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Comments of UnitedHealth Group Incorporated
Submitted to the United States Department of Justice Antitrust Division
Addressing Updates to the Bank Merger Competitive Review Guidelines

October 16, 2020

UnitedHealth Group ("UHG") appreciates the opportunity to provide comments as the Department of Justice Antitrust Division ("DOJ") considers whether to update the existing Bank Merger Competitive Review Guidelines ("Guidelines"). UHG is a participant in a dynamic and growing segment within the health care industry commonly referred to as consumer-directed health care. UHG submits these comments to provide information to DOJ regarding the interaction between the consumer-directed movement in health care and developments in banking accounts and tools. We encourage DOJ to revise its Guidelines to give proper consideration to these dynamic changes in the health care industry.

Consumer-directed health care allows consumers to take a more active role in managing their health care spending and costs. Consumer-directed health care includes technology and data tools that provide consumers with greater transparency about health care costs and allow them to make informed decisions about their health care providers and spending. It also includes benefit designs that align consumers' incentives with their health care choices. UHG is active throughout its organization in bringing data and transparency tools to consumers, and health care providers, to help manage and reduce health care costs. As the UnitedHealthcare website describes it:

> Consumer Driven Health plan members also receive the tools, knowledge and support they need to become better health care consumers, including:
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> - Direct access to health care dollar balances
> - Trusted health information and decision support
> - Quality data and care comparisons to help choose the right physicians
> - Online cost estimators to understand the complete cost of care[1]

One of a number of consumer-directed health care options is a high-deductible health plan. UnitedHealthcare, UHG's health plan division, is a provider of these high-deductible health plans. High-deductible health plans are often paired with health savings accounts ("HSAs"), one of a variety of tax-advantaged savings and financing tools that consumers can use to manage their health care spending. Other such tools include flexible spending arrangements ("FSAs") and health reimbursement arrangements ("HRAs"). Optum, UHG's health care services division, provides or administers these and other employee benefit options.

Consumer-directed health care is a growing phenomenon. According to the Kaiser Family Foundation, in 2019, 30% of employees covered by an employer-sponsored health plan were enrolled in a high-deductible health plan paired with an HSA, up from 20% in 2014.[2] As mentioned above, as consumer-directed health care continues to grow, some of the developments in the segment intersect with

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[1] https://www.uhc.com/employer/health-plans/consumer-driven.
[2] https://www.kff.org/report-section/ehbs-2019-summary-of-findings/.

banking entities and bank regulators and could potentially be impacted by updates to the Guidelines. For example, Optum's division that provides or administers consumer-directed benefit options such as HSAs, FSAs and HRAs is OptumHealth Financial Services, which includes Optum Bank, a Utah-state-chartered, FDIC-insured financial institution (collectively "Bank"). We encourage DOJ, as it considers updates to the Guidelines, to keep in mind the manner in which consumer-directed benefit offerings such as HSAs, FSAs and HRAs sharpen competition overall for health insurance products, and the benefits that flow to consumers from these powerful tools.

Developments in Banking to Address in Updated Guidelines

The current Guidelines employ a stylized, structural approach to merger reviews that appears to be out of step with modern, effects-focused antitrust merger analysis and out of step with the commercial realities of many modern banking relationships. This approach, which is heavily focused on the geographic locations of physical bank branches, fails to account generally for electronic banking and developments in technology that increasingly allow consumers and businesses to access financial services without visiting a physical bank.

The current Guidelines are heavily focused on factors that defined the banking industry in the 1990s when they were drafted. The Guidelines state that DOJ will begin its analysis using data from the federal banking agencies' Screen A. Screen A focuses on the physical location of bank branches, and considers whether the proposed merger would exceed an 1800/200 HHI threshold, based on deposits in the branches in an identified geographic area. The Guidelines go on to state that DOJ will also consider as a secondary screen a merger's potential effects on small- and medium-sized business lending.

This emphasis on physical locations and small-business lending fails to address the role of technology in radically reshaping the banking industry, including Internet banking, mobile banking, and virtual banks. Commentators have discussed ways in which a comprehensive bank merger analysis must address the true scope of bank competition, including these technological developments. For example, a recent article in *Antitrust* magazine this year argued that "[a]s consumers' banking habits are changing, it is important to keep pace with new sources of competition in banking markets," including virtual banks.[3] Additionally, the 1800/200 threshold is out of step with the more recently updated Horizontal Merger Guidelines, and lacks relevance given the nationwide – even global – nature of modern banking.

Background on Health Savings Accounts

One growing segment of the consumer-directed health care industry that intersects with commercial banking and bank regulators is high-deductible health plans and associated tax-advantaged savings and financing tools. Take HSA accounts as an example. HSAs provide individuals the opportunity to set aside pre-tax dollars to pay for out-of-pocket health care expenses. They are designed to accompany high-deductible health plans and provide consumers with an additional tool to help manage their health care spending. As the Optum website puts it:

[3] Mark Botti, Nicholas Hill, Sheridan Rogers, Mathis Wagner, "Updating Retail Bank Merger Review for the Internet Age," *Antitrust* vol. 34 no. 2, at 44 (2020).

> An HSA is designed to work with a qualifying high-deductible health plan (HDHP). The money goes in tax-free, grows income tax-free and comes out income tax-free when you use it for qualified medical expenses.
>
> You can carry over unused funds from year to year and the account is yours to keep even if you change jobs, change health plans or retire.[4]

When an individual combines the often-lower premiums associated with a high-deductible health plan with the tax benefits of an HSA, the combination can provide a compelling alternative to a traditional health plan, increasing the alternatives for health care coverage available to consumers. As individuals have diverse preferences, so they have diverse health care needs, and HSAs enhance competition among health plans by offering additional combinations of premiums, deductibles, and savings options from which individuals may choose.

HSAs and other savings and financing tools are growing in popularity. According to Devenir Research, at the end of 2019 Americans held over 28 million health savings accounts with total assets in excess of $66 billion.[5] Those numbers represented growth of 13% and 23%, respectively, over 2018 numbers.[6]

HSAs are, of course, just one of an ever-growing list of products that offer a variety of ways for individuals to save and pay for their health care expenses. These consumer-directed offerings include FSAs, which allow individuals to pay for out-of-pocket health care expenses on a pre-tax basis but do not require pairing with a high-deductible health plan, and HRAs, into which employers make pre-tax contributions to help cover their employees' health care expenses.

HSAs and these other offerings are widely available and offered by a multitude of firms, including traditional banks, firms offering a variety of employee benefits, and firms whose focus is more narrowly tailored to health care-related products. The Bank participates in this dynamic marketplace as a provider or administrator of these consumer-directed offerings, including HSAs. The Bank is continually innovating to bring enhanced benefits to its members. For example, Optum Pay helps streamline payments to health care providers and provides a convenient, electronic payment option for patients. Used by 1.5 million health care providers and over 50 health plans, Optum Pay provides a single tool to process a variety of payment types, allows health plans to track payments, and gives providers quicker access to claims data.[7]

Health Savings Account Considerations in the Bank Merger Guidelines

Updates to the Guidelines should allow consideration of the competitively dynamic health care industry and the benefits to consumers that flow from consumer-directed health care products, including consumer-directed benefits such as HSAs, FSAs and HRAs.

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[4] https://www.optumbank.com/health-accounts/hsa html.
[5] 2019 Year-End Devenir HSA Research Report, https://www.devenir.com/wp-content/uploads/2019-Year-End-Devenir-HSA-Research-Report-Executive-Summary.pdf.
[6] *Id.*
[7] https://www.optum.com/business/solutions/employer/payment-solutions/optum-pay html.

- The consumer-directed benefits industry is large, growing, and dynamic. Consumer-directed benefits are offered by a wide range of firms including traditional banks and financial institutions, employee benefit administrators, and health plans. As more individuals take an active role in managing their health care spending, the industry's historic growth is expected to continue, with more and varied firms entering and expanding.

- Consumer-directed benefits are sold initially to employers, not individual consumers. Unlike typical commercial banking, firms that offer consumer-directed benefit products do not compete to sell to individual consumers. Rather, the moment of competition is the opportunity to sell the products to an employer as part of its overall benefits offerings. Just as, for example, an employer will select a health plan, dental and vision plan, and pharmacy benefit management plan to offer its employees, so it will select from among various consumer-directed benefit options, such as HSAs, FSAs, or HRAs, which will then be available for selection by individual employees as part of their benefits packages, allowing them to choose the package of options that best fits their needs.

- Consumer-directed benefits provide consumers with powerful tools to save for and manage their health care spending. As with other transactions, mergers involving providers of consumer-directed benefits provide an opportunity to enhance product offerings, increase output, and bring efficiencies to the merged firm that might be unavailable to the parties individually. The current Guidelines require little more than a structural concentration analysis – tied to physical branches – and do not consider the benefits that may flow from merger transactions. Updating the Guidelines will provide an opportunity to articulate the beneficial effects of mergers and how those effects factor into antitrust analysis.

- Unlike the traditional commercial banking industry, firms offering consumer-directed benefits do not require brick-and-mortar locations to compete for business. Despite this, these firms, including Optum, market their consumer-directed benefit offerings nationwide. Thus, there are fewer barriers to entry by new firms, or expansion by existing players, than in other segments of the banking industry.

As the health care marketplace expands and evolves, consumers have an ever-increasing range of health plan and health savings alternatives from which to choose. As the DOJ is considering possible updates to the Guidelines, UHG encourages DOJ to keep in mind the dynamic and expanding consumer-directed health care industry, and the important role of consumer-directed benefits in sharpening competition among health plans and enhancing the options available to consumers to plan and save for their health care needs.

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