

that contractors will go through multiple iterations of contract proposals. FDIC assumes that each respondent will have to revise their submission twice, on average. In addition, these contract proposals include pricing, terms, and conditions, which will require more time than the concept papers. Given these differences, FDIC estimates that each response to an Innovation Pilot Program—Proposal will take 60 hours to prepare and submit.

#### *Request for Comment*

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on November 5, 2021.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2021-24553 Filed 11-9-21; 8:45 am]

**BILLING CODE 6714-01-P**

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## FEDERAL ELECTION COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION NOTICE OF PREVIOUS ANNOUNCEMENT:** 86 FR 60816.

**PREVIOUSLY ANNOUNCED TIME, DATE, AND PLACE OF THE MEETING:** Wednesday, November 10, 2021 at 10:00 a.m., virtual meeting.

**CHANGES IN THE MEETING:** The Open Meeting will begin at 1:00 p.m.

**CONTACT PERSON FOR MORE INFORMATION:** Judith Ingram, Press Officer; Telephone: (202) 694-1220.

*Authority:* Government in the Sunshine Act, 5 U.S.C. 552b.

**Laura E. Sinram,**

*Acting Secretary and Clerk of the Commission.*

[FR Doc. 2021-24759 Filed 11-8-21; 4:15 pm]

**BILLING CODE 6715-01-P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984.

Interested parties may submit comments, relevant information, or documents regarding the agreement to the Secretary by email at [Secretary@fmc.gov](mailto:Secretary@fmc.gov), or by mail, Federal Maritime Commission, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**. Copies of agreement are available through the Commission's website ([www.fmc.gov](http://www.fmc.gov)) or by contacting the Office of Agreements at (202)-523-5793 or [tradeanalysis@fmc.gov](mailto:tradeanalysis@fmc.gov).

*Agreement No.:* 201375.

*Title:* Hoegh Autolines/Liberty Global Logistics LLC Space Charter Agreement.

*Parties:* Hoegh Autolines AS and Liberty Global Logistics LLC.

*Filing Party:* Wayne Rohde; Cozen O'Connor.

*Synopsis:* The agreement authorizes the parties to charter space to/from one another on an "as needed/as available" basis between the U.S. and all foreign countries.

*Proposed Effective Date:* 12/13/2021.

*Location:* <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/53502>.

Dated: November 5, 2021.

**Rachel E. Dickon,**

*Secretary.*

[FR Doc. 2021-24564 Filed 11-9-21; 8:45 am]

**BILLING CODE 6730-02-P**

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## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal

Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551-0001, not later than November 26, 2021.

*A. Federal Reserve Bank of Chicago* (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Carrie L. Brown, Timothy J. Brown, CFC Revocable Trust, Timothy J. Brown, as trustee, CFC Control Trust, and Nick Brown, as trustee, all of Storm Lake, Iowa; Joleen M. Brown, John C. Brown, CFC Revocable Trust, John C. Brown, as trustee, John C. Brown 2020 DGT Exempt Trust, Paul Brown, as trustee, Joleen M. Brown 2021 DGT Exempt Trust, and Paul Brown, as trustee, all of Spirit Lake, Iowa;* to become members of the Brown Family Control Group, a group acting in concert, to acquire voting shares of Commercial Financial Corp., and thereby indirectly acquire voting shares of Central Bank, both of Storm Lake, Iowa.

Board of Governors of the Federal Reserve System, November 5, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021-24575 Filed 11-9-21; 8:45 am]

**BILLING CODE P**

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## FEDERAL TRADE COMMISSION

[File No. 211 0013]

### In the Matter of DaVita, Inc. and Total Renal Care, Inc.; 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 Proposed 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 December 10, 2021.

**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. Please write: “In the Matter of DaVita, Inc. and Total Renal Care, Inc.; File No. 211 0013” on your comment, and file your comment online at [www.regulations.gov](http://www.regulations.gov) by following the instructions on the web-based form. If you prefer to file your comment on paper, please 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:** Stuart Hirschfeld (206-220-4484) and Danica Noble (206-220-5006), Northwest Regional Office, Federal Trade Commission, 915 2nd Avenue, Seattle, WA 98104.

**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 of Agreement Containing Consent Orders 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 website at this web address: <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 December 10, 2021. Write “In the Matter of DaVita, Inc. and Total Renal Care, Inc.; File No. 211 0013” 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 [www.regulations.gov](http://www.regulations.gov) website.

Due to protective actions in response to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your

comments online through the [www.regulations.gov](http://www.regulations.gov) website.

If you prefer to file your comment on paper, write “In the Matter of DaVita, Inc. and Total Renal Care, Inc.; File No. 211 0013” 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 [www.regulations.gov](http://www.regulations.gov), you are solely responsible for making sure 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 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

[www.regulations.gov](http://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that 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 <https://www.ftc.gov> to read this Notice and the news release describing this matter. The FTC Act and other laws 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 it receives on or before December 10, 2021. 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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) with DaVita, Inc., through its wholly-owned subsidiary, Total Renal Care, Inc. (“DaVita”). The proposed Consent Agreement is intended to remedy the anticompetitive effects that would likely result from DaVita’s proposed acquisition (“Proposed Acquisition”) of all dialysis clinics owned by the University of Utah (“University”).

Pursuant to an Asset Purchase Agreement dated September 22, 2021, DaVita proposes to acquire all 18 dialysis clinics from the University in a non-HSR-reportable transaction. DaVita is the largest provider of dialysis services in the United States and the University is an academic and public research institution in the State of Utah. The 18 dialysis clinics extend from the southeast corner of Nevada to the southern part of Idaho. The Commission alleges in its Complaint 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 FTC Act, as amended, 15 U.S.C. 45, by reducing competition and increasing concentration in outpatient dialysis services provided in the Provo, Utah market.

The proposed Consent Agreement will remedy the alleged violations by preserving competition that would otherwise be eliminated by the Proposed Acquisition. Under the terms of the Consent Agreement, DaVita is

required to divest three dialysis clinics to Sanderling Renal Services, Inc., (“SRS”) and must provide SRS with transition services for one year. In addition, DaVita cannot: (1) Enter into, or enforce, any non-compete agreements with physicians employed by the University that would restrict their ability to work at a clinic operated by a competitor of DaVita (except to prevent a medical director under a contract with DaVita from simultaneously serving as a medical director at a clinic operated by a competitor); (2) enter into any agreement that restricts SRS from soliciting DaVita’s employees for hire; or (3) directly solicit patients who receive services from the divested clinics for two years. Finally, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah.

## II. The Relevant Market and Competitive Effects

The Commission’s Complaint alleges the relevant line of commerce is the provision of outpatient dialysis services. Patients receiving dialysis services have end stage renal disease (“ESRD”), a chronic disease characterized by a near total loss of function of the kidneys and fatal if not treated. Many ESRD patients have no alternative to outpatient dialysis treatment because they are not viable home dialysis or transplant candidates (or they are waiting for a transplant for multiple years, during which time they must still receive dialysis treatment). Treatments are usually performed three times per week for sessions lasting between three and four hours. According to the United States Renal Data System, there were over 555,000 ESRD dialysis patients in the United States in 2018.

The Commission’s Complaint also alleges the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is the greater Provo, Utah area. Specifically, the market is centered on Provo, Utah and extends north to Orem, Utah and south to Payson, Utah. The market is defined by the distance ESRD patients will travel to receive reoccurring treatments. Because ESRD patients are often suffering from multiple health problems and may require assistance traveling to and from the dialysis clinic, patients cannot travel long distances to receive treatment. Accordingly, most patients are unwilling or unable to travel more than 30 minutes or 30 miles for treatment, although travel times and distances may vary by location.

Dialysis providers seek to attract patients by competing on quality of services. To some extent, the providers also compete on price. Although Medicare eventually will cover all ESRD patients’ dialysis costs, there is a 30-month transition period where commercially insured patients’ costs are covered by their insurers, which compensate the providers at competitively negotiated rates.

In the greater Provo market, there are only three providers: The University (which has three clinics), DaVita (four clinics) and Fresenius Medical Care (one clinic). Therefore, the University and DaVita directly and substantially compete in the relevant market as the two largest providers, and DaVita would own seven of the eight clinics in the region. The Proposed Acquisition would eliminate competition between DaVita and The University in the relevant market for outpatient dialysis services, increasing the ability to unilaterally raise prices to third-party payers and decreasing the incentive to improve the quality of services provided to patients.

## III. Entry

Entry into the outpatient dialysis services market in the greater Provo, Utah area would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The most significant barrier to entry is contracting a nephrologist with an established referral base to serve as the clinic’s medical director. The Department of Health and Human Services requires each dialysis clinic have a nephrologist as a medical director. Locating a nephrologist is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. Finding patients may also be difficult if the nephrologist does not have local ties, as most nephrologists typically refer their patients to the clinic where they serve as medical director. Moreover, the area itself must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry.

## IV. The Agreement Containing Consent Order

Section II of the Proposed Order requires that DaVita divest the three University clinics in the greater Provo market to SRS, including all of the assets necessary for SRS to independently and successfully operate the clinics, which include, among other things, all leases for real property, all medical director contracts, and a license

for each clinics’ policies and procedures.

Section IV of the Proposed Order requires that DaVita provide transition services to SRS for up to one year, and Section V requires DaVita to provide assistance to SRS in hiring the employees at the divested clinics and to refrain from soliciting those employees for 180 days. In addition, Section V prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist, except to prevent a medical director under a contract with DaVita from simultaneously serving as a medical director at a clinic operated by a competitor. Section V also prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita’s employees for hire.

Section VI of the Proposed Order, along with the Order to Maintain Assets, requires that DaVita take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the divested clinics and their assets. Section VIII provides for the appointment of a Monitor to oversee the divestiture.

Section X of the Proposed Order requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah. With regard to transactions involving clinics in multiple states, such prior approval only applies to the clinics in Utah.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission.

**April J. Tabor,**  
*Secretary.*

## Concurring Statement of Commissioner Christine S. Wilson

Today, the Commission announces a consent order to settle allegations that the proposed acquisition of the dialysis business of the University of Utah Health (“University”) by Total Renal Care, Inc., a wholly-owned subsidiary of DaVita Inc. (“DaVita”), may substantially lessen competition in the market for outpatient dialysis services in the greater Provo, Utah area. I support the outcome but believe two aspects of the consent order warrant discussion so that my support is not misconstrued. Those two sets of provisions relate to prior approval and non-compete agreements. I then highlight a third provision—a ban on no-poach agreements—in light of the ongoing dialogue regarding whether antitrust

enforcement adequately protects competition for labor inputs.

### *Prior Approval and Non-Compete Agreement Provisions*

First, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah. The Commission rescinded the 1995 Policy Statement Concerning Prior Approval and Prior Notice (“1995 Policy”) on July 21, 2021. I dissented from this rescission for three reasons: The 1995 Policy was put in place to prevent resource-intensive and vindictive litigation; it preserved the use of prior approval provisions in appropriate circumstances; and the majority did not provide new guidance explaining how these provisions would be used following rescission of the 1995 Policy.<sup>1</sup>

Because I believe the 1995 Policy provided sound guidance on the appropriate use of prior approval provisions, I will assess the propriety of the prior approval provision in this matter against that touchstone. The 1995 Policy noted prior approval is most likely appropriate where there is a credible risk a company engaged in an anticompetitive merger would attempt the same or approximately the same merger in the future.<sup>2</sup> DaVita has engaged in a pattern of acquiring independent dialysis facilities;<sup>3</sup> many of these acquisitions fall below HSR thresholds and consequently escape premerger review,<sup>4</sup> including this

<sup>1</sup> Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021 at 8–11 (July 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1592366/commissioner\\_christine\\_s\\_wilson\\_oral\\_remarks\\_at\\_open\\_comm\\_mtg\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf). See also Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1592398/dissenting\\_statement\\_of\\_commissioner\\_phillips\\_regarding\\_the\\_commissions\\_withdrawal\\_of\\_the\\_1995\\_policy.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995_policy.pdf).

<sup>2</sup> Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 FR 39745, 39746 (August 3, 1995), [https://www.ftc.gov/system/files/documents/public\\_statements/410471/frpriorapproval.pdf](https://www.ftc.gov/system/files/documents/public_statements/410471/frpriorapproval.pdf).

<sup>3</sup> Paul J. Eliason et al., *How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*, 135 Quarterly J. Econ. 221, 235 (2020) (showing how the acquisitions of independent facilities have contributed to DaVita’s overall growth).

<sup>4</sup> Thomas Wollmann, *How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27274) (“In short, the FTC blocks nearly all reportable facility acquisitions resulting duopoly and monopoly. In sharp contrast, the dashed line reflects exempt facility acquisitions. These ownership changes witness effectively no

proposed acquisition. There is some evidence this pattern of sub-HSR acquisitions has led to higher prices and lower service levels in the dialysis field.<sup>5</sup> For this reason, I have encouraged the Commission on previous occasions to study this industry.<sup>6</sup>

Against this backdrop, a prior approval provision is appropriate here. Specifically, there is a credible risk DaVita will attempt to acquire additional dialysis facilities in the same general area in which divestiture has been ordered. But to be clear, my vote in favor of this consent should not be construed as support for the liberal use of prior approval provisions foreshadowed by the Commission’s majority when it rescinded the 1995 Policy.

Second, the order contains provisions that prohibit DaVita from enforcing non-compete agreements in the University of Utah nephrologists’ medical director contracts.<sup>7</sup> Some commentators have suggested non-compete provisions should be banned, and some of my current and former colleagues on the Commission have expressed sympathy for that view.<sup>8</sup>

enforcement actions, regardless of simulated HHI change. This includes dozens of facility acquisitions involving ΔHHI >2,000, several of which involve ΔHHI near 5,000.”)

<sup>5</sup> Eliason et al., *supra* note 3, at 223 (“We find that acquired facilities alter their treatments in ways that increase reimbursements and decrease costs. For instance, facilities capture higher payments from Medicare by increasing the amount of drugs they administer to patients, for which Medicare paid providers a fixed per-unit rate during our study period. . . . On the cost side, large chains replace high-skill nurses with lower-skill technicians at the facilities they acquire, reducing labor expenses. Facilities also increase the patient load of each employee by 11.7% and increase the number of patients treated at each dialysis station by 4.5%, stretching resources and potentially reducing the quality of care received by patients.”)

<sup>6</sup> See, e.g., Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (February 11, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1566385/statement\\_by\\_commissioners\\_wilson\\_and\\_chopra\\_re\\_hsr\\_6b.pdf#:~:text=Statement%20of%20Commissioner%20Christine%20S.%20Wilson%2C%20Joined%20by%20drive%20content%20curation%20and%20targeted%20advertising%20practices.](https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf#:~:text=Statement%20of%20Commissioner%20Christine%20S.%20Wilson%2C%20Joined%20by%20drive%20content%20curation%20and%20targeted%20advertising%20practices.)

<sup>7</sup> Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of DaVita, Inc. and Total Renal Care, Inc., No. 211–0013 (October 25, 2021), (“[The Order] prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist. . . .”).

<sup>8</sup> Letter from Chair Lina M. Khan to Chair Cicilline and Ranking Member Buck at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-20210928-SD005.pdf> (“The FTC has heard concerns about non-compete clauses at its open meetings, and the Commission recently opened a docket to solicit

While I disagree with that perspective,<sup>9</sup> I have concluded the provisions limiting the effect of non-competes in this matter are necessary to achieve an effective remedy. Specifically, the operations of a dialysis facility must occur under the auspices of a nephrologist; indeed, without a nephrologist, a dialysis clinic cannot operate. Nephrologists are in short supply,<sup>10</sup> and the inability of a facility owner to retain or replace a licensed nephrologist could serve as a barrier to entry or, in this case, preclude the buyer from continuing to compete in the market. Moreover, a repeal of non-competes to effectuate a remedy is not novel; past consent orders have included provisions that prohibit merging parties from enforcing non-competes to aid divestiture buyers in hiring employees.<sup>11</sup> For these reasons, I

public comment on the prevalence and effects of contracts that may harm fair competition. As we pursue this work, I am committed to considering the Commission’s full range of tools, including enforcement and rulemaking.”); New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace at 1 (Jan. 9, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1561475/slaughter\\_-\\_noncompete\\_clauses\\_workshop\\_remarks\\_1-9-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf) (“I also want to thank the advocates and academics—including those participating today—who have raised awareness about and contributed both research and new ideas to the discussion concerning non-compete provisions in employment contracts. State attorneys general and their staff have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anticompetitive non-compete clauses in employment contracts.”); Letter from Commissioner Rohit Chopra to Assistant Attorney General Makan Delrahim at 3 (Sept. 18, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1544564/chopra\\_-\\_letter\\_to\\_doj\\_on\\_labor\\_market\\_competition.pdf](https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf) (“A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication.”); Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, (posted by the Fed. Trade Comm’n on July 21, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0001>.

<sup>9</sup> Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 9–12, (Sept. 28, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596880/commissioner\\_wilson\\_hearing\\_on\\_reviving\\_competition\\_part\\_4\\_-\\_21st\\_century\\_antitrust\\_reforms\\_and\\_the\\_pdf](https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the_pdf).

<sup>10</sup> Muhammad U. Sharif et al., *The global nephrology workforce: Emerging threats and potential solutions!*, 9 Clinical Kidney J. 11, 13 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4720191/> (“These facts would suggest that the current nephrology workforce [in the U.S.] should increase in order to compensate for the expected growth in patient numbers. Unfortunately, the opposite appears to be the case.”).

<sup>11</sup> See, e.g., Decision and Order, Gallo et al. No. 191–0110 at VI.A.4 (April 5, 2021), [https://www.ftc.gov/system/files/documents/cases/gallo\\_cbi\\_decision\\_and\\_order\\_final\\_201107.pdf](https://www.ftc.gov/system/files/documents/cases/gallo_cbi_decision_and_order_final_201107.pdf)

support the provisions pertaining to non-competes in this matter—but my acquiescence to these provisions should not be construed as support for a sweeping condemnation of non-competes more generally.

#### *Ban on No-Poach Agreements*

The order contains an anti-no-poach provision that prevents DaVita from entering into any agreement that would restrict the divestiture buyer from soliciting DaVita's employees. I highlight this provision because some critics have asserted antitrust enforcement ignores competition for labor as an input.<sup>12</sup> I believe modern antitrust enforcement does, in fact, police the market for unlawful practices impacting competition for labor.<sup>13</sup> Naked no-poach agreements are per se illegal under the antitrust laws, and have been subject to enforcement accordingly.<sup>14</sup>

(“Remove any impediments within the control of Respondents that may deter relevant Divestiture Business Employees from accepting employment with the Acquirer, including removal of any non-compete . . . .”); Decision and Order, Stryker et al., No. 201–0014 at VI.B.3 (Dec. 17, 2020), <https://www.ftc.gov/system/files/documents/cases/2010014c4728strykerwrightorder.pdf> (“Remove any impediments within the control of Respondents that may deter Implant Business Employees from accepting employment with the Acquirer, including removal of any non-compete . . . .”); Decision and Order, Arko Holdings et al., No. 201–0041 at VI.B.3 (Oct. 7, 2020), [https://www.ftc.gov/system/files/documents/cases/c-4726\\_201\\_0041\\_arko\\_empire\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/c-4726_201_0041_arko_empire_order.pdf) (“Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with an Acquirer . . . .”). This consent does contain a new twist on our approach to non-competes. Specifically, DaVita may not enforce non-competes to the extent they prevent competitors or potential competitors from obtaining the services of a nephrologist, which will allow potential competitors to launch a competing dialysis clinic in Utah. Given my understanding of DaVita's business practices, the nephrologist shortage, and the historical industry context, I believe this remedy constitutes appropriate fencing-in relief.

<sup>12</sup> Testimony of Eric A. Posner on Antitrust and Labor Markets at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-Wstate-PosnerE-20210928.pdf> (“Yet, while thousands of antitrust cases have been brought over the years, hardly any have addressed labor market cartelization. The Justice Department and the Federal Trade Commission have reviewed thousands of mergers, approving some and rejecting others, but have not even once analyzed the labor market effects of a merger.”).

<sup>13</sup> Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 12–14, (Sept. 28, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596880/commissioner\\_wilson\\_hearing\\_on\\_reviving\\_competition\\_part\\_4\\_-\\_21st\\_century\\_antitrust\\_reforms\\_and\\_the.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf).

<sup>14</sup> Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

With respect to the instant matter, DaVita and its former CEO were recently indicted for agreeing with competitors to refrain from recruiting one another's employees.<sup>15</sup> In a past consent order, where respondents had entered into no-poach agreements, provisions explicitly prohibiting these agreements have been included in an order.<sup>16</sup> I support the inclusion of an anti-no-poach provision in this order because of the relevant allegations against DaVita and to allow the Commission to pursue an order violation if DaVita attempts to limit competition through anticompetitive no-poach agreements in the future.

[FR Doc. 2021–24554 Filed 11–9–21; 8:45 am]

**BILLING CODE 6750–01–P**

## OFFICE OF GOVERNMENT ETHICS

### Privacy Act of 1974; Systems of Records

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Notice of Modification of Four Internal Systems of Records and Rescindment of One Internal System of Records.

**SUMMARY:** The U.S. Office of Government Ethics (OGE) proposes to revise four and rescind one of its existing internal systems of records under the Privacy Act.

The system of records to be rescinded is OGE/INTERNAL–2, which covers telephone call detail records that were used to verify employee telephone usage and to resolve billing discrepancies.

The four systems of records to be revised are the following:

- OGE/INTERNAL–1 Pay, Leave and Travel Records, which contains records related to OGE employees' pay, leave, and travel, including information regarding leave accrual rate, usage, and balances, salary withholdings, travel expenses, and usage of the transit fare subsidy program;

<sup>15</sup> Indictment, *United States v. DaVita Inc. et al.*, No. 1:21-cr-00229 (D. Colo. July 14, 2021).

<sup>16</sup> Press Release, Fed. Trade Comm'n, *VieVu's Former Parent Company Safariland Agrees to Settle Charges That It Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon* (April 17, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/vievu-former-parent-company-safariland-agrees-settle-charges-it> (“According to the complaint, the agreements barred Safariland from competing with Axon now and in the future on all of Axon's products, limited solicitation of customers and employees by either company, and stifled potential innovation or expansion by Safariland. . . . Under the proposed order, Safariland is required to obtain approval from the Commission before entering into any agreement with Axon that restricts competition between the two companies.”).

- OGE/INTERNAL–3 Grievance Records, which contains records relating to grievances filed by OGE employees;

- OGE/INTERNAL–4 Computer Systems Activity and Access Records, which contains information on the use of official email systems, user access to OGE's computer networks, and records related to the verification or authorization of an individual's access to systems, files, or applications; and

- OGE/INTERNAL–5 Employee Locator and Emergency Notification Records, which contains information regarding the organizational location, telephone extension, and hours of duty of OGE employees, as well as their personal contact information and the name, relationship, and telephone number of employees' emergency contacts.

**DATES:** The revisions and rescindment will be effective on November 10, 2021, subject to a 30-day period in which to comment on the new routine uses, described below. Please submit any comments by December 10, 2021. The new routine uses will be effective on that date.

**ADDRESSES:** Comments may be submitted to OGE by any of the following methods:

*Email:* [usoge@oge.gov](mailto:usoge@oge.gov) (Include reference to “OGE Internal SORNs” in the subject line of the message.)

*Mail, Hand Delivery/Courier:* Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Attention: Jennifer Matis, Associate Counsel, Washington, DC 20005–3917.

*Instructions:* Comments may be posted on OGE's website, [www.oge.gov](http://www.oge.gov). Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information before posting.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Matis at the U.S. Office of Government Ethics; telephone: 202–482–9216; TTY: 800–877–8339; FAX: 202–482–9237; Email: [jmatis@oge.gov](mailto:jmatis@oge.gov).

**SUPPLEMENTARY INFORMATION:** In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, this document provides public notice that OGE is proposing to revise and update the OGE/INTERNAL–1, –3, –4, and –5 systems of records in several respects, and rescind OGE/INTERNAL–2, Telephone Call Detail Records.

First, OGE proposes to rescind one system of records that is no longer in use by OGE, OGE/INTERNAL–2, Telephone Call Detail Records. OGE no longer maintains these records and has