

September 27, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Comment submitted electronically via <https://www.regulations.gov>

RE: Public Comment on 16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300

Dear Commissioners:

The undersigned civil society organizations are writing to express strong support for your effort to modernize the Federal Trade Commission's premerger notification rules and report form, particularly the proposed requirement for companies to submit information pertaining to potential labor market effects. We urge the FTC to retain these sensible updates and strengthen the proposal even further by expanding the types of information required by the Labor Markets section.

Specifically, the FTC's proposal would require filing companies to report any penalties or findings issued against them from the Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), and the Occupational Safety and Health Administration (OSHA), as well as identify any pending WHD, NLRB, or OSHA matters. The companies would also be required to submit worker information such as job categories and any plans that would affect their workers after the merger or acquisition, such as geographical overlap of the relevant labor markets. These changes are part of the FTC's broader redesign of the Premerger Notification and Report Form and Instructions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act,¹ which authorizes the FTC to require companies to submit "such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws."²

Given that companies compete for workers, not just customers, the proposed disclosure requirements to aid initial screening for potential impacts on labor market competition are long overdue. Labor market concentration, after all, is connected to the amount of labor rights

¹ 15 U.S.C. § 18a. The proposal would also implement the Merger Filing Fee Modernization Act of 2022, enacted as part of the Consolidated Appropriations Act, 2023, Pub. L. 117–328, 136 Stat. 4459 (Dec. 29, 2022).

² 15 U.S.C. § 18a(d).

violations.³ As explained by one labor economist, "[i]n a setting where the employer has more market power, the workers have worse outside options, are less able to leave and less able to make a credible threat to leave, and it's easier to push them into a corner."⁴ In the collective bargaining context, consolidation of employers also typically increases the employers' leverage against their workers while reducing the negotiating power of a union representing those workers, because the employers no longer need to compete against each other to obtain a labor contract.⁵ We have witnessed these dynamics playing out in glaring real life cases as well, including numerous reports of abuses against workers by Amazon throwing its weight around as the world's largest online retailer⁶ and complaints of the largest private-sector employer in Pennsylvania wielding its dominance against its own employees to suppress wages, degrade working conditions, and undermine their collective bargaining rights.⁷

Moreover, the federal antitrust agencies already consider whether a merger or acquisition subject to regulatory approval may substantially lessen competition for buyers of labor services⁸ and have already challenged acquisition deals due to the consolidation's resulting labor market harms.⁹ By shifting the submission of labor markets information to an earlier stage of the regulatory review, the FTC's proposal will make the review process more uniform and efficient for the reviewing agencies. In fact, given the importance of the labor market considerations, we encourage the FTC to expand the Labor Markets section to include more data for submission, such as the merging companies' histories of labor law violations dating back ten years rather than only five years; information about their remote, temporary, or contract workers; and the merging companies' union avoidance activities and expenditures.

³ Testimony of Brian Callaci, Chief Economist, Open Markets Institute, before the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-Wstate-CallaciB-20210928.pdf>; Zachary Brown, Public Citizen, *The Harms of Monopolies on American Workers* (Nov. 2, 2021), <https://www.citizen.org/news/the-harms-of-monopolies-on-american-worker/>.

⁴ Dan Papszun, *Antitrust Deal Cops to Peek at Worker Abuses, Stirring Backlash*, Bloomberg (Sept. 15, 2023), <https://news.bloomberglaw.com/antitrust/antitrust-deal-cops-to-peek-at-worker-abuses-stirring-backlash>.

⁵ See, e.g., Community Alliance for Global Justice's Letter to FTC (Sept. 13, 2023), <https://www.regulations.gov/comment/FTC-2023-0040-0628>.

⁶ See, e.g., Civil Society Organizations' Letter to FTC On Franchise and Franchise-Like Business Practices (June 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0026-1721>; Athena Coalition et al., *Worker Organizations and Allies Respond to White House Request for Input on Automated Worker Surveillance and Management Systems* (June 29, 2023), <https://athenaforall.medium.com/worker-organizations-and-allies-respond-to-white-house-request-for-input-on-automated-worker-dbefcaeeeb3f>.

⁷ SEIU Healthcare Pennsylvania & Strategic Organizing Center, *Complaint Against University of Pittsburgh Medical Center Regarding Potential Attempted and Actual Monopolization and Monopsonization In Violation of Section 2 of the Sherman Act* (May 18, 2023), https://thesoc.org/wp-content/uploads/2023/05/COMPLAINT_5.17_redacted.pdf.

⁸ 88 Fed. Reg. 42178, 42197 (June 29, 2023).

⁹ *Ibid.* See also, e.g., Press Release, U.S. Dep't of Just., Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>.

With respect to industry complaints about the burden of the proposed requirement to report labor law violations, the premise of these arguments is that companies—including their legal and compliance teams—do not know which labor laws they were alleged or found to have violated after being notified by government prosecutors.¹⁰ Such claims are not credible.

Furthermore, companies considering merger or acquisition transactions already conduct extensive due diligence that identify threatened and actual government actions against the parties to the transaction and other legal liabilities. The notion that corporate executives would then struggle to replicate and provide basic information about the same enforcement actions against their labor law violations—such as the decision date, case number, and description of the penalty or finding made against them—again strains credulity. All these industry complaints also ignore the best and simplest solution to avoiding the paperwork burden in the first place: stop violating our nation's labor laws.

For all these reasons, we applaud the FTC for its focus on the harmful labor market impacts of corporate consolidation and urge the agency to retain the Labor Markets section with additional improvements. Thank you for considering our views, and we look forward to providing further assistance as you move forward with your modernization of the premerger notification process.

Sincerely,

American Economic Liberties Project
Americans for Financial Reform Education Fund
Athena Coalition
Demand Progress Education Fund
Good Jobs First

NextGen Competition
Public Citizen
Revolving Door Project
Service Employees International Union

¹⁰ The proposal would require the covered companies to submit, for each identified penalty or finding of a labor law violation, "(1) the decision or issuance date, (2) the case number, (3) the JD [Judge's Decision] number (for NLRB only), and (4) a description of the penalty and/or finding." 88 Fed. Reg. 42178, 42215 (June 29, 2023).