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TO: The Honorable C. T. Wilson
Chair, Economic Matters Committee

FROM: Office of the Attorney General, Health Education and Advocacy Unit

RE: HB776 - Commercial Law – Maryland Antitrust Act – Premerger
Notification Requirement and Remedies

The Health Education and Advocacy Unit of the Office of the Attorney General supports HB776, which adds a premerger notification requirement to the Commercial Law Article, Title 11, Subtitle 2, Antitrust. The purpose of the subtitle is to complement the body of federal law governing *restraints of trade, unfair competition, and unfair or deceptive practices*. As such, federal and state antitrust laws do not govern every agreement or even every restraint of trade, but only those that are unreasonable; for example, agreements to create a monopoly, fix prices to drive out other competitors, divide markets, or “rig” bids for contracts.

Under the current law, the Attorney General in civil proceedings may request oral or written testimony or the production of documents relevant to the investigation of a possible antitrust violation. This allows the Attorney General to investigate if a merger or acquisition violates the antitrust laws or whether it serves a legitimate purpose and does not go against the public interest. The premerger notification for mergers over \$8 million dollars would give the Antitrust Division of the Attorney General’s Office the opportunity to identify and review potentially anticompetitive mergers and acquisitions before they are consummated and injury to consumers can occur. This would add an additional tool to bolster our Antitrust Division’s efforts to preserve competition in health care and protect patients from higher costs. *See*, <https://www.americanprogress.org/article/empowering-state-attorneys-general-to-fight-health-care-consolidation/>.

Premerger notification is already required under federal law for mergers over \$111.4 million dollars under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435. In a joint report produced by the Federal Trade Commission and the Antitrust Division of the Department of Justice, the agencies noted that 3,520 transactions were reported in FY21, resulting in 32 challenges to protect competition across the economy, including in consumer goods, pharmaceuticals, and healthcare.

Competition in the healthcare industry benefits consumers because it helps contain costs, improve quality, expand choice, and encourage innovation. Mergers between two systems, two hospitals, a hospital and a doctor group practice, between a doctor group practice and medical support services (labs, imaging centers, pharmacies, equipment), threaten the benefits of healthy competition. *See*, <https://www.statnews.com/2021/09/02/hospital-mergers-more-oversight-federal-state-officials/> and <https://www.ahip.org/news/articles/how-hospital-consolidation-hurts-americans>.

Other attempts at healthcare market consolidation and cross-market integration of hospitals, providers, and insurers is increasing and contributing to rising health care costs. Brent Fulton, “Health Care Market Concentration Trends in the United States: Evidence and Policy Responses” (Washington, D.C.: Health Affairs, 2017), available at <https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0556>.

The DOJ’s recent rollback of three policies that created safe harbors from antitrust enforcement in the healthcare industry highlights the DOJ and FTC’s intent to reshape antitrust enforcement in the health care sector. At an April 2022 “listening forum” on health care mergers, for instance, the FTC Chair said that “[t]he types of potential consolidation and monopoly problems that we may be seeing in health care aren’t just isolated to one corner of the industry ... it’s really across the board and systematic in a way that we really need to be vigilant” <https://www.ftc.gov/news-events/events/2022/04/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-health-care>.

The bill also adds language to § 11-210 to clarify that restitution includes disgorgement for purposes of the subsection. The Consumer Protection Division supports making clear for antitrust purposes what is well-established law under the Consumer Protection Act, that disgorgement is encompassed within restitution under Maryland law. *E.g., Consumer Prot. Div. v. Consumer Publ’g Co.*, 304 Md. 731, 776 (1985).

Marylanders deserve to have its regulators scrutinize consolidation that would adversely impact their quality and cost of care. Maryland patients would benefit from this premerger notification reporting requirement. We respectfully request a favorable report on SB0657.