Mr. Robert Jones
Assistant Director
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580

September 27, 2023

RE: 16 CFR Parts 801–803 — Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300. RIN No 3084—AB46

Dear Mr. Jones:

Americans for Financial Reform Education Fund (AFREF) commends the Federal Trade Commission (FTC)) on the notice of proposed rulemaking for Premerger Notification, Reporting, and Waiting Period Requirements.[1] The proposed rules are essential to update the Hart-Scott-Rodino (HSR) pre-merger notification program and to provide necessary transparency to implement the FTC and U.S. Department of Justice proposed merger review guidelines.[2]

The level of economic consolidation has been indisputably rising, leading to far less competitive markets that harm workers, consumers, and communities. The proposed HSR pre-merger notification and reporting requirements are essential to provide antitrust agencies the information to review proposed merger transactions to identify potentially anticompetitive concerns and enforce the Clayton Antitrust Act. The information collected now under the pre-merger notification program does not reflect current market conditions, especially related to private equity leveraged buyout acquisitions, and is insufficient for antitrust authorities to prevent transactions that substantially lessen competition or tend to create monopolies.

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 in ways that have 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.

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[1] Federal Trade Commission (FTC). "FTC 16 CFR Parts 801 and 803 Premerger Notification; Reporting and Waiting Period Requirements." 88 Fed. Reg. 124. June 29, 2023 at 42178 et seq.
[2] 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 HSR pre-merger notification and reporting requirements make important improvements that AFREF wholeheartedly supports. The current pre-merger notification requirements fail to provide antitrust authorities with the granularity of information about the merging parties or the transactions to assess the potential anticompetitive impacts of proposed mergers. Currently, the FTC reports that antitrust agencies must rely on third parties "to learn basic information about the parties' business dealings and the markets" to evaluate potential anticompetitive concerns.[3] The added information is needed for antitrust agencies to evaluate these complex proposed mergers within 30 days and determine whether to issue a Request for Additional Information (known as a second request).

The volume and complexity of transactions has been steeply increasing, especially for private equity buyouts that make up the majority of mergers subject to HSR review. The importance of private equity buyouts to the merger landscape makes it essential that the pre-merger notification disclosure rules reflect these market realities and unique characteristics of private equity-driven mergers and the anticompetitive practices perpetrated by the private equity industry.

AFREF supports the proposed rule's increased disclosure of many critical pieces of information that antitrust agencies need to rapidly assess the potential anticompetitive impacts of proposed mergers and determine whether to issue a second request. This includes information related to the transaction rationale; transaction diagrams; documents prepared by the transacting parties to analyze the acquisition related to market shares, competition, or competitors; studies on efficiencies or synergies; draft merger term and structure documents; and clearly stating that there are criminal penalties for false HSR submissions, among others.

This comment focuses on some pre-merger notification disclosure provisions that address the unique anticompetitive impacts of private equity buyouts. AFREF previously commented on the importance of the FTC and DOJ crafting the merger review guidelines to address the challenges and demonstrated anticompetitive impacts of private equity buyouts.[4] This comment addresses how the proposed rule: I) addresses the complex structures of private equity firms; II) addresses the hidden horizontal overlaps in private equity buyouts; III) discloses information necessary to determine anticompetitive vertical and other non-horizontal combinations; IV) provides needed information to prevent further consolidation from serial mergers; V) provides needed detail to assess anticompetitive minority stakes; and VI) can strengthen the disclosure of data necessary to assess anticompetitive monopsony power over labor markets and workers.

The final rule must confront the complexity of many corporate structures, like private equity firms and their network of funds and portfolio companies. Mergers involving these complex companies must disclose their ultimate parent entity and all of the companies, entities, or funds owned, controlled, or managed by the ultimate parent entity. Antitrust regulators need a clear and complete understanding of these opaque corporate structures to determine whether merging parties can contain subsidiary companies in their sprawling holdings that could be competitors, suppliers, or customers of the other transaction party that could substantially lessen competition or tend to create a monopoly.

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[3] 88 Fed. Reg. 124 at 42180.

[4] AFREF. Comment on FTC-DOJ Draft Merger Review Guidelines. September 18, 2023.

I. Proposed rules address the complex structures prevalent in private equity buyouts

AFREF supports the proposed rule's improved pre-merger notification disclosure to increase the clarity of ultimate parent companies, corporate structures, and transaction entities necessary to assess the potential anticompetitive impact of proposed mergers. This is especially relevant for private equity buyouts that are the majority of mergers over the HSR threshold and because of the private equity industry' notorious complexity and opacity.

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 present unique anticompetitive risks to the economy. Since 2008, U.S. private equity buyouts tripled to 6,000 deals valued at over $800 billion in 2022.[5] These private equity buyouts make up the majority of reportable merger 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.[6]

Private equity firms and their investments are intricately complex corporate structures. The *Financial Times* reported that "private equity is, almost by definition, an opaque asset class."[7] *Institutional Investor* reported that "structural issues in the [private equity] industry hinder transparency," especially at the portfolio firm level.[8] Private equity firms can include the firm itself (typically a limited partnership or limited liability company), investment funds from limited partners (typically pension funds, wealthy families, and endowments) that fuel buyouts, fully-owned portfolio companies that have been acquired in buyouts, platforms of similar or related portfolio companies, partial stakes in growth investment companies, and joint ventures with other companies and private equity firms. These byzantine structures can conceal the ultimate parent private equity firm or the relationships between companies that are controlled by the private equity firm.[9]

The antitrust agencies can struggle to identify whether a merger transaction party is part of a private equity firm — a portfolio firm, private equity-owned portfolio platform, or a truly independent entity. Even if a private equity firm is identified as the ultimate parent entity of a merging party, it can be difficult to determine the full complement of entities owned, controlled, or managed by the private equity firm. Without a full picture of the entire corporate structure of the merging parties, it can be difficult or impossible to untangle or understand the potential anticompetitive impacts.

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[5] Pitchbook. "U.S. Private Equity Breakdown: 2022 Annual." (Pitchbook 2022 Annual). U.S. private equity deal activity. January 2023.

[6] AFREF analysis of Pitchbook data applying the share of private equity buyout deals to private equity deal flow by size. 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. 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 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.

[7] Greene, Sophia. "Private equity: The definition of an opaque asset class." *Financial Times*. January 24, 2015.

[8] Hamlin, Jessica. "Private equity is notoriously opaque. Researchers and investors say this is no longer OK." *Institutional Investor*. October 1, 2021.

[9] *See* Hanichak, Erica, Lakshmi Kumar, and Gary Kalman. FACT Coalition, Global Financial Integrity, and Transparency International. "Private Investments, Public Harm." December 2021; Bůžek, Richard and Christoph Scheuplein. "The global wealth chains of private-equity-run physician practices." *Journal of Economic and Human Geography*. Vol. 113, Iss. 4. September 2022;

The FTC highlighted in the proposal that complex corporate structures with a web of entities hinder the enforcement of antitrust laws because they can conceal potential rivals, suppliers, or customers that pose potential risks to competition.[10] Under the current rules, the parties involved in a transaction (a person) include the "ultimate parent entity and all entities which it controls directly or indirectly" and ultimate parent entities are those that are not controlled by another entity.[11] For private equity buyouts, the ultimate parent entity is the private equity firm and not any individual portfolio company, investment fund, or platform of firms or brands. The current pre-merger notification disclosure requirements have been insufficient to assess the ultimate parent entities and all of the entities they own, control, or manage.

The FTC reports that the antitrust agencies struggle to analyze proposed transactions and that these challenges that "have become more acute as deals and companies have become more complex."[12] For example, KKR's website currently lists 108 U.S. portfolio companies, including many across the healthcare field (a sector that has had a large number of buyouts).[13] KKR's portfolio appears to include some 23 healthcare companies — about one-fifth of its portfolio.[14] KKR's Securities and Exchange Commission filings currently list about 40 funds that finance buyouts — including two that are identified as targeted to health care investments.[15] If a portfolio firm were a merging party, antitrust agencies might have difficulty determining whether it was owned by a private equity firm and what other portfolio firms operate in the same sector, information that is necessary in order to determine horizontal or vertical market overlaps with the other transaction party.

KKR at least lists its portfolio companies on its website, but many private equity firms do not disclose their portfolio companies. Blackstone only has six portfolio examples prominently placed on its website, but its annual filing with the Securities and Exchange Commission has a 27-page exhibit listing its subsidiaries (which are largely Blackstone funds and not the portfolio companies owned by these funds).[16] The same is true of Apollo Global Management; three examples of portfolio firms on the website and over 20 pages of listed subsidiaries that appear to be fund names.[17]

The proposed regulations would clarify that the party that files the HSR pre-merger notification "means the ultimate parent entity."[18] This ultimate parent entity information was previously collected in different places, but the restructured application improves clarity about the ultimate parents and the corporate structures of the transacting parties.[19] The ultimate parent entity would be

[10] 88 Fed. Reg. 124 at 42179.
[11] 16 C.F.R. §801.1(a)(1) and (a)(3).
[12] 88 Fed. Reg. 124 at 42184.
[13] KKR. KKR Portfolio. Accessed September 2023.
[14] AFREF assessment of KKR portfolio. It lists 3 biopharmaceutical firms, a branded pharmaceutical firm, a healthcare diagnostics company, 11 companies categorized as health care (including the ambulance giant Global Medical Response and the physician practice and ambulatory surgery company Envision), 3 medical device companies, a life sciences company, 2 human pharmaceutical services firms, and a precision medicine company.
[15] KKR. U.S. Securities and Exchange Commission 10-K filing. Fiscal Year ended December 31, 2022 at 17.
[16] Blackstone. Our Business — Private Equity. Accessed September 2023; Blackstone, Inc. SEC 10-K filing. Fiscal Year ended December 31, 2022 at Exhibit 21.1.
[17] Apollo. Taking Private Equity to New Heights. Accessed September 2023; Apollo Global Management. SEC 10-K filing. Fiscal Year ended December 31, 2022 at Exhibit 21.1.
[18] 88 Fed. Reg. 124 at 42210.
[19] 16CFR§803.2(a) "notification … shall be filed by the preacquisition ultimate parent entity, or by entity included within the person [UPE] authorized by such preacquisition ultimate parent entity to file notification on its behalf"

required to report on its entity type, and the regulations on entity type currently include several common private equity firm structures.[20] And ultimate parent entities (for both the acquirers and acquisition targets) would be required to report on their organizational structures including controlled entities by operating business.[21] Moreover, the proposal requires a "narrative response describing the ownership structure of the acquiring entity," and, "where a fund or master limited partnership is the UPE, also provide an organizational chart sufficient to identify and show the relationship of all entities that are affiliates or associates," that should encompass all entities that are owned, controlled, or managed by the acquirer.[22] This would allow the antitrust agencies to determine the full range of companies (not just funds) in a private equity firm's portfolio and identify these portfolio companies based on how they are commonly known in the marketplace (both doing-business-as DBA and formerly-known-as FKA names). This information is needed for the agencies to identify the ultimate parents and the firms they control to assess potential anticompetitive overlaps.

It is critical that the final HSR rule require that transactions that involve parties with complex corporate structures like private equity firms disclose their ultimate parent entity and all of the companies, entities, or funds owned, controlled, or managed by the ultimate parent entity. Without a comprehensive and clear delineation of corporate structures, antitrust agencies may not be able to discern whether merging parties with opaque corporate structures contain entities owned, controlled, or managed by the ultimate parent entity could be competitors, suppliers, or customers of the other transaction party that could substantially lessen competition or tend to create a monopoly.

II. Proposed rules provide enhanced tools to address hidden overlaps in private equity buyouts

AFREF supports the proposed rule's expanded pre-merger notification disclosure to identify potential anticompetitive market overlaps that may be hidden by complex corporate structures, including private equity firms' portfolio company structures. Private equity firms own a string of portfolio companies and it is common for private equity firms to specialize in a few sectors, meaning they can own multiple firms in the same industry. A private equity firm's portfolio can include horizontal rivals, companies in adjacent markets that effectively constitute a conglomerate, or firms that are vertical suppliers or customers of another portfolio firm. These kinds of sectoral portfolios already present anticompetitive concerns, but mergers that involve private equity-owned firms or platforms of sectoral firms can present new challenges for antitrust agencies because of the complex corporate structures.

The acquiring entity could be a fund, a portfolio company, a platform, or part of a joint venture that could conceal not only the ultimate parent but also all the other portfolio firms owned or controlled by the private equity firm that is the ultimate parent entity. For example, some of KKR's investments joined the target firm with existing portfolio companies,[23] some have created new

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[20] 88 Fed. Reg. 124 at 42211; the current regulations specify a list of entity types that include "any … corporation, company, partnership, joint venture, … [or] fund." 16 C.F.R. §801.1(a)(2).
[21] 88 Fed. Reg. 124 at 42187 and 42211.
[22] 88 Fed. Reg. 124 at 42211.
[23] KKR. [Press release]. "KKR completes acquisition of Brightspring Health Services." March 5, 2019.

buyout or management platforms with sub-portfolio firms,[24] some of the investments are announced through specific funds,[25] and some investments are made through credit funds.[26] The structural variation and complexity of these transactions impedes expeditious review by antitrust agencies.

A current private equity buyout presents a tangible example of this problem. Last month, Roark Capital announced it was buying Subway, adding 37,000 locations to its restaurant empire.[27] Roark Capital already owns over 20 restaurant chains including directly owning few individual chains as well as owning four restaurant group platforms (Inspire Brands, Focus Brands, Cheesecake Factory, and CKE) that in turn own restaurant chains.[28] The announcement of the proposed transaction did not specify whether Subway would be folded into Inspire Brands or Focus Brands or be owned directly by Roark.[29] But Subway is a direct rival for fast dining with chains across Roark's portfolio and if the HSR pre-merger notification does not include Roark's entire fast dining portfolio it could diminish the visibility of potential impacts on competition and make the evaluation of the merger more difficult for antitrust agencies.

The proposed rule would require the disclosure of all of the businesses within the merging parties' control and an assessment of the transaction and its potential market overlaps that could substantially lessen competition or tend to create a monopoly. The proposal requires acquiring parties to "describe all business operation(s) of all entities within the acquiring person" (and, again, the acquiring person means the ultimate parent entity).[30] This should include all of the portfolio companies of a private equity firm pursuing a buyout. The proposed disclosure also requires transaction parties to "describe each of the principal categories of products and services (as defined in the day-to-day operations) of the acquiring person or acquired entity" and "current or known planned products or services of the acquiring person or acquired entity (as appropriate) that competes with (or could compete with) a current or known planned product or service of the other party (acquiring person or acquired entity as appropriate)."[31] The parties must disclose the sales in units and dollars for the competitive overlaps as well as the North American Industrial Classification System (NAICS) 6-digit codes of the acquirer and acquisition target that would create product market overlaps.[32] Both transaction parties are also required to report all their controlled entity and minority holding ovelaps, including NAICS codes and geographic market overlaps by their DBA and FKA commonly owned names.[33]

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[24] KKR. [Press release]. "KKR forms Falcon Vision to advance innovation in ophthalmology." February 26, 2019.
[25] KKR. [Press release]. "Clarify Health Solutions raises $57 million in Series B financing round led by KKR." September 18, 2018.
[26] KKR. [Press release]. "KKR Acquires $373 Million Portfolio of Prime Auto Loans.
[27] 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.
[28] Roark Capital. Portfolio — Restaurant and Food. Accessed September 2023. Inspire Brands (Arby's, Baskin-Robbins, Buffalo Wings, Dunkin', Jimmy John's, and Sonic); Focus Brands (Auntie Anne's, Carvel, Cinnabon, Jamba Juice, McAlister's Deli, Moe's Southwest Grill, Schlotszky's, and Seattle's Best on military basis,); CKE Restaurants (Carl's Jr. and Hardee's); The Cheesecake Factory (Flower Child, North Italia, and the Cheesecake Factory); Culvers, Miller's Ale House, and Nothing Bundt Cakes are owned separately from the other subsidiary franchises.
[29] Subway Restaurants. [Press release]. "Subway announces sale to Roark Capital." August 24, 2023.
[30] 88 Fed. Reg. 124 at 42213; 16 C.F.R. §801.1(a)(1).
[31] 88 Fed. Reg. 124 at 42214.
[32] 88 Fed. Reg. 124 at 42214 to 42215.
[33] 88 Fed. Reg. 124 at 42214, 42215, and 42217.

III. Proposed rules disclose information necessary to determine anticompetitive vertical and other non-horizontal combinations

AFREF supports the pre-merger disclosure of additional information to identify potential anticompetitive vertical linkages. Mergers that allow a firm to control upstream suppliers, downstream customers, 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.[34] Private equity firms can incentivize their portfolio companies to purchase services or products from other companies 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 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 tonnes of carbon dioxide equivalent.[35] 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).[36] 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).[37] Private equity energy combinations like these allow a parent firm's 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 supports the inclusion of vertical and other non-horizontal combinations in the proposed merger review guidelines. The proposed additional pre-merger notification disclosure is necessary for antitrust agencies to effectively assess the potential anticompetitive impact of these non-horizontal mergers. The proposed rule requires merging parties to report supply relationship narratives including related sales to or related purchases from the other party or to rivals of the other party.[38] The proposed rule requires the granular reporting of these related sales or purchases in dollars and units as well as disclosing the top 10 customers or suppliers, respectively, of these sales or purchases. These additions are necessary to prevent anticompetitive vertical linkages that are already common in private equity portfolios.

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[34] Pitchbook 2022 Annual. Share of US PE deal value by sector and at 22 and 31.
[35] Giachino, Alyssa et al. AFREF, Global Energy Monitor, and Private Equity Stakeholder Project. "The Carlyle Group's Hidden Climate Impact." April 2023.
[36] First Reserve. Portfolio Investments. Accessed September 2023.
[37] Lime Rock Partners. Portfolio. Accessed September 2023.
[38] 88 Fed. Reg. 124 at 42214 to 42215..

IV. Proposed rule provides needed information to prevent further consolidation from serial mergers

AFREF supports the proposal's required disclosure of previous acquisitions that were in the same industry or product market for the prior 10 years. The private equity industry pioneered and perfected the serial "roll-up" acquisitions that were too small to attract antitrust agency attention but nonetheless amassed considerable market power over time. Private equity firms use these add-on buyout deals to purchase multiple competitors of an existing portfolio company or expand their geographic reach to create a much bigger player in an industry that can in aggregate substantially lessen competition or tend to monopoly. The proposed merger review guidelines addressed serial mergers below the HSR threshold for the first time, and the proposed pre-merger notification disclosure rules on prior acquisitions are necessary to prevent further consolidation from private equity roll-ups.

A large portion of private equity buyouts are 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.[39] These deals "are at the core of the PE buy-and-build playbook," according to industry publication Pitchbook.[40] 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).[41] These roll-ups below the antitrust reporting thresholds can nonetheless consolidate market power. These 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. These private equity roll-ups to monopolistic platforms have been especially prevalent in health care, including physician practices, ambulances, anesthesiology, dental practices, home health, nursing homes, and more.

The proposed rule on prior acquisitions would require acquirers and acquisition targets to report any acquisitions over the previous 10 years that derive revenues from business lines with overlapping 6-digit NAICS codes or other competitive overlaps, including minority stakes over a certain size.[42] This disclosure would provide the necessary information to address the anticompetitive impact of serial acquisition roll-ups below the threshold. However, the proposed merger guidelines still need to have specific structural presumptions against large agglomerations of market power through sequential mergers and an approach to assess what level of roll-ups could substantially lessen in competition or tend to create monopolies.

V. Proposed rule provides needed detail to assess anticompetitive minority stakes

AFREF supports the proposed merger pre-notification disclosure of partial ownership and shared board members necessary to assess whether less than majority ownership investments can exercise

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[39] Pitchbook 2022 Annual. Median U.S. add-on deal value. January 2023.
[40] *Ibid.* at 16.
[41] *Ibid.* Median U.S. add-on deal value. January 2023. HSR thresholds from FTC Annual HSR reports.
[42] 88 Fed. Reg. 124 at 42217.

control and direction that can undermine competition. About one-fifth of private equity investments are minority stakes in so-called "growth" investments that accounted for 1,500 deals worth over $100 billion in 2022.[43] Private equity firms can exert influence and control over target firms with minority ownerships that can distort competitive markets. These minority investments "can allow private equity firms to apply active management despite fractional ownership," according to Pitchbook.[44] This can raise concerns of anticompetitive exercise of coordinated market power when the minority investments are in firms that are rivals of wholly-owned portfolio companies that operate in the same market (either as horizontal competitors, in adjacent markets, or vertical upstream suppliers or downstream customers).

The current pre-merger notification disclosure requires the identification of owners from 5 percent to 50 percent of the entity, but excludes limited partners.[45] The proposed rule clarifies that any minority stake is subject to antitrust review, including limited partners and requires the identification of investors in the acquirer or acquired entities that hold from 5 percent to 50 percent interest — including those directly and indirectly controlled by transacting parties and platforms created by the transaction.[46] As the FTC observed, "the complexity of these organizational structures makes it all the more important that the filing person provide this information."[47]

Private equity minority investment interests often confer rights to appoint board members or allow board observers that create anticompetitive opportunities to exert coordinated market power. 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 has been substantially underenforced. Even when the same individual does not sit on multiple boards, private equity firms can spread members of a close-knit team among portfolio companies and those in which it holds minority interests, creating the same de facto interlocking directorate effect. The shared or overlapping directorates facilitate coordinated or collusive anticompetitive behavior and use of shared privileged information to set strategies, coordinate activities, and discourage expansion or aggressive rivalry.

The proposed pre-merger notification disclosure would require the acquiring and acquired parties to identify all current officers, directors, and board observers as well as those who have served in the previous two years.[48] Additionally, the parties would have to disclose entities that provided more than 10 percent of the credit to the transaction that allowed the private lender to exert control, which would address private equity firm's potential dual role as private provider of leveraged loans to finance buyouts.[49]

AFREF supports these measures to address the potential anticompetitive impacts of minority interests but recognizes that these provisions address those transactions that exceed the HSR thresholds. Many private equity purchases are add-on acquisitions that fall far below the HSR thresholds. The FTC should apply the minority interest and board membership requirements to any serial transaction that requires additional disclosure of prior acquisitions.

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[43] Pitchbook 2022 Annual. U.S. PE growth/expansion deal activity.
[44] Pitchbook 2022 Annual at 4.
[45] 88 Fed. Reg. 124 at 42188.
[46] 88 Fed. Reg. 124 at 42212.
[47] 88 Fed. Reg. 124 at 42188.
[48] 88 Fed. Reg. 124 at 42212.
[49] *Ibid.*

VI. Strengthen proposed rule to disclose data necessary to assess anticompetitive monopsony power over labor markets and workers

AFREF supports the proposed rule's increased pre-merger disclosure of information necessary to determine a merger's potential anticompetitive impact on labor markets and workers. The proposed merger review guidelines appropriately raised the prominence of anticompetitive monopsony power that explicitly includes labor markets. Mergers can exacerbate monopsonistic buyer power over workers that can suppress wages, lower benefits, and worsen working conditions.

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.[50] 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."[51] Workers are especially vulnerable to the exercise of monopsony market power by employers because labor markets are less elastic than product markets.[52] 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.

Private equity buyouts — especially in sectors with high private equity penetration — can exacerbate the impacts of monopsony power over labor markets and workers. Many private equity firms control portfolios of firms in the same sector that have locations or storefronts that employ people in similar occupations and geographies that can effectively collaborate to squeeze workers, prevent pay increases, and tamp down on workplace benefits. Private equity cost cutting strategies to boost profits are often taken out of workers through downsizing, work intensification, lowering wages or eliminating raises, reducing benefits like health care and retirement, and eliminating severance payments.[53] 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 4.4 percent more than companies that were not taken over.[54]

AFREF supports the proposed rule's collection of information on employment necessary to assess a proposed merger's potential anticompetitive pressure on labor markets, but suggests strengthening these requirements to more fully determine the impact on workers. That includes adding narrower geographic information, the collection of worker wage and benefit information, and increasing the time frame for data collection on workplace safety, wage and hour, and labor law violations.

The proposed rule's collection of information on transacting parties' 5 largest standard occupational classifications and commuting zones is appropriate and necessary, but the FTC should consider

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

colleting additional and narrower geographic information.[55] Many of the commuting zones are larger than the Census Bureau's metropolitan statistical areas, which may reflect a larger commuting distance than is common for many low -wage workers. For example, the geographic market for fast food or retail jobs may not be larger than a handful of nearby towns or a single county. AFREF recommends that the FTC also require the listing of each county for locations that the proposed rule separately requires street-level address reporting that contains county identification as well.

AFREF further recommends that the FTC require the disclosure of wage and benefit information for workers in the 5 largest standard occupational classifications. Monopsonistic employers or coordinated oligopolies of employers exert their market power to extract value from workers by suppressing wages and reducing benefits, so it is important for the FTC to collect information on these employment metrics. AFREF recommends that the FTC require the disclosure of median hourly wages and median weekly wages (to account for insecure scheduling) for each of the 5 largest occupational classifications. Additionally, transacting parties should separately disclose the percentage of workers who receive healthcare benefits, retirement benefits, paid sick leave, and paid vacation in each commuting zone for each of the 5 largest standard occupational classifications. This would enable the antitrust agencies to assess the extent that transacting parties may be using their market power to reduce wages and benefits and the proposed merger's potential anticompetitive impact on worker wages and benefits.

AFREF supports the collection of information on transacting parties' worker, workplace safety, and labor law violations.[56] However, AFREF recommends extending the disclosure period of worker, workplace safety, and labor violations from 5 years to 10 years and including state and civil labor law violations and penalties. These kinds of labor law violations demonstrate an employers' capacity and incentive to extract value from workers, but the enforcement of labor and workplace laws are notoriously lax and almost entirely based upon worker reporting of potential violations.[57] The Department of Labor has been starved for resources necessary to robustly enforce laws to protect workers from wage theft, anti-union retaliation, and workplace safety.[58] Some states' attorneys general enforce state and federal labor law, but there is tremendous variation between the states' labor laws and enforcement,[59] meaning that in some areas there may be little history of violations that may not reflect workers' lived experience.

A 5-year period of federal worker, workplace safety, and labor law violations is unlikely to capture the extent to which employers may be engaging in anti-worker practices because of lax enforcement, expanding the period to 10 years including state and civil enforcement efforts would be a better proxy for the potential breadth of these violations. For example, Roark Capital's more than 20 fast food and fast casual restaurants including Arby's, Dunkin', Jimmy John's and Sonic employ an

[55] 88 Fed. Reg. 42215.
[56] *Ibid.*
[57] Fine, Janice et al. Washington Center for Equitable Growth. "Maintaining Effective U.S. Labor Standards Enforcement through the Coronavirus Recession." September 3, 2020; Bazelon, Emily. "Why are workers struggling? Because labor law is broken." *New York Times Magazine*. February 19, 2020.
[58] Mangundayao, Ihna, Celine McNicholas, and Margaret Poydock. Economic Policy Institute. "Worker Protection Agencies Need More Funding to Enforce Labor Laws and Protect Workers." July 29, 2021.
[59] Gerstein, Terri. Economic Policy Institute. "Workers' Rights Protection and Enforcement by State Attorneys General." August 27, 2020; Doty, Pamela J. and Edward Katko. Prepared for the Office of Disability, Aging and Long-Term Care Policy. U.S. Department of Health and Human Services. "Analysis of State Efforts to Comply with Fair Labor Standards Act Protections to Home Care Workers." December 2019; Scherer, Jennifer and Nina Mast. Economic Policy Institute. "Child Labor Laws are Under Attack in States Across the Country." March 14, 2023.

estimated 700,000 low-paid workers.[60] A 2021 survey of shift workers by the Economic Policy Institute and the Shift Institute found that a sizeable majority of workers at some 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.[61] And Roark has trumpeted its efforts to block raising the minimum wage and protecting workers trying to form unions.[62]

Despite the tens of thousands of locations and 700,000 workers, there has been only one federal labor law violation that has drawn a penalty in the past 5 years (a workplace safety violation that resulted in a $6,000 penalty; there was a second workplace safety violation within the past decade) according to data from Good Jobs First's Violation tracker.[63] Expanding the violations to state and civil labor law violations and a 10-year period would add another 9 cases of wage and hour violations with nearly $2.5 million in penalties. AFREF strongly recommends increasing the time period to 10 years and including state and civil labor law enforcement cases.

Americans for Financial Reform Education Fund commends the Federal Trade Commission for revisiting and redesigning the Hart-Scott-Rodino pre-merger notification and disclosure rules to provide antitrust agencies with the information necessary to expeditiously review proposed mergers and assess the transaction's potential anticompetitive impacts. The merger waves over the past decades has increased economic concentration that 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 this proposed rule to collect the necessary information to address the unique consolidation strategies and practices of the private equity industry, with suggested clarifications and improvements for disclosures related to labor markets. It is critical that the final rule require that transactions that involve parties with complex corporate structures like private equity firms disclose their ultimate parent entity and all of the companies, entities, or funds owned, controlled, or managed by the ultimate parent entity to provide the necessary information to antitrust agencies to assess the possible anticompetitive impact of combining entire corporate networks. Thank you for the opportunity to comment and for the consideration of these recommendations to the proposed HSR pre-merger notification disclosure rules.

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[60] Roark Capital. Portfolio Companies. Restaurant and Food. Accessed September 2023; Mortgenson, Gretchen. "Working for companies owned by well-heeled private-equity firms can mean lower wages for employees." *NBC News*. October 9, 2021.
[61] Economic Policy Institute. Company Wage Tracker. Accessed September 2023.
[62] Sirota, David, Andrew Perez, and Walker Bragman. "This fast food giant bragged about killing the $15 minimum wage." *Newsweek*. March 27, 2021.
[63] AFREF analysis of Roark Capital's restaurant chains violations from Good Jobs First's Violation Tracker. Accessed September 2023.