UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chairman

Statement of Chairman Andrew N. Ferguson
Joined by Commissioner Mark R. Meador
Regarding Fairfield Medical Center's Sale to Adena Health

September 2, 2026

On September 1, 2026, Adena Health announced its acquisition of Fairfield Medical Center (FMC), a general acute care hospital system based in Lancaster, Ohio, that has served patients in Fairfield County for over 110 years. This acquisition follows concerns that Commission staff raised—in coordination with the Ohio Attorney General's Office—about an earlier proposed transaction in which OhioHealth sought to acquire FMC.[1] OhioHealth operates 16 hospitals across central Ohio, and OhioHealth's acquisition of FMC would have resulted in the combined firm controlling a high share of inpatient hospital admissions in and around Fairfield County. The proposed acquisition by OhioHealth threatened substantially to reduce competition among hospitals in this region, risking higher costs and diminished quality of care for patients across southeastern Ohio.[2] FMC's decision to move forward with Adena Health, which does not currently have a hospital in Fairfield County or its surrounding areas, preserves healthcare competition in that region for Ohioans.

I write today to emphasize the significance that I place on comprehensive "shop" processes when a firm argues that an acquisition is necessary because the target firm is in financial distress. Of course, if a hospital is struggling financially, it may be in the best interests of the hospital's patients and employees for the hospital to be acquired. A hospital closure results in fewer healthcare services in the local area that hospital served and provides no competitive constraint on other hospitals.

But FMC's decision to abandon the OhioHealth deal should serve as a reminder that financial distress is not a blank check for mergers that would substantially reduce competition between hospitals and risk leaving patients with higher costs and lower quality care. As articulated by the U.S. Supreme Court[3] and reflected in Section 3.1 of the 2023 Merger Guidelines, a firm can only claim the failing firm defense if: (1) it has a "grave probability of a business failure;" (2)

[1] See Fairfield Medical Center Explores Partnership, https://www.fmchealth.org/fairfield-medical-center-explores-partnership/ (last visited Aug. 28, 2026); OhioHealth Seeks to Acquire Lancaster's Fairfield Medical Center as 17th Hospital, Columbia Bus. First (Nov. 20, 2025), https://www.bizjournals.com/columbus/news/2025/11/20/ohiohealth-seeks-acquire-fairfield-medical.html.
[2] See 15 U.S.C. § 18 (prohibiting acquisitions if the effect "may be substantially to lessen competition").
[3] *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 137–38 (1969) (quoting *Int'l Shoe Co. v. FTC*, 208 U.S. 291, 302 (1930)).

the prospects of reorganizing in bankruptcy are "dim or nonexistent;" and (3) after a good-faith effort to obtain other offers, the potential buyer "is the only available purchaser."[4]

In assessing the third element of the failing firm defense, I look closely at the *process* that a financially distressed hospital followed to identify potential buyers.[5] Specifically, I look for evidence that a firm has, unsuccessfully, made good-faith efforts to obtain reasonable alternative offers that pose less of a risk to competition than the proposed merger.[6] An otherwise anticompetitive acquisition is justifiable only if the distressed firm—here a hospital—can substantiate that its "shop" process engaged with other buyers that do not present similar competition concerns as the proposed buyer.[7] The mere fact, then, that a close competitor is *willing* to buy the financially distressed hospital is not sufficient to justify an otherwise unlawful risk of harm to patients and healthcare workers.[8] The antitrust laws permit anticompetitive mergers on the basis that they are superior to closures of hospitals *only* if there is no alternative transaction that would preserve competition or present fewer or less severe competition concerns.[9]

Although the attributes of an adequate shop process vary based on the specific facts of any given case, in general Commission staff look for the following:

- Whether the search solicited interest from the full set of potential buyers[10]
- Whether potential buyers were given sufficient time to evaluate a potential transaction[11]

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[4] Dep't. of Justice & Fed. Trade Comm'n, Merger Guidelines § 3.1 (Dec. 18, 2023) ("2023 Merger Guidelines").
[5] See *ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] See, e.g., *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415, 445–46 (D. Del. 2017) (finding that defendants failed to demonstrate that the acquirer was the only available purchaser, as the target company "essentially engaged in a single bidder process and then agreed to several deal protection devices that have made it impossible to entertain other offers"; therefore the company had not shown it "made good faith efforts to elicit reasonable alternative offers that would pose a less severe danger to competition").
[9] See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506 (1974) (explaining that the failing firm defense "presupposes that the effect on competition … will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a 'lesser of two evils' approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business.").
[10] See *United States v. Pabst Brewing Co.*, 296 F. Supp. 994, 1002 (E.D. Wis. 1969) (holding that a defendant must make "a sufficiently clear showing" that it "undertook a well conceived and thorough canvass of the industry such as to ferret out viable alternative partners for a merger"); *FTC v. Harbour Group Invs., L.P.*, 1990 WL 198819, at *6 (D.D.C. Nov. 19, 1990) (declining to apply the failing firm defense where the company made minimal efforts to contact obvious companies in its own industry that appear to be willing to at least entertain the notion of purchasing the company).
[11] Cf. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 954d2 (online ed. May 2026) ("No matter how much the failing company may be warranted in imposing a reasonable deadline for firm offers, it takes little time to ask a reasonable number of potential acquirers if they are interested, and that should be a minimum requirement.").

- Whether potential buyers received sufficient and equal access to information necessary to evaluate a potential transaction.[12]
- Whether the seller engaged with interested potential buyers in good faith.[13]
- Whether the seller appropriately considered offers from buyers that did not present competitive concerns.[14]

Notably, these factors are often in the seller's financial interest and may yield more attractive offers than a truncated sales process to a handful of bidders. Regardless, an adequate search for alternative purchasers is a necessary condition to raising a failing firm defense to a transaction that otherwise may substantially lessen competition.[15] And if that search process yields an offer that would preserve competition, rather than substantially lessen it, the seller may not accept the anticompetitive offer even if it is more lucrative to do so.

A financially distressed hospital should document its shop process carefully so that Commission staff can expeditiously review it and ensure that a broad range of buyers had the opportunity to consider whether to acquire the hospital. If the shop process was not reasonable, the Commission will act aggressively to protect American consumers and workers to secure a better deal. This may include a demand that the selling firm re-shop itself using a sufficient process, which can resolve concerns surrounding a search process efficiently and without the need for litigation. Attendant delays from a re-shop process can be avoided if hospitals follow best practices like those highlighted above in the first instance.

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Adena Health's acquisition of FMC preserves competition between hospitals—including FMC and OhioHealth—to serve patients and employ healthcare workers in southeastern Ohio. This outcome is a good one for Ohioans. I thank Commission staff, and our colleagues at the Ohio Attorney General's Office, for their exemplary work on this matter.

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[12] See *Energy Sols.*, 265 F. Supp. 3d at 445 ("[Defendant] engaged with one other potential bidder" and "left it in the dark about the sale process before abruptly ending discussions without obtaining a bid.").
[13] See *ibid.*
[14] See *Joseph Ciccone & Sons, Inc. v. E. Indus., Inc.*, 537 F. Supp. 623, 628 (E.D. Pa. 1982) ("Successful invocation of that [failing firm] doctrine requires proof that the defendant acquired the failing company ... by way of a 'reasonable offer which effects the least anti-competitive result.'"); see also *United States v. Greater Buffalo Press*, 402 U.S. 549, 555–56 (1971) (holding that a defendant must show that there was "no other prospective purchaser" for the acquired company, and finding that the acquired company was not within the "failing company" exception to Section 7 of the Clayton Act where only two companies were "considered as prospective purchasers; the numerous other smaller [market participants] were never even approached"); *Energy Sols.*, 265 F. Supp. 3d at 445.
[15] See 2023 Merger Guidelines at § 3.1 n.62.