To: Federal Trade Commission and U.S. Department of Justice
Re: Request for Information on Merger Enforcement
Docket #: FTC-2022-0003-0001
Submitted on: April 21, 2022
Submitted by: Americans for Financial Reform Education Fund, Center for Economic and Policy Research, United for Respect

I. Introduction and Background

Thank you for the opportunity to comment on how the Department of Justice (DOJ) and the Federal Trade Commission (FTC) can modernize enforcement of the antitrust laws regarding mergers.

We write to urge the FTC and DOJ to draft merger guidelines that are well equipped to prevent the harms caused by the private equity industry. The private equity industry controls an ever-increasing portion of the US economy. The extractive business model requires it to acquire and consume more businesses and sectors every year. It has increased in size eight-fold over the past two decades from $700 billion in global assets in 2000 to $5.8 trillion in 2018.[1] Private equity firms drove one in four mergers and acquisitions in the early 2000s, and one in three by 2018.[2] Today, the private equity industry controls 8,000 companies in the United States, more than twice as many companies as are publicly traded on U.S. stock markets.[3]

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[1] Elvin, Christopher. Preqin. "Private Equity Update." KPMG Private Equity Forum. November 2016 at 5; Preqin. "Private Equity Spotlight." Vol. 14, Iss. 1. January 2018 at 7; McKinsey & Company. "Private Markets Come of Age." 2019 at 15.

[2] Wylie Fernyhough and Darren Klees, 2018 annual M&A report, PitchBook, files.pitchbook.com/website/files/pdf/PitchBook_2018_Annual_MA_Report.pdf.

[3] Parmer, Hema and Jason Kelly. "The returns are spectacular. But there are catches." Businessweek. October 3, 2019.

The industry functions by raising money to buy productive businesses and extract value from those businesses they acquire. These acquisitions are financed by debt, sometimes through a leveraged buyout. In an LBO, private equity firms use the company they are buying as collateral for a loan to purchase that company. After acquiring a company, private equity firms restructure the business, usually firing workers[4], raising prices[5], and engaging in convoluted legal and financial schemes to avoid regulation and convert as much of the target business's revenue into a direct profit stream back to the private equity firm.[6]

The harms to competition from these practices are myriad. Perhaps the most chilling example comes in healthcare. One recent study found private equity buyouts lead to an 11% increase in total healthcare spending in the markets they affect because of their market power.[7] Moreover, during the last decade, private equity investment in healthcare has more than tripled in terms of annual deal values.[8] That deal volume surged to even greater heights during the COVID-19 pandemic.[9] Private equity investment in healthcare raises troubling questions about national, regional, and local concentration in healthcare. Even small PE acquisitions in local markets often trigger "stealth consolidation,", as with dialysis centers or dermatology, with deals that are too small to draw the attention of antitrust enforcers but add up to substantial market power and worse health, price, and quality outcomes for patients.[10] U.S. Dermatology Partners, for instance, has been flipped three separate times by PE firms since 2013; it now is the third largest such chain in the country. Aspen Dental has been owned by four different PE firms, including two in the last decade alone. Other tactics (like joint ownership) also allow private equity firms to acquire market power under the radar and then impose price increases on patients.[11] Some evidence even indicates that private equity entry into a market intensifies and amplifies the already existing dynamics

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[4] Primack, Dan. Axios. Private equity takeovers result in significant job losses. Oct 7, 2019. https://www.axios.com/private-equity-employment-job-losses-40bbf941-0815-4046-b777-e95a29e925d8.html

[5] Baker, Walter et al. McKinsey & Company. Pricing: The next frontier of value creation in private equity. Oct 23, 2019. https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/pricing-the-next-frontier-of-value-creation-in-private-equity

[6] Cumming, Chris. Wall Street Journal. Buyout Firms Set Record for Loading Companies With Debt to Pay Themselves. Oct 25, 2021. https://www.wsj.com/articles/buyout-firms-set-record-for-loading-companies-with-debt-to-pay-themselves-11635156003

[7] Liu, Tong, *Bargaining with Private Equity: Implications for Hospital Prices and Patient Welfare* (July 30, 2021) https://ssrn.com/abstract=3896410

[8] Scheffler, Richard M., Laura M. Alexander, and James R. Godwin, "Soaring Private Equity Investment in the Healthcare Sector: Consolidated Accelerated, Competition Undermined, and Patients at Risk," Petris Center at the University of California, Berkeley (May 18, 2021), https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf.

[9] AlphaSense, "Private Equity's Boom: Why It's Happening, and What's Next," Aug. 25, 2021, https://www.alpha-sense.com/blog/private-equitys-2021-boom-why-its-happening-whats-next/.

[10] Scheffler et al., supra note 4, at 43-44.

[11] Id., at 49-50.

leading to greater concentration in that market. In other words, private equity entry into healthcare markets produces a vicious cycle of monopolization.[12]

For an example that touches every corner of America, look at fast food and chain restaurants. What do Arby's, Auntie Anne's Pretzels, Carl's Jr., Cinnabon, Corner Bakery, Hardee's, and Jimmy John's have in common? The same private equity majority owner or major investor: Roark Capital. The effects on competition are mind-bending. Arby's took over Buffalo Wild Wings in 2017, created a new conglomerate—Inspire Brands—and then bought Sonic and Jimmy John's, which Roark Capital already owned. In other words, different parts of Roark Capital merged with itself.[13] The result is malls and downtowns across the country, with as many as 5 restaurants owned by the same private equity giant.[14]

That slate of mergers is a microcosm of competitive dynamics in the broader industry: in the same timeframe, one private equity firm bought or tied up Burger King, Tim Hortons, Popeyes, Kraft, Heinz, and Anheuser-Busch and InBev. The results for competition, workers, and even the brands of the companies involved? Poor, at best. The result for 3G the private equity firm? Very profitable.[15]

Because the primary tool for the private equity industry is acquisition of multiple companies into a portfolio, it is almost by default a concentrating force throughout the economy. However, the merger guidelines in the past have not effectively curtailed the anticompetitive effects of private equity on the economy.

a) Legal Background

We believe there is substantial additional authority for the agencies to address a much wider swath of merger behavior. The FTC and DOJ are tasked with preventing mergers which substantially lessen competition or tend to create a monopoly. Of course, a transaction that immediately increases concentration by eliminating a primary rival should receive scrutiny. But, as is often the case in private equity, many transactions affect competition in a more systemic way, either intentionally or as a side effect of extractive behavior that weakens competition. We believe that a greater focus on these transactions, which tend to create monopolies in their incipiency, are of critical importance for the merger guidelines to address. With careful attention to the anticompetitive effects of private equity transactions

[12] Id, at 47-48.
[13] David Dayen, Monopolized: Life in the Age of Corporate Power, 244 (New York: The New Press, 2020).
[14] CBInsights. With Sonic Acquisition, PE Firms Tighten Grip on Restaurant Industry. Sep 27, 2018. https://www.cbinsights.com/research/with-sonic-acquisition-pe-firms-tighten-grip-on-restaurant-industry/
[15] Id.

at the early stage of market consolidation, the FTC and DOJ can avoid the long-term tendency toward monopoly that these transactions often create.

The changes we recommend are within the scope of the Clayton Act authority under its plain meaning. However, even if these expanded interpretations are challenged in court under existing precedent, there is a compelling case to alter that precedent. Antitrust law often updates its applications and legal standards to evolving economic facts on the ground.[16] As far back as 1921, the Supreme Court reversed economic common law due "to a better realization of the facts of industrial life."[17] Since then, courts have "felt relatively free to revise [their] legal analysis as economic understanding evolves" and even "to reverse antitrust precedents that misperceived a practice's anticompetitive consequences."[18] This thinking undergirds the D.C. Circuit Court ruling in the *Microsoft* case. The court reasoned that digital markets were new and rapidly changing so tying behavior there should be evaluated under a different standard than in the markets which courts had previously applied the rule.[19] Keeping with this tradition, we believe that a full understanding of the competitive impacts from private equity requires changes to the merger guidelines. We believe these changes are a better fit with the spirit of the Clayton Act and the realities of today's markets, and therefore will deserve deference from the courts if adopted.

b) Recommendations

First, we ask that the merger guidelines expand their analysis framework for what constitutes a transaction that substantially lessens competition. This includes eliminating the distinction between vertical and horizontal market analysis, looking at hyper-local market power, examining serial acquisitions below the reporting thresholds, and analyzing ways firms establish market power beyond majority ownership of a company. Blackstone is a textbook case of conduct that slips by enforcers: its doctor staffing firm, TeamHealth, hurts patient health while siphoning earnings away from doctors.[20] Blackstone also recently took

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[16] See e.g. State Oil Co. v. Khan 522 U.S. 3, 20–21 (1997) ("[This] Court…reconsider[s] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question"). See also Barak Orbach, Antitrust Stare Decisis, ANTITRUST SOURCE 1 (Oct. 2015), https://www.americanbar.org/content/dam/aba/publishing/antitrust_sourceoct15_orbach_10_19f.authcheckdam.pdf (noting that "Kimble declared that the Court is more willing to overrule antitrust precedents than other precedents").

[17] Duplex Printing Press Co. v. Deering, 254 U.S. 443, 481 (1921) (Brandeis, J., dissenting).

[18] Kimble v. Marvel Entertainment LLC, 135 S.Ct. 2401, 2412–13 (2015).

[19] See United States v. Microsoft Corp. 253 F.3d 34, 94 (D.C. Cir. 2001) ("We need to know more than we do about the actual impact of these arrangements on competition to decide whether they TTT should be classified as per se violations of the Sherman Act.'') (citing White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

[20] Isaac Arsndorf, "How Rich Investors, Not Doctors, Profit from Making up ER Bills," ProPublica (Jun. 12, 2020), https://www.propublica.org/article/how-rich-investors-not-doctors-profit-from-marking-up-er-bills.

a minority stake in AIG's "Life and Retirement business", while at the same time increasing its overall market power by also taking on management of AIG assets.[21] This mode of analysis also requires looking at additional markets beyond product markets for a transaction, including for labor and data. We encourage the DOJ and FTC to scrutinize these acquisitions in context, as a collection of conduct, to properly assess their potential anticompetitive effect.

Second, we believe the merger guidelines should examine ways in which certain acquisition and transaction practices themselves create *systemic* risks that tend toward monopoly. Previous case law has cautioned that antitrust law protects "competition not competitors."[22] This logic has primarily been used to immunize certain conduct from antitrust scrutiny even when a competitor can prove it was harmed. However, the inverse of this logic should also be true: behavior which does not necessarily immediately harm individual competitors but creates systemic pressure on the viability of competition generally in the market should be prohibited. Private equity engages in several practices which fit this bill. We urge the DOJ and FTC to scrutinize private equity and other acquisitions which, by virtue of their consolidation in one market, create pressures for parties in related markets to consolidate are one example. We also encourage the agencies to take into account and develop an approach that addresses the concentration dynamics and risks created by the use of leveraged buyouts which load an entire market sector with debt that entrenches existing financial advantages, facilitates anticompetitive behavior, and harms the entire industry's competitive vibrancy.[23] The DOJ and FTC should seriously consider these larger structural effects from transactions as they consider ways to address monopoly in its incipiency.

II. Expanded Scrutiny on What Substantially Lessens Competition

Private equity engages in many acquisition practices that substantially lessen competition. Perhaps most notable is the roll-up strategy wherein a private equity firm buys many businesses in the same industry with "complementary capabilities" to combine into one firm with market power. This practice combines many of the factors the agencies should more closely scrutinize to prevent harmful market consolidation. Of course, these practices are not unique to roll-ups or even to private equity, but they are acutely prevalent in these contexts.

a) Local Market Power

[21] Tezuka, Maera and Madeleine Farman, "Blackstone buys up life insurance stake; life sciences tools in demand," S&P Global (Jul. 16, 2021) https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blackstone-buys-up-life-insurance-stake-life-sciences-tools-in-demand-65498241.

[22] Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 320 (1962)

[23] Poerink, John. Wharton on Private Equity. The Consolidation Play and the Need for Due Diligence. Mar 29, 2010. https://kw.wharton.upenn.edu/private-equity/seminar/the-consolidation-play-and-the-need-for-due-diligence/

First, in many instances consumers cannot avoid the market power amassed by private equity firms in small local markets. Private equity firms excel at finding markets where disproportionate market power can be purchased in hyper local markets. This way, they can enjoy anticompetitive benefits with a small number of transactions that potentially do not even meet reporting thresholds. One prime example of this is housing. Deciding where to live is often dependent on factors like family, schools, and work and these are significant barriers to easily moving to another home. This makes housing an easy market to capture demand because people cannot simply order new housing online from across the country as they might if their electronics store raised prices on them. Private equity seizes on this local market power. On the heels of the housing crisis, private equity firms spent $36 billion buying homes in targeted markets—buying 90% of the houses sold in one Atlanta zipcode from January 2011 to June 2012.[24] These homes are then leased back at extractive rates andwith increasing add on fees. In many cases, however, people cannot reasonably avoid this market power without taking the drastic step of moving from their established community.

Skiing is another example. A private equity firm created a 13 resort, five state, transnational behemoth company (including resorts at Squaw, Steamboat, and Deer Valley).[25] Why? Declining ski visits prompted resort mergers to create cross-resort passes and ultimately raise prices. Vail Resorts pioneered this model, and KSL Capital Partners followed suit.[26] No matter where you live or your skiing level, it is difficult to avoid these expensive passes in North America.

The markets can be even more localized than regional skiing markets. Look at Stop & Shop, which openly abuses the competitive process in localized markets throughout the Northeast—but whose conduct is, so far, too localized for even state-level enforcers to take notice.[27] Stop & Shop and shell companies associated with the grocer have purchased parcels of land around different parts of Massachusetts solely with the intent to prevent other grocers from developing that space. Shop & Stop often resells the land but explicitly adds provisions restricting other businesses who sell food from occupying that space.

[24] Alana Semuels, "When Wall Street is Your Landlord," *The Atlantic* (Feb. 13, 2019), https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/.
[25] Danny King, "Melding Snow: The Consolidation of the Ski Resort Industry," *Travel Weekly*, November 8, 2017. Aspen's four resorts can be cross-promoted with this new group.
[26] Id.
[27] Robert Kuttner, "Rollups: All Monopolies are Local," *The American Prospect* (Jan. 14, 2022) prospect.org/power/rollups-all-monopolies-are-local/.

Hyper local power has outsized importance in people's lives, often because it translates to direct and unavoidable pricing power. For example, for sick or injured people that need medical transport to a hospital, there is often only one option. It's safe to say they are not comparison shopping. Private equity has aggressively acquired stakes in emergency air ambulance markets and used that power to raise prices to a multiple of 7-8 times higher than the standard Medicare price for such services.[28] Acquisitions in this space do not require rolling up national markets. Simply covering the majority of an area around a hospital is enough to give dominant pricing power. This is a common practice in private equity to gain the most market power for the least capital outlay. We urge the agencies to scrutinize these acquisitions more closely, including a retrospective analysis, to address harmful local market power.

b) Serial Acquisitions Below Reporting Thresholds

Another critical element of the roll-up strategy is serial acquisitions. Private equity firms may purchase one or two major players in a market but far more often, their deals are below the reporting threshold under the Hart-Scott-Rodino Act.[29] At the same time, the average private equity firm size is rising to multiple billions of dollars.[30] This means private equity firms generally buy many dozens of companies without ever triggering much or any official scrutiny. As the CEO of Goldman Sachs recently said, "the bread and butter of the M&A business is hundreds and hundreds of transactions for companies…and that activity and the continued consolidation across industries…continues to be relatively active."[31] However, these serial acquisitions below reporting thresholds can still roll up an industry or otherwise consolidate market power in single markets. Monopoly power is just as harmful whether it is obtained through a single purchase of a large competitor or 20 deals to absorb a previously richly competitive field of competitors.

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[28] Loren Adler, Kathleen Hannick, and Sobin Lee, *High air ambulance charges concentrated in private equity-owned carriers*, Brookings (Oct. 2020) https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2020/10/13/high-air-ambulance-charges-concentrated-in-private-equity-owned-carriers/

[29] What Is A Private Equity Firm's Ideal Deal Size?, Generational Equity https://www.genequityco.com/insights/what-is-a-private-equity-firm-s-ideal-deal-size ("a significant majority of deals closed by PE firms in the first quarter of this year were below $100 million in value. Even more surprising, more than 40% of all transactions were valued BELOW $25 million."); HSR threshold adjustments and reportability for 2022, Federal Trade Commission (Feb. 11, 2022) https://www.ftc.gov/news-events/blogs/competition-matters/2022/02/hsr-threshold-adjustments-reportability-2022 ("For 2022, that threshold will be **$101 million.")**

[30] Kevin Dowd, "The Average PE Fund Size is Skyrocketing in 2019," Pitchbook (April 23, 2019) https://pitchbook.com/news/articles/the-average-pe-fund-size-is-skyrocketing-in-2019.

[31] Goldman Sachs Chairman & CEO David Solomon Speaks with CNBC's Jim Cramer Today, CNBC (Feb. 23, 2022) https://www.cnbc.com/2022/02/23/cnbc-exclusive-cnbc-excerpts-goldman-sachs-chairman-ceo-david-solomon-speaks-with-cnbcs-jim-cramer-today.html.

Consider landscaping, which has seen a trend of private equity-backed firms serially acquiring smaller firms, and thengoing public. KKR's BrightView, then the highest grossing commercial landscaping company in North America, filed for an IPO of $100 million in 2018.[32] BrightView's growth came in large part because of acquisitions below the Hart-Scott-Rodino thresholds for required reporting. In the previous year alone, it had acquired eight businesses with a combined revenue of $188 million.[33] Private equity giant CD&R followed the same playbook with SiteOne, a landscaping company carved out of John Deere in 2013.[34] Under CD&R, SiteOne acquired at least nine companies under the HSR reporting threshold before it went public in 2016. It had acquired several other regional players in the landscape supply chain in that year alone.[35] This pattern continued as a baked-in business model following the IPO and CD&R's exit from SiteOne, with a flurry of later acquisitions fueled in part by the tremendous debt placed on the company.[36] CD&R, the private equity firm behind SiteOne's creation and growth, is very active in this market and adjacent markets. It also owns TruGreen, a lawn care company, which itself underwent a 2016 merger with Scotts LawnService to create the county's dominant lawn care company.[37]

These patterns of acquisitions may be difficult to identify at first, but the new merger guidelines should make clear that these patterns of practice will receive scrutiny. Likely by the time agencies notice a pattern of serial acquisitions, several will already be consummated, and the market will be well on its way to harmful consolidation. Therefore, we recommend that the guidelines flatly prohibit serial acquisitions in the same industry and especially in the same market when discovered. If a firm has engaged in a pattern of anticompetitive serial acquisitions over a short time, the agencies should challenge any further acquisitions outright. In the case of serial acquisitions that have progressed far

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[32] Brian Horn, "BrightView Makes its move," Lawn & Landscape (May 31, 2018), https://www.lawnandlandscape.com/article/ll-053118-brightview-goes-public-ipo-filing/.

[33] Id.

[34] "Clayton, Dubilier, & Rice to Acquire John Deere Landscapes," CDR Press Release (Oct. 28, 2013) https://www.cdr-inc.com/news/press-release/clayton-dubilier-rice-acquire-john-deere-landscapes.

[35] See e.g., Landscape Management, "SiteOne Acquires Hydro-Scape," Jan. 16, 2016, https://www.landscapemanagement.net/siteone-acquires-hydro-scape/#:~:text=SiteOne%20Landscape%2C%20formerly%20John%20Deere,its%20first%20acquisition%20in%202016.

[36] See Abigail Stevenson, "Cramer: Know your IPO! Sleeper stock fit for international volotality," CNBC (Jun. 17, 2016) https://www.cnbc.com/2016/06/17/cramer-know-your-ipo-sleeper-stock-fit-for-international-volatility.html ("Cramer was concerned about the company's balance sheet, as with most private equity backed IPOs; it has little cash and nearly $400 million in long-term debt. It raised nearly $200 million in the IPO and it is using some of that to pay down the debt…The company also believes it can expand dramatically with smart acquisitions.").

[37] "TruGreen and Scotts Lawn Service Close Merger," CDR Press Release (April 13, 2016) https://www.cdr-inc.com/news/press-release/trugreen-and-scotts-lawnservice-close-merger.

enough to create monopoly power in a market, we further recommend that the agencies challenge and unwind these mergers retroactively.

c) Eliminating the Horizontal-Vertical Market Analysis Paradigm

The first practice is roll-ups that fall outside the standard division of horizontal and vertical competition. Private equity acquisitions often anticompetitively feed complementary products and services into an interconnected dominant firm. One of the selling points for private equity roll-ups is that they combine companies that may not directly horizontally compete with one another. They may also not be in the direct vertical supply chain for a business. In this way, they do not neatly fit the existing guidance in horizontal and vertical merger guidelines. However, this does not mean these acquisitions preserve competition. In fact, the combination of adjacent products into an interrelated bundle can create an anticompetitive gravity that is greater than the sum of its parts.

Roll-ups are often sold as creators of efficiencies, combining everything a consumer might buy in an industry into one company. However, the most common expression of this efficiency is simply abusive market power over consumers. Consider prisons. Private equity firm HIG Capital acquired Trinity Services Group (prison food) and Keefe Group (commissary services) in the last decade and combined them in TKC Holdings.[38] The thinking is that such a combination should deliver efficiency gains, through economies of scale and the like. The reality has been the opposite: TKC has been incentivized to deliver poor quality meals, damaging the health of incarcerated individuals, and spiking long-term health care costs.[39]

Most distressingly of all, mental health and behavioral services for teens have been gobbled up by many private equity giants, meaning some teens only have access to low quality, profit-focused, private equity-controlled mental health services like Aspen Educational Group.[40] Several different PE firms, including Bain Capital, owned Aspen Educational Group at one point or another. The group "...ran boarding schools, wilderness therapy programs, special needs summer camps, residential treatment facilities, and weight loss programs for youth."[41] This mix of programs was built through acquisitions. And while the acquisitions were not always for directly overlapping horizontal competitors, or vertical suppliers of services for

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[38] Baker, Jim, "HIG Capital's Prison Food and Commissary Store Racket," Private Equity Stakeholder Project (Oct. 2019),https://pestakeholder.org/wp-content/uploads/2019/10/HIG-Capital-Prison-Food-Commissary-PESP-103019.pdf.
[39] Id.
[40] Eileen O'Grady, "The Kids Are Not Alright: How Private Equity Profits Off of Behavioral Health Services for Vulnerable and At-Risk Youth," Private Equity Stakeholder Project (Feb. 2022), https://pestakeholder.org/wp-content/uploads/2022/02/PESP_Youth_BH_Report_2022.pdf.
[41] Id.

their products, the resulting combination created substantial market power in the "troubled teen" industry. This meant large profits for Bain, among others, even as quality declined and complaints mounted because of their market power that grew through these acquisitions that did not fit comfortably in the horizontal/vertical framework. Accordingly, we encourage any merger guidelines to account for the fact that the vertical and horizontal markers of competitive markets do not reflect the economic realities of the private equity space. Instead, transactions should be evaluated for how they build on-the-ground power for firms to exclude rivals and extract more from consumers in their local markets, regardless of the formalistic distinctions of horizontal and vertical competition.

d) Control Outside Majority Ownership

Assessing private equity control of an industry requires scrutiny of the extent to which private equity companies gain and maintain minority ownership or influence over companies they don't outright control. While in most cases a private equity firm buys controlling majority stakes of their target companies, the average holding period for their ownership of a given company is only about 5 years.[42] After this period, many private equity groups maintain some minority ownership stake. Alongside ownership, private equity groups often also select the members of the board of directors of target companies which may last even after the private equity firm fully divests from a company. Placing the same person on several boards to coordinate where they don't outright own the other companies is called an interlocking directorate and it is per se illegal under the antitrust laws. This area is substantially underenforced, however, and the private equity industry often exercises anticompetitive control through these arrangements. Outside of this strict definition, if a private equity firm spreads members of a close-knit group amongst many current and former portfolio companies, it may de facto create the same interlocking directorate effect.

An industry that has seen substantial private equity activity—with target companies even sometimes changing hands multiple times between private equity groups—is prone to a substantial anticompetitive effect from minority stakes and interlocking directorates. The minority stakes and interlocking directorates of an industry create substantial risk for two key abuses of power. The first is the obvious incentive for players in the market to collude. Wink-and-nod collusion is much easier to coordinate when a single private equity firm has an ownership stake or a friendly director on the board of most of the companies in a market.

Second, these techniques create the risk of anticompetitive data sharing. Shareholder rights or a board membership create natural ways for a private equity company to peer behind the

[42] Hugh MacArthur et al., "Still Booming, but is the Cycle Near Its End?" Bain & Company Insights (Feb. 25, 2019), https://www.bain.com/insights/year-in-review-global-private-equity-report-2019/.

curtain on firms in the markets they operate in. If they no longer hold majority ownership, there are still substantial risks of sensitive business information being shared back to the private equity firm or with the majority owned companies. Without enforceable information firewalls and regular oversight, we can only assume that such sensitive information finds its way around to private equity group members. Sharing this information, again, creates powerful anticompetitive benefits for the private equity group's portfolio companies and further increases the risk of concerted action between firms that are not formally merged.

These forces toward de facto consolidation from minority stakes and direct or indirect interlocking directorates create substantial risks of lessened competition. We urge the FTC and DOJ to consider these elements as simply another form of market power when looking at acquisitions in the private equity industry. The prevalence of these indirect ways of controlling market share mean that a market may appear on its surface to be competitive, but is covertly controlled by only one or two private equity groups. To adequately address and prevent this type of harmful consolidation, however, the agencies will need to collect substantially more information from acquisitions. This requires an update to the filing information requirements that the FTC and DOJ request for acquisitions that exceed the HSR reporting thresholds. It also likely requires the agencies to request more information for acquisitions in the private equity space that fall below the reporting thresholds. As a bare minimum we recommend the agencies request information on private equity groups' ownership stake histories over the past 5 or more years on a month-to-month basis and placements on boards of directors of portfolio companies. We further recommend that the agencies study and seek out companies with a history of serially buying minority stakes of other companies in the same or similar markets to examine for market power of this sort.

e) Labor Market Power

Power in labor markets is another critical element of substantially lessen competition that deserves attention in any revision to the merger guidelines. Consolidation and market power in labor markets is a problem across nearly every market in the economy. However, it is particularly pronounced in the private equity space. We know that labor market power can lead to lower wages for employees.[43] Beyond this, even if wages are not decreased, labor monopsony can force workers to accept longer hours, worse working conditions, and less autonomy.[44] This reduction in the quality of work can be just as damaging as lower wages.

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[43] Chen Yeh, Claudia Macaluso, Brad Hershbein, *Monopsony in the U.S. Labor Market* (Jan. 12, 2022) https://www.google.com/url?q=https%3A%2F%2Fwww.dropbox.com%2Fs%2F3qpxons17tuk044%2Fmonopsony_draft_January2022.pdf%3Fdl%3D0&sa=D&sntz=1&usg=AFQjCNE6kqkizL96jbNSUNntH7fvvX9uZA.

[44] Caius Z. Willingham, Olugbenga Ajilore, *The Modern Company Town*, Center for American Progress, (Sep. 10, 2019) https://www.americanprogress.org/article/modern-company-town/.

Labor markets are known to be less elastic than standard product markets.[45] This creates a dangerous capacity for abusing workers. Private equity in particular is institutionally predisposed to finding additional ways to wring revenue from target companies. Private equity combines this with the practice of rolling up industries or purchasing localized pockets of market power to create the ability and incentive to abuse market power over workers. The retail stories of Sears, Toys "R" Us, and other similar players are all-too-indicativeexamples here too: private equity's entry into that market erased hundreds of thousands of jobs. It also cleared the way for Amazon's entry by depleting these firms of the capital they would have needed to update and adapt to changing technology .

We urge the FTC and DOJ to formally require consideration of the effects on labor markets for each transaction to determine whether it will allow the newly consolidated company to lower wages or impose worse work quality. The consideration of labor effects can include standard measures like market concentration metrics, or a larger systemic analysis including whether the merger takes place in the context of a market with downward trending wages from prior consolidation.[46] We urge that, whatever metric is chosen, it should be employed with clear structural presumptions against mergers that exceed the thresholds. Further, we encourage the agencies to adopt guidelines which clarify that any assertions of efficiencies in labor markets should largely be discounted unless there is concrete, non-speculative evidence that such benefits will materialize.

f) Data Monopolization

Finally, we urge the agencies to consider how acquisitions of data market power uniquely reduce competition. The nature of data markets, by virtue of their overlap with platform and network markets, are especially prone to rapid accumulations of market power. The House Digital Markets Majority Staff Report explained that markets of this sort tend to have network effects, switching costs, and other entry barriers that make them make competition precarious.[47] Because of these effects, competition for data advantages tends to happen at an earlier stage, with early winners gaining exponentially increasing scale advantages over

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[45] Id. ("Almost all workers face some employer power due to factors such as search frictions, incomplete information, and job differentiation. And some face additional restrictions on their ability to find new jobs via no-poaching agreements or noncompete clauses—anti-competitive hiring practices that preclude workers from finding work at other firms.")

[46] See e.g. Suresh Naidu, Eric Posner, and Glen Weyl, Antitrust Remedies for Labor Market Power pp. 27–36 https://ssrn.com/abstract=3129221

[47] Majority Staff of the Subcomm. on Antitrust, Commercial and Admin Law of the H. Comm. on the Judiciary, 116th Cong., Report on the Investigation of Competition in Digital Markets, at 385 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

their rivals, allowing them to compete *for* the entire market, rather than in it.[48] Because of this tendency of data markets to "tip", it is important that the agencies examine data acquisition at earlier stages of competition and lower levels of concentration than they might for a product market.

On top of this, data markets are often tightly integrated with adjacent markets—generally the markets that the data is about—in ways that make monopolization of a data market a dangerous anticompetitive weapon. This is especially potent when the data acquisition is combined with a competitive offering in the underlying product or service market. The adjacent data market power creates a risk that the data monopolist could both extract more from their customers and unfairly compete against rivals. As an example, the Department of Justice very recently challenged the merger of UnitedHealth Group and Change Healthcare in part under a recognition of this threat. The agency said such an acquisition of data would give "United control of a critical data highway through which about half of all Americans' health insurance claims pass each year" which would allow them to see sensitive information from rivals and control critical health information for consumers.[49]

In private equity, data acquisitions are commonplace and thus the risk of these anticompetitive effects are particularly high. Private equity groups regularly purchase both troves of data, and companies with unique ongoing control over data sources and data streams. Private equity's interest in healthcare may be motivated in part by the acquisition of such troves of data.[50] So, too, are more initially puzzling purchases, like Blackstone's acquisition of Ancestry, the family history service which is a treasure trove of data.[51] These types of purchases often trigger less scrutiny in private equity because they are smaller or made in local markets. However, due to the unique anticompetitive threat profile of data acquisitions, they deserve heightened scrutiny.

We urge the agencies to formally call for an assessment of the potential increases in data market power from a given transaction. And further, we urge a recognition that data markets

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[48] See Chicago Booth Stigler Ctr. for the Study of Econ. & State, Stigler Cmte. on Dig. Platforms 29 (2019); Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, Wash. Ctr. for Equitable Growth 1 (Sept. 2020) ("The monopolist operates in a market with significant network effects, scale and scope economies, and low distribution costs. Therefore, the competition that matters most is often for the market not within the market.").

[49] Press Release, Department of Justice, Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare, (Feb. 24, 2022) https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare

[50] Rana Foroohar, "The SEC Has Shone a Welcome Light on Finacial Darkness," *Financial Times* (Feb. 13, 2022) https://www.ft.com/content/69419405-df3e-4449-82d1-79d276ccf2d9.

[51] "Blackstone completes acquisition of Ancestry, Leading Online Family History Business, for $4.7 Billion," Blackstone Press Release (Dec. 4, 2020) https://www.blackstone.com/news/press/blackstone-completes-acquisition-of-ancestry-leading-online-family-history-business-for-4-7-billion/.

require scrutiny at earlier stages of competition and in conjunction with their related markets to understand the extent to which these acquisitions ultimately reduce competition.

III. Structural Protection for the Competitive Process

It is equally important that the DOJ and FTC recognize and develop a coherent theory of enforcement against mergers which "tend to create a monopoly." The development of this incipiency standard need not proceed from scratch. We have guidance from the Supreme Court that incipiency "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended §7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[52] We agree that whether a transaction tends toward monopoly is about more than the singular effects of a transaction on the competitors in the field or the imminent increase in concentration today. Rather, we urge the agencies to examine the systematic effects of transactions on the competitive process over time. In the private equity space there are two major incarnations of how transactions tend towards monopoly in the long term structurally: related market effects and the effects of private equity purchase techniques like leveraged buyouts on competitive vibrancy.

First off are related market effects. Extensive private equity activity in an industry generally results in the scale of businesses increasing. Even if the market stays ostensibly competitive between several companies, the continued acquisitions and combinations by private equity begin to create substantial power imbalances between the consolidated industries in which private equity is active and any related markets. This has close theoretical parallels to cluster markets in which a company creates a combination of noncompeting goods but generates market power from that combination and forces potential competitors to compete with the entire bundle.[53] An obvious example of this is Amazon Prime, which offers video streaming, consumer goods, grocery, music, and more. Private equity driven consolidation of related markets may create power in that suite of offerings that creates pressure for related markets to concentrate in response. Scholars now recognize that these related-market effects are more than hypothetical. For example, Zillow's acquisition of Trulia appears to have created increased concentration in local real-estate agent markets.[54] The same such effects are

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[52] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362 (1963)
[53] *See* Hovenkamp, Herbert J., *Digital Cluster Markets* Col. Bus. L. Rev. (forthcoming) at 5 https://scholarship.law.upenn.edu/faculty_scholarship/2299 (This process of aggregating noncompeting products or services leads to the creation of "cluster markets," which are markets that consist of noncompeting goods. It then becomes important to ask when it is sensible to locate power in the cluster itself rather than in the simple presence of any particular item.")
[54] Newman, John M., *Complex Antitrust Harm in Platform Markets*, CPI Antitrust Chronicle (May 2017) https://ssrn.com/abstract=2955376

common in private equity transactions, though they are less studied because private equity consolidation tends to happen in more localized or niche markets.

Second, we urge the agencies to examine and develop strategies to prevent the harms ofacquisition techniques like leveraged buyouts. This perspective requires looking beyond the individual transaction to the market as a whole. A leveraged buyout, simply, is when a private equity firm raises money to buy a company by using the target company as collateral. When such a transaction is closed, the target company is saddled with the tremendous debt that it took to purchase itself, leaving it in a weakened condition, and creating systemic harms to the competitive landscape. Moreover, the large debt load on a company that has been forced to pay the debt for purchasing itself creates the incentive for anticompetitive acts to recoup revenue to service that debt.

Hospital Corporation of America has been the subject of several large buyouts and serves as a good example of both previous points. The company—itself the product of lax antitrust enforcement—pursued questionable mergers and got hit with antitrust lawsuits because its conduct post-financialization further warped an already uncompetitive landscape.[55]

Finally, and perhaps most importantly, the leveraged buyout and other such acquisition techniques leave a lasting trail in markets that fundamentally weaken the competitive health of those markets. One of the hallmarks of a market impacted by leveraged buyouts are zombie companies. A zombie company generates only barely enough revenue to service its massive debts but not enough to ever pay down principal. In fact, being owned by private equity makes a firm ten times more likely to declare bankruptcy.[56] Zombie companies also have been identified in the systemic risk literature as potential shock-amplifiers that can cause financial crises. These companies are the equivalent to what economist Hyman Minsky defines as firms engaging in speculative and Ponzi finance in his famous Financial Instability Hypothesis.[57] Minsky argues that highly leveraged firms engaged in Ponzi finance are those for which the income flows from operations are not enough to cover the debt interest costs or the repayment of principal. Ponzi firms depend on the possibility of refinancing their debt or taking on additional debt to pay commitments as they come due, otherwise they have to resort to the liquidation of assets. Widespread sell-offs can put downward pressures on

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[55] See e.g., Jennifer Henderson, "HCA Hit With Antitrust Suit Over High Praces," MedPage Today (Aug., 12, 2021) https://www.medpagetoday.com/special-reports/exclusives/94014.

[56] Alicia McElhaney, *LBOs Make (More) Companies Go Bankrupt, Research Shows*, Institutional Investor (Jul. 26, 2019) https://www.institutionalinvestor.com/article/b1gfygl4r8661f/LBOs-Make-More-Companies-Go-Bankrupt-Research-Shows

[57] Minsky, Hyman. "The Financial Instability Hypothesis." Levy Economics Institute of Bard College. Working Paper No. 74. May 1992. Available at: https://www.levyinstitute.org/publications/the-financial-instability-hypothesis

general asset prices and can lead to a full Fisher-style debt deflation or a so-called "Minsky moment." The Financial Instability Hypothesis shows how an abundance of firms in the Ponzi position lowers the resilience of the economy and increases systemic fragility and the likelihood that income shocks can be amplified into a crisis.

When private equity groups have purchased and resold a substantial portion of a market, they are often left with zombie companies or firms that barely maintain profitability. Such zombie firms shed jobs and physical store locations as the private equity debt load became unmanageable. When a substantial portion of a market is left with these financially wounded companies, the market becomes less competitive overall. Companies cannot invest in their products, they cannot withstand even mild economic shocks, and they generate less vibrant competition overall. These fragile firms sit like underbrush in a market, creating the conditions for the wildfire of monopoly to clear out competition in later years because they are no longer equipped to be true competitors.

For example, retail giants like Sears and Toys "R" Us, along with numerous smaller retailers, were a casualty of private equity. Private equity firms loaded such retailers up with crippling debt and bled them dry of productive assets, a plunder that benefitted Wall Street but caused perhaps more than a million jobs to disappear across the retail sector. Private equity backed firms did not come to dominate the sector—most ended up in some form of bankruptcy.[58] But debt-laden retail firms could not quickly respond to another threat: Amazon, who monopolized retail in the shadow of private equity's evisceration of the sector. The result has been disastrous for labor and the competitive landscape, but good for giants like Amazon.

We urge the DOJ and FTC to closely scrutinize and create presumptions to challenge acquisitions that employ leveraged buyouts and techniques like it. These techniques harm competition even when they don't harm competitors in the traditional sense. And they plant the incipient seed for a market to later tend toward monopoly. Thank you again for this opportunity to comment.

Respectfully,
Americans for Financial Reform Education Fund
Center for Economic and Policy Research
United for Respect

[58] ABI Journal, *Private Equity Has a Retail Problem*, (Jan. 2018) insolvencyintel.abi.org/i/924776-private-equity-has-a-retail-problem/3; United for Respect, *Pirate Equity: How Wall Street Firms are Pillaging American Retail*, (Jul. 2019) united4respect.org/pirateequity.