA plans, and commercial health plans.

Once seniors "age into" Medicare, they may choose between coverage through Original Medicare or MA plans. As noted in *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017), seniors who choose to enroll in an MA plan overwhelmingly tend to remain in MA plans as opposed to transitioning to Original Medicare. MA plans are differentiated from Original Medicare in several important respects, including MA plans' limited networks, caps on out-of-pocket spending, coordination of care by providers, and members' access to supplemental benefits like prescription drug coverage. *See Aetna*, 240 F. Supp. 3d at 26-28, 30, 41. Therefore, the market for individual MA plans excludes Original Medicare. *See Aetna*, 240 F. Supp. 3d at 41.

The market for MA plans also excludes eligibility-restricted Medicare options such as SNPs and employer-group MA plans. SNPs are MA plans specifically designed to provide targeted care and limit enrollment to special needs individuals through specialized benefits and networks designed to treat specific conditions or needs.[1] Unless an individual MA member has or develops a qualifying need, that member cannot enroll in a SNP. Employer-group MA plans are customized for Medicare-eligible retirees of a particular employer. An MA enrollee cannot enroll in an employer-group MA plan unless they are a former employee of a participating employer.

Finally, the market for MA plans also excludes commercial health plans. MA plans often feature zero or very low premiums and are thus much less expensive for individuals compared to commercial health insurance products, which frequently charge

[1] https://www.cms.gov/Medicare/Health-Plans/SpecialNeedsPlans/index.html. Special needs patients include people who are institutionalized, have dual-eligibility for Medicare and Medicaid, or have a severe or disabling chronic condition specified by CMS.

much higher premiums. Seniors who purchase MA plans therefore are not likely to purchase a commercial health plan in the event of a price increase on all MA plans.

C. Relevant Geographic Market

The relevant geographic market in which to analyze the effects of the Proposed Acquisition is no broader than the Las Vegas Area. Healthcare markets are local in nature. Evidence gathered from market participants shows that patients—and particularly seniors—strongly prefer to receive care as close to home as possible. Accordingly, MAOs that wish to market MA plans to seniors in the Las Vegas Area must offer MCPOs within the Las Vegas Area in their provider networks (i.e., they cannot substitute MCPOs located outside the Las Vegas Area). Moreover, as a general matter, seniors may only subscribe to MA plans approved for sale in their county of residence. Therefore, a Medicare-eligible senior typically cannot substitute an MA plan approved for another county for an MA plan offered in their county of residence.

IV. THE EFFECTS OF THE PROPOSED ACQUISITION

The Proposed Acquisition would likely result in substantial competitive harm to consumers in the two relevant markets. First, the Proposed Acquisition would combine the two leading MCPOs in the Las Vegas Area. Together, the Optum and DMG MCPOs cover more than 80% of MA members in the Las Vegas Area. Accordingly, the Proposed Acquisition would lead to a presumptively anticompetitive increase in market concentration in the MCPO market. This presumption of anticompetitive harm is supported by evidence of the close competition between Optum and DMG that would be eliminated by the Proposed Acquisition. Seniors in the Las Vegas Area benefit from this head-to-head competition in the form of lower health care costs and higher quality of

care. If combined, DMG and Optum would gain additional leverage and be able to demand higher reimbursement rates from MAOs, and would have reduced incentives to maintain and improve their quality of care. Ultimately, these effects would be felt by local seniors in the form of higher premiums, co-pays, and out-of-pocket costs, as well as reduced access to high quality care.

The Proposed Acquisition would also likely harm competition in the market for MA plans sold to individuals in the Las Vegas Area by combining DMG's strong position in the MCPO market with United's strong position in the MAO market. The merged firm would have the incentive and ability to negotiate higher reimbursement rates for MCPO services from United's MAO rivals, making those rivals less competitive. This would worsen seniors' options, reduce competition, and ultimately increase prices or reduce quality (e.g., supplemental benefits) in the market for MA plans sold to individuals in the Las Vegas Area.

V. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the competitive concerns raised by the Proposed Acquisition by requiring UnitedHealth Group to divest the HCPNV Assets and grant related licenses to Intermountain Healthcare or another buyer approved by the Commission. The HCPNV Assets include all assets and rights related to the HCPNV business, including ownership interest in the relevant operating companies, rights under the medical group agreements, real property, governmental approvals, and business information. The proposed Consent Agreement requires the Respondents to provide transition services and allow the use of the HealthCare Partners brand for a period of time to facilitate the transfer of the business. In addition, the proposed Consent Agreement

limits UnitedHealth Group and DaVita's use of, and access to, confidential business information pertaining to the divestiture assets.

With the HCPNV Assets and related licenses, Intermountain Healthcare can preserve the competition that currently exists in the two relevant markets. Intermountain Healthcare is a successful, not-for-profit healthcare system consisting of hospitals, clinics, medical groups, and a health plan, SelectHealth. Headquartered in Salt Lake City, Utah, Intermountain Healthcare serves MA patients across the entire continuum of care in Utah and Idaho. Intermountain Healthcare has the experience to ensure the continued use of the HCPNV business such that they remain an effective competitor to United in the Las Vegas Area. Moreover, Intermountain Healthcare is familiar with the Las Vegas Area through SelectHealth, which began offering an MA plan in Clark County this year. Intermountain Healthcare also has a minority ownership interest in P3 Health Group Holdings LLC, which owns and operates P3 Health Partners, a recent MCPO entrant to the Las Vegas Area. However, contingent on consummation of the proposed divestiture, Intermountain Healthcare has entered into a contract to divest this ownership interest in P3 Health Group Holdings, LLC, and forfeit its associated board seats. SelectHealth's current negligible share of the MA market in the Las Vegas Area and our analysis of Intermountain's and competitors' business incentives following the proposed divestiture indicate that Intermountain's ownership of SelectHealth does not raise concern for overall competition.

United must complete the divestiture within 40 days of closing the Proposed Acquisition. The proposed Consent Agreement provides for the appointment of a monitor to ensure UnitedHealth Group's and DaVita's compliance with the obligations

set forth in the Orders. The proposed Consent Agreement requires Respondents to provide transition assistance to facilitate the transfer of the business to the buyer. The proposed Consent Agreement also contains appropriate compliance reporting requirements. If Respondents do not fully comply with the obligation to divest the HCPNV Assets, the Commission may appoint a Divestiture Trustee to divest the HCPNV Assets.

The proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by Respondent UnitedHealth Group of any ownership interest in any healthcare provider in the Las Vegas Area. Under the proposed Consent Agreement, for the next ten years, Respondent UnitedHealth Group will be required to give the Commission 30 days' advanced notice of any such acquisition that is not subject to the Hart-Scott-Rodino Act, and provide a copy to the Attorney General of the State of Nevada. If 30 days expire without Commission action, Respondent UnitedHealth Group may consummate the proposed acquisition. Otherwise, Respondent UnitedHealth Group must produce to the Commission information and documents relating to the proposed acquisition in response to a written request, and not consummate the transaction until 20 days after substantially complying with the Commission's request.

The proposed Decision and Order will have a term of ten years.

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement or modify its terms in any way.

By direction of the Commission. Chairman Simons not participating by reason of recusal.

April J. Tabor,

Acting Secretary.

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

UnitedHealth Group, Inc. ("United") proposes to acquire DaVita Medical Group ("DMG"). United's insurance business, operated by United's subsidiary UnitedHealthcare, offers commercial and Medicare Advantage ("MA") health insurance plans to employer groups and individual consumers across the country. United and DMG both offer managed care provider organization ("MCPO") services to health insurers. The merger is therefore both horizontal in nature – because it combines two competing MCPO service providers – and vertical, as it combines MCPO and insurance assets.

Staff spent more than a year and a half investigating the competitive effects of this acquisition, which involves assets in several states, including Colorado, Florida, New Mexico, Nevada, and Washington. Based on the findings from that investigation, the Commission has accepted a proposed consent agreement requiring United to divest DMG's healthcare provider organization (its MCPO) in the Las Vegas, Nevada, area to Intermountain Healthcare, a non-profit healthcare provider system without a presence in the market. We join Commissioners Slaughter and Chopra in supporting this remedy and in thanking staff for their exceptional effort and diligence through this long investigation.

Our colleagues write separately, stating they would have asked a federal judge to block United's acquisition of DMG based on their belief that the vertical integration of United's health insurance business and DMG's MCPOs and physicians in Colorado would harm consumers. In our view, the evidence in support of likely harm in Colorado was not compelling, and therefore a federal judge was unlikely to grant that relief.

As Commissioners Slaughter and Chopra point out, the acquisition in Colorado is purely vertical. In other words, in that state the transaction combines firms that operate at different levels of the supply chain and do not compete with one another. Specifically, DMG's MCPO services and physicians serve as "inputs" to the MA insurance plans that United and other health insurers sell to employers and individuals. The putative theory of harm in Colorado involved raising rivals' costs ("RRC"). It posited that, after acquiring DMG, United would find it profitable to raise DMG's prices to rival MA insurance plans, because doing so would reduce these plans' benefits and induce some customers to switch to United's MA products. The more business United recaptures in the market for MA plans, the greater its incentive to raise DMG's prices to rivals.

We do not rule out the possibility that vertical mergers can harm competition under a RRC theory. We both voted to issue the complaint, which alleges a similar vertical theory of harm in Nevada. And given both substantially stronger facts and the significant horizontal overlap in that state, that was the right call.

But vertical mergers often generate procompetitive benefits that must also factor into the antitrust analysis.[1] A major source of these benefits is the elimination of double-marginalization, which places downward pressure on prices in the output market. We conclude that the evidence in Colorado, quantitative and qualitative, reflected both dynamics, with mixed results. In our view, taken together, the evidence would not have convinced a judge that the proposed acquisition was likely, on balance, to harm consumers in Colorado.

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[1] *See, e.g.*, *United States v. AT&T*, 310 F.Supp.3d 161, 192-94 (D.D.C. 2018).

As our colleagues note, a lawsuit based upon this evidence posed significant litigation risk. Among other things, the law on vertical mergers is relatively underdeveloped, and an adverse decision can impact enforcement in later cases that present clearer harm. Of course, all litigation presents risks, and sometimes the risks are worth taking. But, faced with a body of evidence of harm that was ambiguous in the first place, we cannot agree with our colleagues that this was a case on which to roll the dice.

Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra

UnitedHealth Group, Inc. ("United") proposes to acquire DaVita Medical Group ("DMG"), which provides healthcare services in Nevada and Colorado, among other states. Today, the Commission voted to accept a proposed consent agreement that requires a divestiture of the DMG business serving Clark and Nye counties in Nevada to maintain competition. We agree with the proposed remedy for Nevada, but we disagree with the Commission's decision to not pursue an enforcement action in Colorado.

We believe the evidence uncovered by Commission staff demonstrates that the vertical merger of United's health insurance and DMG's healthcare services businesses would likely result in actionable harm to competition in Colorado. We were prepared to challenge the transaction in court, given the likelihood of harm. We acknowledge that Commission action involving Colorado would have borne significant litigation risks, but we believe such risks were worth taking.

Fortunately, the Attorney General of Colorado has taken action in an effort to address some of the harmful effects of the merger in a separate action. We hope all state

attorneys general actively enforce the antitrust laws to protect their residents from harmful mergers and anticompetitive practices.

We thank Commission staff for their tireless work on a complex and very resource-intensive matter. While we would have preferred a different outcome, staff put the Commission in a very strong position to make a well-informed decision and serve the public interest.

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