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Mr. Henry Liu
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Federal Trade Commission
600 Pennsylvania Ave. N.W.
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September 18, 2023

RE: Draft Merger Review Docket ID No. FTC-2023-0043

Dear Mr. Kantor and Mr. Liu:

Americans for Financial Reform Education Fund (AFREF) commends the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) for the draft Merger Guidelines that would substantially improve the merger review process.[1] The levels of economic consolidation and concentrated market power have been indisputably rising, leading to far less competitive markets that harm workers, consumers, communities and the operation of markets. The proposed revision of the merger guidelines enumerates how the statutory authorities in the Clayton Act address the current level of market concentration and the emerging strategies that firms have used to lessen competition and tend towards the monopolistic exercise of market power. The draft guidelines present a clear roadmap for agencies to evaluate proposed mergers in the light of current market realities and effectively achieve the goals of the Clayton Act.

AFREF is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups dedicated to advocating for policies that shape a financial sector that serves workers, communities and the real economy, and provides a foundation for advancing economic and racial justice. The unchecked merger wave of the past few decades has concentrated economic power into the hands of fewer firms that has raised prices for consumers, suppressed wages and benefits for workers, undermined the ability to form and sustain small businesses, and sapped vitality from our communities. These negative impacts have disproportionately disadvantaged people of color, women, and people with limited English proficiency as individuals, families, and communities.

[1] Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ). "FTC-DOJ Merger Guidelines (Draft for Public Comment)." (FTC-DOJ Draft Merger Guidelines). Matter No. P859910. July 19, 2023.

The proposed merger guidelines make important structural and thematic improvements to prior merger guidelines that AFREF wholeheartedly supports. First, the guidelines are in far more accessible language that describes the specific anticompetitive considerations in numbered guidelines. This improves transparency for market participants as well as workers, small businesses, and individual consumers that clarifies how antitrust authorities will evaluate proposed mergers.

Second, the proposed guidelines revitalize the structural presumptions that horizontal and vertical mergers undermine competition that is grounded in the statutory authorities and in case law. This includes the restoration of lower market share and concentration thresholds for mergers that are presumptively anticompetitive. AFREF supports these improvements and encourages the FTC and DOJ to consider further strengthening these elements by more clearly enumerating the structural presumption that confronting merger-driven concentration in its incipiency requires a much more skeptical evaluation of proposed mergers. Additionally, the agencies should consider lowering the market share and concentration levels below the levels in the proposed guidelines. The restoration of the concentration thresholds for presumptively illegal mergers is a considerable improvement, but the standards in force from 1982 to 2010 were insufficiently stringent to stave off the rapid economic consolidation that has occurred over the past three decades.

Third, AFREF welcomes the recognition and clarity that the potential non-price effects of mergers are potentially as harmful as the potential price effects. The almost exclusive use of the consumer welfare standard where mergers were evaluated on whether econometric models predicted small but significant price increases under the hypothetical monopolist test has failed to check protracted concentration in the U.S. economy to the detriment of consumers, workers, small businesses, and communities. The proposed merger guidelines restore some needed balance by recognizing that mergers can reduce quality, variety and choice, hinder access, impede innovation, or reduce wages and benefits for workers. But in the end, the proposed guidelines reinforce more than replace the consumer welfare standard. The appendices clearly show that the agencies will continue to rely on the econometric models of the hypothetical monopolist test that have a demonstrated track record of failing to prevent increasing concentration and declining competition. The merging firms that control the data and employ sympathetic economists are well served by the predictive model tests, but the public and the robustness of a competitive economy fare poorly under these tests. The antitrust authorities should consider relying more heavily on presumptive concentration levels to guide merger evaluation and minimize the use of these economic model tests.

Fourth, AFREF supports the clarification of several common rebuttals to the presumption that a given merger may substantially lessen competition or tend to create monopolies — especially the efficiency defense and the barriers to coordination defense — but believe the agencies should consider further strengthening these sections to effectively prevent firms from pursuing these spurious claims. Merging firms have frequently contended that a proposed acquisition would increase efficiencies that would improve competition and reduce consumer prices, an argument that received much credence under the supremacy of the price-based consumer welfare standard. AFREF urges the agencies to more decisively debunk this fallacious contention in the final merger guidelines. There is little or no empirical evidence that mergers have improved market efficiencies and even less that the end consumers receive the benefits of those purported efficiencies in lower prices. The notion that scale efficiencies are pro-competitive runs entirely contrary to the statutory language because a true monopoly would have the greatest scale efficiencies. The proposed guidelines clarify that the efficiency defense requires merger-specific, verifiable evidence that the efficiencies would benefit the market and not just the merging parties, but even these tests rely on

the internal data and modeling of the merging parties and are subject to potential distortion. Similarly, the agencies should almost always reject proposed rebuttals to the presumption that mergers can amplify coordinated market effects. In the all-too common markets with few large competitors, there is no need for back-room collusion because the participants can monitor and mirror their rivals' pricing and strategies creating a cartel without communication.

AFREF strongly supports the overall approach and structure of the proposed merger guidelines, but this comment focuses in particular on the anticompetitive impacts that private equity buyouts have on the economy and their implications for merger review. Private equity investment firms have been a driving force in mergers and acquisitions for decades. Private equity buyouts represent the majority of reportable mergers, but a large portion of private equity transactions fall below the Hart-Scott-Rodino (HSR) thresholds, especially for sequential mergers as part of a roll-up strategy and for minority stake purchases as part of a growth equity investment strategy. The proposed guidelines recognize that agencies must enforce the antitrust laws and review mergers "in a changing economy" and "in a manner consistent with modern analytical tools and market realities."[2] The importance of private equity buyouts to the merger landscape makes it essential that the merger guidelines reflect these market realities and unique characteristics of private equity-driven mergers and the anticompetitive practices perpetrated by the private equity industry.

This comment describes: the scale, uniqueness, and anticompetitiveness of the private equity industry's leveraged buyout acquisition (Section I); the private equity strategy of sequential roll-up acquisitions that lessen competition and tend to create monopolies (Section II on Guideline 9); the private equity practice of taking minority stake investments in firms that can increase the risk of coordinated market behavior and collusive practices (Section III on Guideline 12); the anticompetitive exercise of monopsonistic market power, including in labor markets (Section IV on Guideline 11); the private equity strategy to amass multiproduct adjacent market conglomerates that tend to entrench and extend monopoly power (Section V on Guideline 7); and the private equity practice of assembling vertical combinations that disadvantage rivals and undermine competition (Section VI on Guideline 6).

I. Private equity's role in U.S. mergers and the importance of incipiency

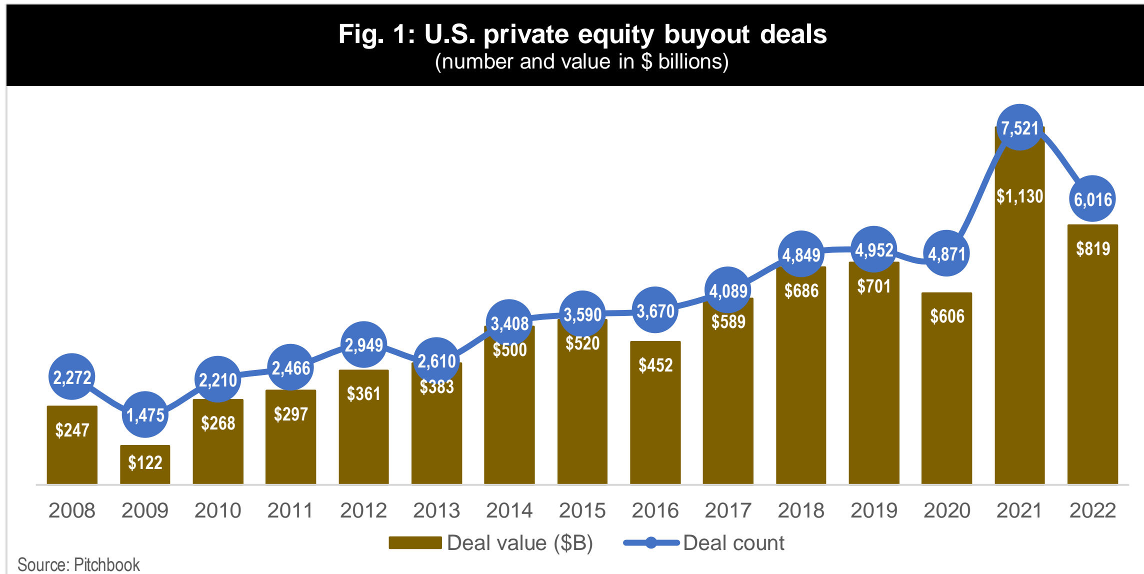
AFR commends the FTC and DOJ for recognizing that changes and evolutions in the marketplace require the merger guidelines to clearly apply the statutory authorities to reflect the current economic environment. The private equity industry has become the primary driver of consolidation and merger activity in the United States and the predatory practices and economic extraction of private equity firms from their portfolio acquisitions present unique risks to a competitive economy.

Private equity firms are investment companies that pool large volumes of private capital to buy companies. These purchases are financed by debt collateralized by the acquired firm, typically through a leveraged buyout where the takeover target must repay the debt that financed its own acquisition. After the takeover, the private equity firms restructure the business, usually firing workers,[3] raising prices,[4] and engaging in financial engineering to convert as much of the target

[2] FTC-DOJ Draft Merger Guidelines at 4 and 6

[3] Primack, Dan. "Private equity takeovers result in significant job losses." *Axios*. October 7, 2019.

[4] Baker, Walter et al. McKinsey & Company. "Pricing: The Next Frontier of Value Creation in Private Equity." October 23, 2019.



business's revenue into a direct profit stream back to the private equity firm as possible.[5] Private equity's leveraged buyout acquisition spree over the past decades has made it an ever-increasing share of the economy. In 2022, private equity firms owned or backed 18,000 U.S. companies, about 4 and half times more than the number of publicly traded U.S. companies.[6]

Private equity leveraged buyouts have supercharged the economic consolidation and concentration over the past 15 years. Private equity buyouts have nearly tripled from about 2,300 deals in 2008 to over 6,000 deals in 2022 and the total value of buyout deals more than tripled to over $800 billion in 2022 (see Figure 1).[7] Private equity buyout deals have increased an average of 10 percent annually over the past 15 years, despite contractions and slowdowns during the financial crisis, the pandemic, and the recent inflationary period.

These private equity deals now make up the majority of reportable mergers transactions. At a minimum, three-quarters of the 3,500 mergers in 2021 that exceeded the $92 million HSR threshold were the 2,580 private equity buyout deals that were larger than $100 million.[8] And the private equity share of reportable transactions has risen steeply over the past 15 years, rising from a minimum of 29 percent in 2008 to 73 percent in 2021 (see Figure 2). It is likely that the private equity share of the reportable merger transactions is even higher for deals under $100 million. AFREF estimates that private equity buyout deals could have represented at least 75 percent of the reportable HSR transactions in seven of the past 15 years.[9]

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[5] Cumming, Chris. "Buyout firms set record for loading companies with debt to pay themselves." *Wall Street Journal*. October 25, 2021.
[6] E&Y for the American Investment Council. "Economic Contribution of the U.S. Private Equity Sector in 2002." April 2023 at 1; Center for Research in Security Prices, LLC. "CRSP Market Indexes US Market Update December 2022." December 2022 at 7.
[7] Pitchbook. "U.S. Private Equity Breakdown: 2022 Annual." (Pitchbook 2022 Annual). U.S. private equity deal activity. January 2023.
[8] AFREF analysis of Pitchbook data applying the share of private equity buyout deals to private equity deal flow by size.
[9] AFREF estimate based on an even distribution of deals between Pitchbook's reported $25 million to $100 deal size and the annual HSR threshold. For example, when the HSR threshold was $76 million in 2014 and 2015, about 32 percent of

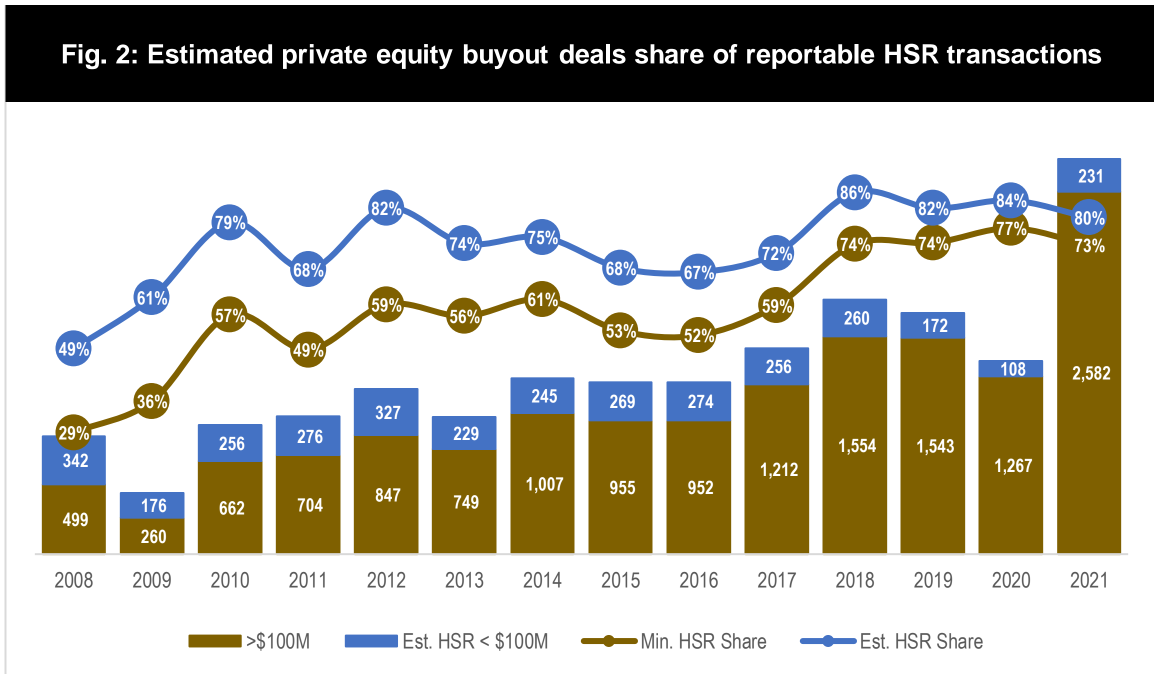

Fig. 2: Estimated private equity buyout deals share of reportable HSR transactions

The sheer number and scale of private equity buyout acquisitions means that the antitrust agencies should closely examine the private equity industry's effect on consolidation and the specific strategies that private equity employs to amass market power that can substantially lessen competition and tend to create monopolies. Private equity firms often make a series of sequential acquisitions in the same product market that fall below the HSR reportable transaction thresholds but that over time assemble a firm with substantial market power that undermines competition. And private equity firms frequently take minority investment stakes that nonetheless provide the ability to influence or control the firm in which they are investing that facilitates the illegitimate exercise of coordinated market power. AFREF supports the proposed merger guidelines efforts to address these two specific and common private equity strategies that are discussed in detail below.

First, the antitrust agencies need to examine the mergers not as a Wall Street firm purchasing a one-off asset but as a holding company with dozens or scores of subsidiaries acquiring a new company. The combination of a private equity firm itself with a hospital or retail chain or petrochemical plant will not appear to be a merger that affects competition. But the portfolio companies owned and controlled by the private equity firm can and often do contain direct horizontal rivals or vertical firms in the target company's supply chain. As a consequence, these private equity buyouts can often have the effect of substantially lessening competition or tending to monopoly. It appears that antitrust authorities are examining the competitive implications of a private equity-owned portfolio company's add-on acquisitions. But the leveraged buyout of target firms by private equity firms in other contexts does not appear to receive the same level of scrutiny. The antitrust agencies must evaluate the entire portfolio of owned companies and minority business investments to assess the potential anticompetitive effects of any proposed merger.

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the private equity buyout deals of this size likely exceeded the HSR threshold. This estimate increases the share of deals when the threshold was lower and reduces it when the threshold approached $100 million.

Additionally, the antitrust agencies should recognize the systemic anticompetitive impact of a large number of extractive private equity leveraged buyout acquisitions that can destabilize target firms and entire sectors and lead to corporate collapses that can precipitate further consolidation as larger buyers purchase firms out of bankruptcy. The private equity business model relies on extractive financial engineering — including imposing huge debt burdens through leveraged buyouts, extracting exorbitant management fees, larding on debt-financed dividend payments, and asset stripping (for example by selling off real estate that then requires a firm to pay rent) that undermine the financial viability of their portfolio companies and threaten the livelihoods of workers. As a result, private equity portfolio firms are far more likely to go into bankruptcy. A 2019 California Polytechnic State University study found that 20 percent of the firms taken over by private equity went into bankruptcy — a rate ten times higher than for non-private equity firms.[10]

The private equity buyout business model imposes financial precarity on the takeover targets that can be catastrophic for portfolio firms' survival, but it also has significant impacts on the competitiveness of portfolio firms' sectors. The private equity industry's high levels of acquisition, add-on mergers, relatively rapid exits over five- to seven-year horizons, and high levels of bankruptcy contribute to sectoral instability and higher levels of sector concentration. For example, private equity leveraged buyouts in the retail sector led to more than 50 bankruptcies between 2015 and 2020 — 56 percent of the bankruptcies in the sector.[11]

AFREF supports the proposed merger guidelines dedication to preventing mergers that increase concentration in their incipiency and those that further a trend in concentration. Antitrust enforcement "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.'"[12]

Whether a transaction tends toward monopoly is about more than the singular effects of a specific transaction on rivals, the competitive landscape, or the imminent increase in concentration. AFREF urges agencies to examine the systematic risks unique to private equity buyout transactions on the competitive process over time. The high proportion of private equity leveraged buyouts as a share of reportable transactions requires an approach that addresses the concentration dynamics and risks created by these transactions that load an entire market sector with debt that entrenches existing financial advantages, facilitates anticompetitive behavior, and harms the entire industry's competitive vibrancy.[13]

II. Antitrust regulators must aggressively police roll-up mergers that amass market power in a series of acquisitions (Guideline 9)

AFREF supports the draft merger guideline's recognition that a series of smaller acquisitions can result in anticompetitive market power in the same manner that large mergers may substantially

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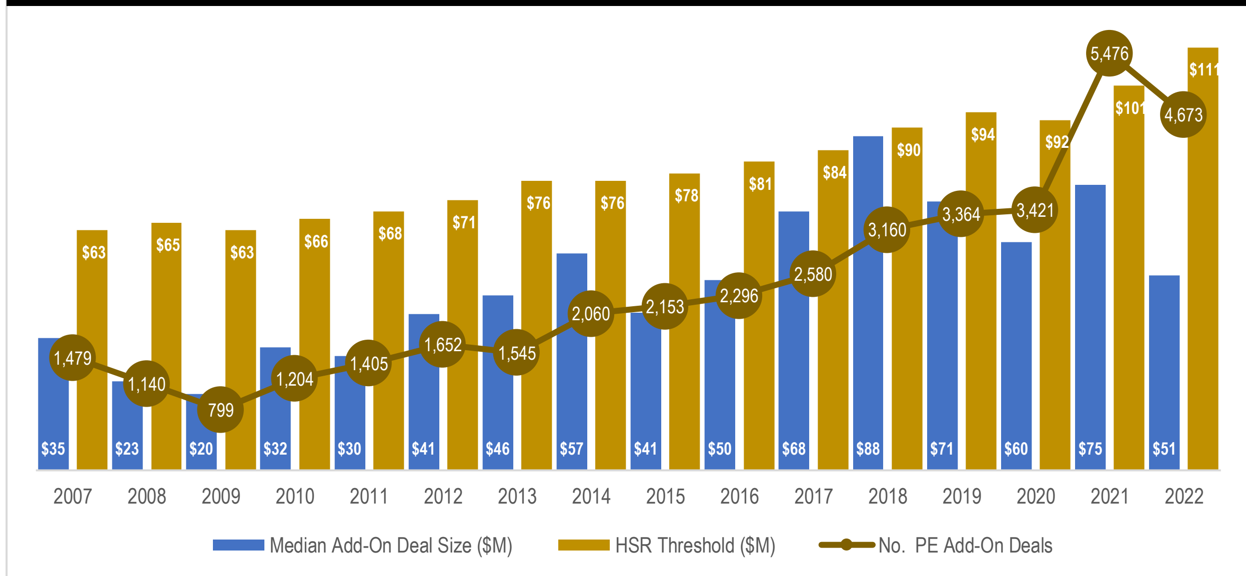
[10] Ayash, Brian and Mahdi Rastad. California Polytechnic State University. "Leveraged Buyouts and Financial Distress." July 19, 2019.
[11] Woodall, Patrick and Oscar Valdés Viera (Woodall & Valdés Viera). AFREF, Center for Popular Democracy, and United for Respect. "Double Exposure: Retail workers hammered by combo crisis of pandemic and private equity." December 2020 at 9.
[12] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362 (1963).
[13] Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 320 (1962).



lessen competition or tend to create monopoly in violation of the Clayton Act (Guideline 9). The proposed approach in the draft merger guidelines is sound, but it should be strengthened to ensure that serial acquisitions that pursue a roll-up strategy that constructs a larger firm that undermines competition cannot occur without sufficient antitrust regulatory scrutiny. Moreover, the ability to monitor and enforce Guideline 9 hinges upon the antitrust regulators' collection of pre-merger notification data under the Hart-Scott-Rodino Act.[14]

The private equity industry has perfected the creation of powerful firms through serial "roll-up" acquisitions of companies in the same business lines that offer the same products or services. Private equity firms use these add-on buyout deals to purchase multiple competitors of an existing portfolio company to create a much bigger player in an industry. Monopoly power is equally harmful whether gained through one large takeover or through ten or twenty smaller acquisitions that can absorb a previously richly competitive field of rivals.

A large portion of private equity buyouts are for these "add-on" investments that bring new, typically smaller, companies into an existing portfolio company. There were nearly 4,700 private equity add-on deals in 2022 that represented 78 percent of the number private equity buyouts.[15] These deals "are at the core of the PE buy-and-build playbook," according to Pitchbook.[16]

The majority of these add-on deals are too small to receive scrutiny by antitrust regulators. Over the past 15 years, the median-sized add-on deal was below the HSR transaction threshold every year (the median is the midpoint, where half the deals are smaller and half are larger) (see Figure 3).[17] These roll-ups below the antitrust reporting thresholds can nonetheless consolidate market power. These

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[14] Federal Trade Commission "Premerger Notification; Reporting and Waiting Period Requirements." RIN 3084-AB46. 88 Fed. Reg. 124. June 29, 2023 at 42178 et seq.
[15] Pitchbook 2022 Annual. Median U.S. add-on deal value. January 2023.
[16] *Ibid.* at 16.
[17] *Ibid.* Median U.S. add-on deal value. January 2023. HSR thresholds from FTC Annual HSR reports.

smaller, serial deals have allowed private equity firms to build portfolio companies that can use their market power to reduce market competition, impose price hikes or fees on consumers, wage concessions on workers, and allow quality and innovation to languish.

For example, Roark Capital's Driven Brands built an automotive service conglomerate through a series of mergers. This roll-up was an intentional strategy designed to build market power and many of the purchases were single locations that would fall far below the HSR thresholds. Driven Brands' president stated that "There is so much fragmentation in the express tunnel car wash industry and we're excited to be on the forefront of consolidation. Each site we acquire will make us better, and we will make it better [by leveraging] our scale to bring cost synergies to the business along with our proven Driven playbook to grow it for years to come."[18] Its car wash business line was accumulated through a series of small mergers — one car wash or a small chain of local car washes — as well as its 2020 purchase of International Car Wash Group that became the operator of the small acquisitions.[19] It bought a fleet of car wash locations in Georgia, North Carolina and Tennessee one at a time or a few businesses at a time.[20] It built a similar empire of car washes in Texas.[21] By 2021, Driven's ICWG controlled 300 car wash locations that consolidated individual locations and small, multilocation businesses.[22]

Private equity roll-ups have been especially prevalent in healthcare. These roll-ups have allowed the growing scale of private equity-owned healthcare companies (like ambulance companies, medical practice groups, like dermatologists or dental offices) that can charge higher prices, charge consumers excessive fees by staying out-of-network (a surprise billing strategy), or offer ancillary services that are uncovered by insurance coverage to drive up revenues.[23]

A 2023 study by AFREF and the American Antitrust Institute found that 37 private equity-owned home healthcare firms bought up 330 smaller home health agencies focusing on the least concentrated markets and that in the eight states where these firms were most dominant, they represented 11 percent of the home health firms but received 18 percent of the Medicare home health payments.[24] A 2023 study by the American Antitrust Institute, the Petris Center at University of California Berkeley School of Public Health, and the Washington Center for Equitable Growth found that private equity acquisitions of physician groups sextupled in ten years, that a single private equity-owned physician firm controlled more than 30 percent of the market in 28 percent of metropolitan areas, and that private equity-owned practices were statistically shown to raise prices and increase patient out-of-pocket expenditures.[25]

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[18] Solanot, Gonzalo. "USA: Driven Brands has acquired over 300 car washes." *PetrolPlaza*. November 4, 2021.
[19] Driven Brands. [Press release]. "Driven Brands ("Driven") announced its acquisition of International Car Wash Group ("ICWG") has been completed." August 5, 2020.
[20] "Driven Brands makes a slew of acquisitions." *Carwash News*. January 7, 2021.
[21] Driven Brands. [Press release]. "Driven Brands Car Wash North America Completes Acquisition of In & Out Car Wash in DFW metroplex." November 17, 2020.
[22] Solanot, Gonzalo. "USA: Driven Brands has acquired over 300 car washes." *PetrolPlaza*. November 4, 2021.
[23] American Medical Association (AMA). Proceedings of the AMA 2019 Annual Meeting. 2019 at 446.
[24] Moss, Diana L. and Oscar Valdés Viera. American Antitrust Institute and AFREF. "The Growth of Private Equity Ownership in the Home Healthcare Market." June 6, 2023.
[25] Scheffler, Richard M. et al. American Antitrust Institute, Petris Center at University of California Berkeley School of Public Health, and Washington Center for Equitable Growth. "Monetizing Medicine: Private Equity and Competition in Physician Practice Markets." July 10, 2023.

The private equity roll-up of air ambulances and ground ambulances has continued even after widespread attention to surprise billing led to a federal statute to address astronomical out-of-pocket bills that were not covered by health insurance. Private equity firms began buying up emergency ambulance firms and non-profits in the wake of the financial crisis.[26] Ambulance patients are captive consumers — they get the ambulance that shows up and some patients are not even conscious — who are especially vulnerable to companies that use their market power to impose price hikes, such as surprise medical bills.

Table 1. Air Ambulance Roll-Up

Private Equity Firm	Air Ambulance Buyout	Year
Bain Capital	Air Medical Group Holdings[27] (Included Air Evac Lifeteam, Med-Trans Corporation, Eagle Med)	2010
	REACH Air Medical Services[28]	2012
	MidAtlantic MedEvac.[29]	2015
KKR	Air Medical Group Holdings[30]	2015
	CALSTAR[31]	2016
2018 Global Medical Response created	Air Medical Resource Group[32] (included Eagle Air Med, Guardian Flight, Gallup Med Flight, MedStar, Aeromed, Valley Med Flight, Alaska Regional LifeFlight, MountainStar AirCare, AeroCare Medical Transport, and Wiregrass Life Flight	2017
	Sunrise Air Ambulance[33]	2019
	Hospital Wing[34]	2021
	GrandView Aviation[35]	2022

The KKR-owned Global Medical Response was built from a series of smaller mergers that drew little antitrust scrutiny and even the biggest mergers resulted in modest divestitures. In 2015, KKR bought Air Medical Group Holdings (AMGH) from Bain Capital; the company made about 200,000 air and ground ambulance trips every year and operated in 34 states.[36] Bain had already bulked up AMGH through a series of roll-ups (see Table 1).[37] KKR added CALSTAR in 2016.[38] In 2017, KKR's AMGH bought Air Medical Resource Group from Envision Healthcare for $2.4 billion adding a dozen companies that created a ground and air ambulance behemoth that operated in 45 states plus Washington, DC.[39] The FTC approved

[26] Webb, Olivia. "Private equity chases ambulances." *American Prospect*. October 3, 2019.
[27] "UPDATE 3-Bain Capital agrees to buy Air Medical." *Reuters*. August 26, 2010;
[28] "REACH Air Medical Services acquired by Air Medical Group Holdings." *AirMed&Rescue*. December 7, 2012.
[29] "UPDATE 3-Bain Capital agrees to buy Air Medical." *Reuters*. August 26, 2010; "REACH Air Medical Services acquired by Air Medical Group Holdings." *AirMed&Rescue*. December 7, 2012; "Med-Trans Acquires MidAtlantic MedEvac." *Journal of Emergency Medical Services*. January 1, 2015.
[30] KKR. [Press release.} "KKR to acquire Air Medical Group Holdings." March 11, 2015.
[31] Delgado, Edwin. "REACH, CALSTAR announce air medical services merger." *Imperial Valley Press*. June 17, 2016.
[32] Huber, Mark. "AirMed operator expands with new acquisition." *Aviation International News*. April 16, 2017; "American Medical Response to be acquired for $2.4B." *EMS1*. August 8, 2017.
[33] Guardian Flight. [Press release]. "Guardian Flight acquires Sunrise Air Ambulance." April 29, 2019.
[34] Bullock, Clara. "Hospital Wing becomes part of the Global Medical Response family." *AirMed&Rescue*. October 7, 2021.
[35] GrandView Aviation. [Press release]. "Global Medical Response completes purchase of Grandview Aviation." March 29, 2022.
[36] KKR. [Press release.} "KKR to acquire Air Medical Group Holdings." March 11, 2015.
[37] "UPDATE 3-Bain Capital agrees to buy Air Medical." *Reuters*. August 26, 2010; "REACH Air Medical Services acquired by Air Medical Group Holdings." *AirMed&Rescue*. December 7, 2012; "Med-Trans Acquires MidAtlantic MedEvac." *Journal of Emergency Medical Services*. January 1, 2015.
[38] "AMR acquiring Rural/Metro corporation." *EMS1*. July 30, 2015; Delgado, Edwin. "REACH, CALSTAR announce air medical services merger." *Imperial Valley Press*. June 17, 2016.
[39] Huber, Mark. "AirMed operator expands with new acquisition." *Aviation International News*. April 16, 2017; "American Medical Response to be acquired for $2.4B." *EMS1*. August 8, 2017.

the merger after AMGH agreed to divest air ambulance services in Hawaii.[40] After the FTC approval of the merger, KKR combined the two firms into the new Global Medical Response with 6,900 ambulances and medical transport vehicles, 300 helicopters, 170 airplanes, and 110 fire trucks.[41]

The Government Accountability Office found that in years prior to the creation of GMR, air ambulance helicopter prices rose by 60 percent between 2012 and 2017 to a typical price of over $36,000 and 69 percent resulted in surprise, out-of-network bills for patients.[42] After the creation of GMR, nearly 75 percent of air ambulances were provided by three for-profit companies, including two private equity firms, KKR's GMR and American Securities' Air.[43] In 2020, Congress passed surprise billing legislation that covered air ambulances (but not ground ambulances), but rather than prohibiting surprise bills, the law required surprise billing disputes to enter arbitration in what *Bloomberg* called a "win for the [private equity] healthcare companies."[44] Even after the uproar over surprise billing GMR continued to roll-up more air medical transport companies, including Hospital Wing and Grandview Aviation[45]

Most of the air ambulance buyouts received little or no antitrust scrutiny either because they fell below the HSR thresholds or because the product-market assessment did not result in the elimination of rivals. It is common for private equity firms to expand their reach by buying firms to acquire a presence in a new geographic market. These gaps in oversight have prevented the rigorous antitrust enforcement necessary to prevent the creation of dominant air ambulance companies that have imposed not the small, but significant price hikes envisioned in the hypothetical monopolist test, but outrageous and ongoing price hikes.

The proposed Guideline 9 directs antitrust regulators to examine a series of mergers to assess the cumulative anticompetitive impact of multiple, sequential acquisitions in order to confront the anticompetitive risks posed by roll-ups. The draft merger guidelines correctly identify the risk of an "anticompetitive pattern or strategy of multiple small acquisitions" that in aggregate can violate the Clayton Act "even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly."[46]

However, the merger guidelines and the pending Hart-Scott-Rodino merger prenotification regulations must be strengthened to provide the antitrust regulators the capacity to identify and prevent emerging monopolistic roll-up and sequential acquisition practices in their incipiency. It can be difficult to identify acquisitive patterns — the first small acquisition is not a pattern at all. But it

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[40] FTC. [Press release]. "Ambulance Companies Air Medical Group Holdings, Inc. and AMR Holdco, Inc. agree to divest air ambulance services in Hawaii as a condition of merger." March 7, 2018.
[41] Global Medical Response. [Press release]. "AMGH and AMR complete transaction and combine under new parent company Global Medical Response." March 14, 2018.
[42] U.S. Government Accountability Office (GAO). "Air Ambulance: Available Data Show Privately-Insured Patients Are at Financial Risk." GAO-19-292, March 2019 at 15 and 17.
[43] GAO. "Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight." GAO-17-737. July 2017 at 19; Roumeliotis, Greg. "Exclusive: KKR nears $2 billion deal for Air Medical." Reuters. March 10, 2015.
[44] Perlberg, Heather and Melissa Karsh. "Private equity dodges worst from surprise-billing crackdown." *Bloomberg*. December 22, 2020; Kliff, Sarah and Margot Sanger-Katz. "Surprise medical bills cost Americans millions. Congress finally banned most of them." *New York Times*. December 22, 2020.
[45] Bullock, Clara. "Hospital Wing becomes part of the Global Medical Response family." *AirMed&Rescue*. October 7, 2021; GrandView Aviation. [Press release]. "Global Medical Response completes purchase of Grandview Aviation." March 29, 2022.
[46] FTC-DOJ Draft Merger Guidelines at 22.

could become the foundation for a private equity firm to form a platform to which it can then agglomerate other small acquisitions to build market power. Overly narrow applications of the product-market definition can further obscure these trends, as many roll-up strategies focus on building networks by adding new business territories where there is no product-market overlap.

The proposed merger guidelines encourage agencies to examine patterns of growth and any business plans that are suggestive of a roll-up strategy. But because it is difficult to spot these strategies when they begin, it will be difficult to identify roll-up strategies in their incipiency. The draft guidelines empower the agencies to "examine the impact of the cumulative strategy" if the agencies have already determined there is a "pattern or strategy of pursuing consolidation through acquisition."[47] 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.

The draft merger guidelines and pre-merger notification regulations should be strengthened to provide a roadmap to identify emerging serial acquisition strategies. The agencies should consider any series of mergers in the same business line that in aggregate exceed the median merger threshold over the previous five years as presumptively substantially lessening competition or tending to create a monopoly. The size of the typical private equity roll-up is just below the HSR reportable transaction threshold and many serial acquisitions happen in quick succession. Aggregating smaller transactions in the same business lines over a five-year period should identify emerging patterns of agglomeration that can substantially lessen competition or tend to create a monopoly. Agencies should challenge these acquisitions. Further, the agencies should examine markets where roll-up strategies are already known to have allowed owners to amass sufficient market power to undermine competition and threatens monopolistic exercise of market power and consider unwinding these markets retroactively under the Sherman Act authorities.

III. Antitrust regulators must address investments and acquisitions of minority stakes that undermine competition (Guideline 12)

AFREF supports the proposed merger guideline's recognition that investors can exercise control and direction of firms by purchasing minority investment stakes that can undermine competition. While in most cases private equity firms buy controlling majority stakes of their target companies, about one-fifth of private equity deals are so-called "growth" investments that are minority shares. There were nearly 1,500 new growth investments in 2022 valued at over $100 billion dollars.[48] In other cases, a private equity firm may spin-off or sell the majority of a portfolio firm but retain a minority stake.[49] 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.

Private equity firms can exert influence and control over target firms even with minority ownership stakes. According to Pitchbook, these growth deals "can allow private equity firms to apply active management despite fractional ownership."[50] This can raise anticompetitive concerns especially when the influence and control is exerted upon minority stake companies that are rivals of portfolio

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[47] *Ibid.* at 23.
[48] Pitchbook 2022 Annual. U.S. PE growth/expansion deal activity.
[49] Hugh MacArthur et al. Bain & Company Insights. "Still Booming, but is the Cycle Near Its End?" February 25, 2019.
[50] Pitchbook 2022 Annual at 4.

companies that the private companies own outright. For example, L. Catterton owns multiple restaurant chains as portfolio companies but also owns minority stakes in several more restaurants that theoretically compete with the companies it owns.[51]

Private equity groups often select the board members of companies in which they have a minority ownership stake as well as target companies, and these directors often remain even after the private equity firm fully divests from a company. Some firms place the same person on several boards to coordinate business strategies across firms even where they only hold minority positions. Theoretically, this kind of interlocking directorate is a per se violation of antitrust laws. But this area has been substantially underenforced, and the private equity industry often exercises anticompetitive control through these arrangements. Even when the same individual does not sit on multiple boards, private equity firms can spread members of a close-knit group amongst many current and former portfolio companies, creating the same de facto interlocking directorate effect. Sectors and industries that have seen substantial private equity involvement over time are especially prone to the anticompetitive impact of minority interests, influence, and interlocking directorates. Many private equity exits are to other private equity firms. There were nearly 550 private equity-to-private equity sales in 2022 worth $134 billion — about 45 percent of all sales.[52]

Minority stakes allow private equity firms to exert control and exercise coordinated market power that undermines competition. The first mechanism is the ability to capitalize on shared proprietary insider information between purported rivals. This creates the risk of anticompetitive data sharing that allows a private equity company to peer behind the curtain on firms in the markets they operate in. This obviously happens with portfolio companies that operate in the same market (oil and gas, healthcare, retail, restaurants, etc.). But even without majority ownership, there are still substantial risks of sensitive business information being shared with the private equity firm and its portfolio companies that are theoretical rivals. Without enforceable information firewalls and regular oversight, we can only assume that such sensitive information finds its way around to private equity group members.

Shared information increases the likelihood of coordinated or collusive anticompetitive behavior. This allows private equity firms to exercise influence, establish business strategies, coordinate activities, discourage expansion or innovation, or deter aggressive rivalry that would deliver benefits to consumers (like increased product selection or quality or reduced prices). Private equity firms with minority stakes have the ability and incentive to use their minority stake powers of control to effectively coordinate the market behavior of the firms in which they hold non-controlling stakes and their fully-owned portfolio firms. These forces toward de facto consolidation from minority stakes and direct or indirect interlocking directorates create substantial risks of lessened competition.

The proposed merger guidelines effectively describe the anticompetitive risks of minority ownership stakes. But the draft merger guidelines do not identify how the agencies will identify and assess the minority stakes that can lessen competition. Much will depend upon the HRS pre-merger notification disclosure regulation that must provide the information necessary to police the anticompetitive impact of minority investments. Many of these investments are far below the HSR threshold (typically they are millions, tens of millions, or scores of millions of dollars, not over $111

[51] L. Catterton. L. Catterton. Investments. Accessed September 2023. On top of the restaurant chains L. Catterton owns, it holds minority stakes in Hopdoddy, Piada Italian Street Food, and Velvet Taco.
[52] Pitchbook 2022 Annual at 29.

million, the current threshold). To deal with this information gap, the agencies should request information on private equity firms' ownership stake histories over the past 5 years on a month-to-month basis and the 5-year history of placements of private equity firm staff on boards of directors of portfolio companies. The agencies should identify and further study 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.

IV. Antitrust regulators must confront the exercise of monopsony power over workers and other suppliers (Guideline 11)

AFREF supports the necessary addition of a merger guideline covering monopsony power and its explicit inclusion of the potential anticompetitive exercise of market power in labor markets that harm workers. In local job markets with few — or even one, in company towns — large employers, the monopsonistic buyer of labor imposes wages and conditions on workers who have few alternative job opportunities. Senator John Sherman described the monopsonistic power over workers when promoting the Sherman Antitrust Act in 1890, stating that a trust "commands the price of labor without fear of strikes, for in its field it allows no competitors."[53]

Large employers or pools of cooperating employers can exercise uncompetitive market power over workers that suppress wages, lower benefits, undermine job quality, unfairly lock workers into their jobs, and contributes to economic inequality.[54] The reduction in the quality of work can be just as damaging as lower wages. A 2021 literature review in *HR Review* found that all of the studies of labor market buyer power found "that firms have considerable monopsony power" over workers that is "actually exercised by employers, resulting in lower wages."[55]

Workers are especially vulnerable to the exercise of monopsony market power by employers because labor markets are less elastic than standard product markets.[56] Workers face far higher job search and job switching costs than employers and unlike buying widgets from a seller, job applicants must secure the consent of the employer to get a job.

Consolidation and market power in labor markets is a problem across nearly every market in the economy, but it can be particularly pronounced in sectors with high penetration by private equity buyers. Private equity cost cutting strategies to boost profits are often taken out of workers through workforce downsizing, work intensification, lowering wages or eliminating raises, reducing benefits like health care and retirement, and eliminating severance payments.[57] Firms taken over by private equity are more likely to shed workers. A 2019 study by University of Chicago and Harvard economists found that after two years, companies taken over by private equity had reduced the workforce by 4.4 percent compared to companies that were not taken over.[58]

[53] *Congressional Record*. March 21, 1890 at 2457.
[54] *See* Council of Economic Advisors. "Labor Market Monopsony: Trends, Consequences, and Policy Responses." October 2016.
[55] Manning, Alan. "Monopsony in labor markets: A review." *HR* Review. Vol. 74, No.1. January 2021 at 4.
[56] Willingham,Caius Z. abd Olugbenga Ajilore. Center for American Progress "The Modern Company Town." September 10, 2019..
[57] Coleman-Lochner, Lauren and Eliza Ronalds-Hannon. "What happens to a company when PE buys it?" *Businessweek*. October 3, 2019.
[58] Davis, Steven J. et al. "The Social Impact of Private Equity Over the Economic Cycle." January 1, 2019 at 5.

The combination of the private equity industry strategies of rolling up sectors and purchasing local and regional market power and of squeezing revenues out of portfolio firms through cost-cutting that harms workers creates the ability and incentive to exert monopsony power to suppress wages and benefits. Many private equity firms control portfolios of firms in the same sector that have locations or storefronts that employ people in similar occupations that can effectively collaborate to squeeze workers, prevent pay increases, and tamp down on workplace benefits.

The retail industry exemplifies some of the risks workers face from monoponistic private equity employers. The retail industry employs the most low-wage workers of any industry and they are disproportionately women and people of color that are concentrated in the lowest paid occupations.[59] Half of retail workers have uncertain schedules, worsening the economic penalty of low hourly wages.[60] Private equity firms have bought scores of retail chains over the past fifteen years, driving many into bankruptcy, and shedding over half a million jobs.[61] In many markets, private equity firms own multiple retail chains that are essentially an oligopoly that can tacitly collude to keep wages and benefits from rising. In 2020, private equity firms operated at least 25 separate retail chains in fifteen states.[62] Sometimes a single private equity firm can own multiple companies in a single sector like retail. Sycamore Partners currently owns seven chains that sell clothing as well as a department store chain (that sells apparel) and the office supply giant Staples.[63] Retail workers can find it hard to switch jobs when the employers that are purportedly competing to hire and retain the most talented staff are actually owned by the same firm.

Restaurant workers face low earnings, limited or non-existent benefits, uncertain schedules and volatile earnings, and the real risk of wage theft by employers. These untenable working conditions are exacerbated by monopolistic employers that can effectively suppress wages, erode job quality, and impede job mobility. Private equity firms have invested heavily in restaurants including fast food, fast casual, and even higher-end fine dining establishments, buying nearly 850 chains or locations from 2010 to 2017, more than 100 every year.[64] Roark Capital owns more than 20 fast food and fast casual restaurants including Arby's, Buffalo Wild Wings, Carl's Jr., Dunkin', Hardee's, Jamba Juice, Jimmy John's, and Sonic.[65]

The 700,000 workers at these chains face low wages.[66] A 2021 survey of shift workers by the Economic Policy Institute and the Shift Institute found that a sizeable majority of workers at some

[59] Ross, Martha and Nicole Bateman. Brookings Institution Metropolitan Policy Program. "Meet the Low-Wage Workforce." November 2019 at 11 and note 20 at 48; Anderson, D. Augustus and Lynda Laughlin. U.S. Census Bureau. "Retail Workers: 2018." ACS-44. August 2020 at 4.

[60] Schneider, Daniel and Kristen Harknett. University of California Berkeley and Aspen Institute. "Income Volatility in the Service Sector: Contours, Causes, and Consequences." July 2017 at 2.

[61] Woodall & Valdéz Viera. 2020.

[62] *Ibid*. AFREF analysis of private equity owned retail chains by state.

[63] Sycamore Partners. Investments. Accessed September 2023.

[64] Aaron Allen & Associates. "Most active PE restaurant chains globally." July 31, 2017; Dubey, Akshat, Claire Davies, and Piyush Gupta. PwC. "The Growth Menu." 2018 at 10.

[65] Roark Capital. Portfolio Companies. Restaurant and Food. Current Investments. Includes Arby's, Auntie Anne's, Baskin-Robbins, Buffalo Wild Wings, Carl's Jr., Carvel, Cheesecake Factory, Cinnabon, Culver's, Dunkin', Flower Child, Hardee's, Jamba Juice, Jim'n Nick's Bar-B-Q, Jimmy John's, McAlister's Deli, Miller's Ale House, Moe's Southwest Grill, North Italia, Nuthing Bundt Cakes, Schlotzsky's, Seattle's Best Coffee (military bases), and SonicAccessed September 2023.

[66] Mortgenson, Gretchen. "Working for companies owned by well-heeled private-equity firms can mean lower wages for employees." *NBC News*. October 9, 2021.

chains in the Roark portfolio earned under $15 an hour, including 85 percent of Sonic, 84 percent of Arby's, 69 percent of Jimmy John's, and 68 percent of Dunkin workers.[67] And Roark has pushed to keep wages low. In 2021, it announced it had successfully lobbied against legislation that would have raised the minimum wage to $15 and protected workers trying to form unions.[68] In the summer of 2023, Roark added the 37,000 location Subway to its restaurant network that includes the head-to-head competitor Jimmy John's sandwich chain, further consolidating their power over restaurant workers.[69]

Private equity firms that hold a portfolio of businesses like restaurants that employ low-wage workers have the ability and incentive to use their market power over workers to hold down wages. Portfolio firms are unlikely to compete for workers based on higher pay or better benefits. First, they may represent a large portion of the job openings in any market and occupation. Unlike in a product market, where the definition might be narrowed to fried chicken restaurants or sandwich shops, fast food and fast casual restaurant workers generally perform broader job classifications, making the labor market more concentrated than the product market. Secondly, this market power deters job switching because other similar jobs have similar remuneration structures and even without anticompetitive policies like non-compete agreements and no-poach policies, the private equity firm can black-list workers from changing jobs within their portfolio or share information about individual workers and their earnings history to disadvantage job applicants. In combination, the market power over workers and the coordinated market effects over labor markets can disadvantage workers and suppress wages and benefits.

AFREF supports the additional clarity of the monopsony market power guideline and the explicit inclusion of labor markets, but recommends that the agencies strengthen the evaluation of mergers that potentially lessen competition or tend to create monopolistic buyer markets. The proposed merger guidelines recognize that firms can exercise market power in buyer markets with lower market shares. For example, sellers may need to control more than half of the consumer market to exercise monopoly power, but buyers can potentially exert dominance over suppliers with less than ten percent of the purchasing market.[70] AFREF urges the agencies to include a structural presumption that a merged firm's buyer market share over 15 percent presents an impermissible threat of undue concentration (or half the concentration level of 30 percent that is included for seller markets[71]). Additionally, the agencies should consider more expansive labor market analyses that address the impacts of concentration on workers that evaluate the proposed merger in light of labor market trends such as wage trajectories following prior consolidation.[72]

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[67] Economic Policy Institute. Company Wage Tracker. Accessed September 2023.
[68] Sirota, David, Andrew Perez, and Walker Bragman. "This fast food giant bragged about killing the $15 minimum wage." *Newsweek*. March 27, 2021.
[69] Summerville, Abigail, Anirban Sen, and Deborah Mary Sophia. "Roark Capital to buy sandwich chain subway for up to $9.55 billion." *Reuters*. September 6, 2023.
[70] Foer, Albert A. American Antitrust Institute. "Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust." Working Paper No. 06-07. November 30, 2006 at 5.
[71] FTC-DOJ Draft Merger Guidelines at 7.
[72] *See* Naidu, Suresh, Eric A. Posner, and Glen Weyl. "Antitrust remedies for labor market power." *Harvard Law Review*. Vol. 132. 2018.

V. Antitrust agencies should prevent mergers in adjacent markets that create conglomerates that entrench or extend monopolies (Guideline 7)

AFREF supports the draft merger guidelines prohibition on mergers that entrench or extend monopolies (Guideline 7). The final merger guidelines should be strengthened to clarify that mergers that create conglomerates of multiproduct adjacent or related markets that extend or entrench a dominant position in new markets can substantially lessen competition in those adjacent markets.

Private equity acquisitions often anticompetitively combine complementary products and services into an interconnected dominant firm. Private equity roll-ups can combine companies that may not directly horizontally compete with one another or provide upstream or downstream vertical products or services (see Guideline 9). Private equity minority stake investments are often in sectors or business lines that are adjacent to companies in a private equity firm's portfolio (see Guideline 12).[73]

The combination of related or complementary products or services that are not direct rivals, suppliers or customers creates a conglomerate that can use its combined market size to undermine competition. These complementary acquisitions do not neatly fit the existing horizontal or vertical merger guidelines. The combination of adjacent products into an interrelated bundle can create an anticompetitive gravity that is greater than the sum of its parts.

The agglomeration of conglomerates through mergers and acquisitions creates related market effects. Extensive private equity activity in an industry generally results in the scale of businesses increasing as the number of firms declines and the size of the businesses increase. Even if the specific product-market stays ostensibly competitive between several rival companies, the continued acquisitions and combinations of firms in adjacent markets by private equity firms can begin to create substantial power imbalances between the private equity-owned conglomerate of adjacent companies and the 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 effectively forces potential competitors to compete with the cluster of goods.[74] The draft merger guidelines identify cluster markets as non-substitutable goods that can be offered from the same firm or platform, such as hospitals offering a suite of discrete, non-fungible acute care services.[75]

KKR's Global Medical Response is effectively a cluster product market of emergency services. Its nationwide network has 8,000 ground ambulances, 375 helicopters, 123 medical airplanes, and 174 fire trucks with almost 400 airbases, 60 communication centers, and 51 fire stations.[76] None of these emergency services are direct competitors — ground ambulances cannot secure distant organs or suppress fires. GMR and its affiliate American Medical Response offer a suite of medical and emergency services to large organizations (community-based CPR training, providing medical and

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[73] Pitchbook 2022 Annual at 16.

[74] *See* Hovenkamp, Herbert J. "Digital Cluster Markets." *Columbia Business Law Review*. Forthcoming at 5
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."

[75] FTC-DOJ Draft Merger Guidelines at Appendix 3 at 11.

[76] Global Medial Response. About Overview. Accessed September 2023.

emergency services for events like concerts or sporting events, on-site medical and testing services for employers, and contracts with insurers and health plans).[77] GMR's presence in adjacent markets amplifies its market power in ways that can disadvantage its rivals, increase prices, suppress wages, and undermine competition.

Several private equity firms own platforms of chains that offer adjacent complementary services that can undermine competition and disadvantage rivals. Roark Capital bought the automotive franchise conglomerate Driven Brands in 2015 when it consisted of 1,500 locations.[78] It accumulated additional chains and individual facilities to grow the conglomerate and its reach into adjacent markets. In 2019, Driven Brands bought ABRY Auto Body Repair and the Canada-based Clairus Group auto glass company.[79] In 2020, it bought the International Car Wash Group.[80] Roark took Driven Brands public in an initial public offering in 2021 where Roark retained a 70 percent ownership stake.[81] Today, Driven operates auto maintenance franchises (like auto service brands Meineke, Take 5 Oil Change, Merlins, and Econo Lube, 1-800-Radiator & A/C), auto body and collision repair chains (Maaco, Abry, Fix Auto, and CARSTAR), auto glass chains (VitroPlus, UniglassPlus, Go!Glass, and AutoGlassNow), car wash franchises (Take 5), and the Automotive Training Institute that can supply workers to its franchises.[82]

Although it now consists of some chains in the same product-market lines, many of these businesses are in adjacent markets. Auto service firms do not generally perform auto body repair or replace auto glass. Driven Brands can exercise coordinated market power through its family of related service businesses (its auto glass brands, for example), but it also can exercise market power through its control of conglomerate services. These adjacent business lines are not direct competitors but benefit from being part of a larger auto service conglomerate. Driven's size, scale, and reach enables it to share and cross-refer customers to related businesses and the range of its offerings means it is better positioned to offer bulk services to institutional customers.

The home service platform Neighborly is a conglomerate of adjacent and related home services franchises that offer a suite of services to homeowners, landlords, and property managers. Neighborly and its predecessor Dwyer Group have been private equity owned for over a decade. When Riverside Partners bought the Dwyer Group in 2014 it operated 7 franchise chains (Aire Serve, Glass Doctor, Grounds Guys, Mr. Appliance, Mr. Electric, Mr. Rooter, Rainbow Restoration) with 1,600 locations.[83] Over the next four years, Riverside rolled up Bright & Beautiful, Five Star Painting, Molly Maid, Mr. Handyman, ProTect Paitners, Real Property Management, and Window Genie.[84] In 2018, Harvest Partners bought the 20-chain, 3,200 location conglomerate from Riverside

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[77] American Medical Response. Solutions. Accessed September 2023; Global Medical Response. Services Overview. Accessed September 2023.
[78] Roark Capital and Driven Brands. [Press release]. "Roark Capital Group acquires Driven Brands." April 17, 2015.
[79] Driven Brands. [Press release]. "Driven Brands announces acquisition of ABRA Auto Body Repair of America franchised locations." October 2, 2019; Driven Brands. [Press release]. "Driven Brands announces acquisition of the Clairus Group." November 18, 2019.
[80] Driven Brands. [Press release]. "Driven Brands ("Driven") announced its acquisition of International Car Wash Group ("ICWG") has been completed." August 5, 2020.
[81] Ewen, Beth. "Driven Brands IPO sets records." *Franchise Times*. January 15, 2021.
[82] Driven Brands. About. Accessed September 2023.
[83] Dwyer Group. [Press release]. "The Dwyer Group, Inc. acquired by the Riverside Company." August 18, 2014.
[84] Service Brands International. [Press release]. "Ann-Arbor's Service Brands International acquired by Texas-based Dwyer Group." June 15, 2015; Copeland, Mike. "Dwyer buys 2 companies; New shops in McGregor; Group to buy Snacks N' Suds; Free hotel rooms; 4 days for Thanksgiving." *Waco Tribune-Herald*. November 19, 2016; "The Dwyer

and renamed it Neighborly.[85] Harvest Partners added Dryer Vent Wizard, Housemaster, Mosquito Joe, Precision Door Service, and Shelf Genie.[86] When KKR bought Neighborly it had 28 chains and 4,800 locations and KKR added Lawn Pride and Junk King bringing the total number of chains to 30 with over 5,000 locations by 2022.[87]

Neighborly leverages its portfolio of brands to undermine competition. In 2021, Neighborly also launched a smartphone app promoted with a $10,000 sweepstakes that allowed homeowners to "click to call" any of the franchises to pursue Neighborly's "organizational vision to Own the Home™."[88] Neighborly's president described this strategy to promote its "brands representing 19 skilled trade verticals" that mean "the Neighborly name is becoming synonymous with "home service" in its most general form" — essentially the definition of a cluster market.[89] Neighborly's brands can and do cross market the affiliated services through the company's web platform that "makes a huge impact on generating new business and keeping existing customers coming back" and franchise "owners can rely on each other, while referring new customers […] within the realm of Neighborly brands."[90]

AFREF supports the proposed Guideline 7 that constrains mergers that can extend or entrench dominant market power, especially the recognition that anticompetitive market power can be amassed through "mergers that are neither strictly horizontal nor vertical."[91] The private equity roll-up conglomerate strategies can and do extend or entrench market power into new geographic or new, adjacent product markets. AFREF recommends clarifying that these conglomerate mergers of adjacent products or services do entrench or extend market power and can increase barriers to entry for potential rivals, raise switching costs for customers, create network effects that disadvantage rivals, or extend a dominant position through bundling, tying, or linking products and services offered by the conglomerate. Additionally, AFREF recommends that the agencies lower the structural presumption threshold for market dominance for mergers where one of the merging parties already controls 30 percent of the market. This level of single-firm concentration sets the bar too high and is the same as the structural presumption for the *combined* market shares of merged firms that increase concentration in highly concentrated markets.[92]

Group acquires Five Star Painting franchise." *Paint & Coatings Industry*. February 4, 2015; "Dwyer Group acquires Bright & Beautiful." *Business Franchise Magazine*. April 20, 2017; Dwyer Group. [Press release]. "Dwyer Group acquires Real Property Management." February 27, 2018.

[85] Neighborly. [Press release]. "Neighborly acquired by Harvest Partners." June 4, 2018; Copeland, Mike. "New Dwyer name." *Waco Tribune-Herald*. September 22, 2018.

[86] "Dwyer Group completes latest acquisition." *What Franchise*. August 14, 2018; Neighborly. [Press release]. "Neighborly acquires ShelfGenie." October 6, 2020; Neighborly. [Press release]. "Neighborly acquires Dryer Vent Wizard." February 25, 2020; Neighborly. [Press release]. "Neighborly acquires Housemaster." July 2, 2020. "Neighborly Acquires Precision Door Service Brand." *Franchising*. January 12, 2021.

[87] KKR and Neighborly. [Press release]. "KKR to acquire leading home services platform Neighborly." July 8, 2021; Neighborly. [Press release]. "Neighborly kicks off 2022 reaching 5,000 franchise milestone." February 24, 2022; Ewen, Beth. "Neighborly reaches 30-brand milestone with purchase of Lawn Pride." September 8, 2022; Neighborly. [Press release]. "Neighborly acquires Junk King, the nation's top-rated junk removal and hauling company." November 2, 2022.

[88] Neighborly. [Press release]. "Neighborly launches new mobile app, offers early users a chance to win $10,000." September 28, 2021.

[89] Bidwell, Mike. Neighborly President and CEO. "Neighborly's Vision to Own the Home." Linkedin. March 29, 2021.

[90] *Ibid.*

[91] FTC-DOJ Draft Merger Guidelines at 19.

[92] FTC-DOJ Draft Merger Guidelines at 7.

VI. Antitrust agencies should prevent vertical mergers that foreclose competition (Guideline 6)

AFREF supports the inclusion of vertical markets into a unified set of merger review guidelines. Mergers that allow a firm to control upstream suppliers, downstream buyers, or related services can foreclose rivals' access to markets, raise prices, extend market power into related markets, and substantially lessen competition.

Private equity firms frequently have portfolios that include upstream and downstream segments as well as firms with the capacity and incentive to offer services to other portfolio companies on favorable terms or foreclose access in ways that disadvantage potential rivals, undermining competitive markets. Over the past decade, nearly one third (30 percent) of private equity deals were for business-to-business service firms that could potentially harm competition.[93]

Private equity firms can incentivize their portfolio companies to purchase services or products from other company in their portfolio. This generates revenue stream for the private equity firm but the ownership and control of these vertical providers can also disadvantage rivals. Private equity firms control the nursing home chain operations and can require the facilities to contract for services and purchase supplies from other companies affiliated with the private equity parent firm.[94] The Formation Capital-owned Consulate Health Care nursing home chain contracted with affiliates for management, rehabilitation, and other services.[95] This self-dealing can harm rivals. For example, a private equity-owned nursing home could receive discounted linen services from an affiliate that were not offered to rival nursing homes at the same prices or terms. It happens in retail as well. L. Catterton owns and owns stakes in multiple restaurant chains, but it also has a stake in the restaurant industry accounting and back-office software company Restaurant365.[96]

More classical vertical arrangements upstream and downstream are also present in private equity portfolios. For example, Sycamore Partners owns a fleet of retail companies, including apparel stores Ann Taylor, Belk, Hot Topic, Lane Bryant, Loft, Talbots, The Limited, and Torrid as well as the textile and apparel supplier MGF Sourcing.[97] The vertical arrangement allows Sycamore's MGF to source a large portion of the apparel at some of its retailers,[98] and it also allows it to preclude rivals' access to clothing supplies at comparable prices.

Private equity vertical linkages are especially common in the fossil fuel energy sector. The Carlyle Group has owned oil and gas drilling assets that have pumped 1.3 billion equivalent barrels of oil from 2011 to 2021, midstream transportation assets like pipelines, and downstream assets like 19 oil and gas power plants and petrochemical refineries that have emitted an estimated 277 million metric

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[93] Pitchbook 2022 Annual. Share of US PE deal value by sector and at 22 and 31.
[94] Mills, R□ an and Melanie Payne. (Mills & Payne). "Neglected: Florida□ s largest nursing home owner represents a trend toward corporate control." Naples (FL) Daily News. May 31, 2018; Rau, Jordan. "Care suffers as more nursing homes feed money into corporate webs." *New York Times*. January 2, 2018.
[95] Mills & Payne 2018.
[96] L. Catterton. Investments. Restaurant365. Accessed September 2023.
[97] Sycamore Partners. Investments. Accessed September 2023.
[98] Safdar, Khadeeja and Miriam Gottfried. "How one investor made a fortune picking over the retail apocalypse." *Wall Street Journal*. March 21, 2018.

tonnes of carbon dioxide equivalent.[99] First Reserve owns or backs oil and gas exploration and production companies (such as Ascent Resources and Lucero Energy), midstream assets (such as Blue Racer Midstream and Plains All American Pipeline), distribution companies (such as Palmdale Solutions and ReFuel), and oil and gas service companies (such as Intero Integrity Services and TNT Crane & Rigging).[100] Lime Rock Partners invests in oilfield service companies (such as OILSERVE, Shelf Drilling, and Silixia) and exploration and production assets and companies (such as Arena Gulf and Crownrock Minerals).[101] These private equity energy combinations allow its assets and portfolio companies to reinforce one another and disadvantage rivals by charging higher prices or foreclosing access to critical junctures in the oil and gas market.

AFREF encourages the agencies to strengthen the vertical merger guidelines by reducing the structural presumption market share below 50 percent. Companies can distort markets and significantly disadvantage rivals by controlling less than half the market in many sectors and the agencies should consider significantly reducing this 50 percent market share threshold. Moreover, antitrust authorities need to examine potential mergers in relation to the target firm's potential ability to extend the vertical reach not only of the private equity firm but of the other firms in the private equity portfolio. This may be especially critical for the "plus" factors for mergers below the presumptively anticompetitive threshold where the opacity of private equity firms' portfolio holdings can obscure prior trends to integration.

Americans for Financial Reform Education fund commends the Federal Trade Commission and Department of Justice for developing a robust, accessible update to the merger guidelines that is rooted firmly in the statute and jurisprudence and restores the structural presumption against mergers that substantially lessen competition or tend to create monopolies. The increased economic consolidation and concentrated market power from mergers over the past decades has raised prices and lowered quality for consumers, suppressed wages and benefits for workers, undermined the ability to form and sustain small businesses, and sapped vitality from our communities.

AFREF urges the adoption of these guidelines with suggested clarifications and improvements, especially to address the unique consolidation strategies and practices of the private equity industry. Private equity firms' leveraged buyouts represent the majority of reportable merger transactions over the Hart-Scott-Rodino threshold of $111 million, so it is necessary and appropriate for the antitrust agencies to consider the specific impacts of private equity takeovers have on competition and the potentially impermissible exercise of market power under the Clayton Act. Thank you for the opportunity to comment and for the consideration of these recommendations to the proposed merger guidelines.

[99] Giachino, Alyssa et al. AFREF, Global Energy Monitor, and Private Equity Stakeholder Project. "The Carlyle Group's Hidden Climate Impact." April 2023.
[100] First Reserve. Portfolio Investments. Accessed September 2023.
[101] Lime Rock Partners. Portfolio. Accessed September 2023.