

**Before the Department of Justice and the Federal Trade Commission
Response to Draft Merger Guidelines
Docket ID FTC-2023-0043**

Written Comments from the American Economic Liberties Project

September 18, 2023

**THE PROPOSED MERGER GUIDELINES TAKE HISTORIC STEPS TO
CENTER LABOR IMPACTS IN MERGER REVIEW**

I. Introduction

We submit this comment in response to the Request for Comment on Draft Merger Guidelines proposed by the Department of Justice Antitrust Division and the Federal Trade Commission (together, “the Agencies”), specifically addressing concerns about labor markets in merger review as covered in Guideline 11. The American Economic Liberties Project (“Economic Liberties”) is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States.¹

¹ This comment focuses on the issues of monopsony power and labor markets as they are expounded upon in Guideline 11. Economic Liberties is submitting a separate comment regarding the other proposed guidelines, which discusses structural presumptions, incipency, vertical mergers, common ownership, and serial acquisitions.

The relationship between antitrust and labor has been strained from the beginning. Although the Sherman Act was expressly intended to address the harm that corporate concentration bears on workers,² it was also used to quash union organizing. Even after the Clayton Act explicitly exempted the combination of workers from the Sherman Act's ban on restraints of trade,³ federal antitrust laws continued to be used to prevent worker boycotts and strikes.⁴ With passage of the National Labor Relations Act, collective bargaining emerged as a dominant means of countering employer power and abuses. And for good reason. Antitrust enforcers in both the private and public sector showed little concern for the power of employers in labor markets, and antitrust cases based on labor abuses have been infrequent at best.⁵ But with increasing recognition that labor markets are more concentrated than previously understood, and better understandings of the nexus between labor market concentration and decades of wage stagnation, it is time for antitrust enforcers and allies across the labor movement to set their sights on the harm to workers stemming from corporate concentration.

² In congressional debates around the Sherman Act, Senator John Sherman himself stated, "The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors.*" 189021 Cong. Rec. 2457 (1890) (emphasis added).

³ Section 6 states, "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17.

⁴ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn. of N. Am.*, 274 U.S. 37 (1927)

⁵ Suresh Naidu, Eric Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 552 (2018)

The Draft Merger Guidelines take historic steps to address the impact of mergers on workers. No previous iteration of the Guidelines has ever mentioned impacts to labor markets, with only passing reference to buyer-side market power, also called monopsony.⁶ The 2010 Merger Guidelines, for instance, downplayed the importance of buyer and employer power, providing that the Agencies “do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer power.”⁷ In the context of labor, “reduction in the quantity purchased” refers to post-merger layoffs or pay cuts, which often *are* done because the consolidated company obtained additional power in labor or product markets.. Meanwhile, merging parties have often promised increased employment and improved working conditions, although even a cursory review of past mergers reveals merging parties abandoning labor-related commitments in the aftermath of merger approvals.

With this comment, Economic Liberties lends its support to the Agencies’ efforts to mend an over century-old gap in scrutiny of the impacts of mergers on labor markets, which build on renewed study of those impacts and recent legal developments. We provide historical context for the inclusion of labor market impacts

⁶ The concept of market power among buyers to depress the price paid for a product first appeared in the 1984 Merger Guidelines. The 1992 Merger Guidelines were the first to include reference to “monopsony” power.

⁷ U.S. Dep’t of Justice and the Fed. Trade Comm’n, 2010 Merger Guidelines (Aug. 19, 2010), *available at*: <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

in the updated guidelines. Finally, we offer discrete suggestions for improving upon this already-meritorious effort.

II. Labor Markets are Highly Concentrated.

With intermittent variation, corporate mergers have increased in frequency and size since the FTC started consistently tracking mergers in the late 1970s.⁸ In 1979, the first full year of premerger reporting, only 861 transactions were reported.⁹ That number spiked to 3,087 in 1996,¹⁰ and in 2021, hit a new record with 3,520 reported transactions.¹¹ Over the course of roughly the same period, accompanying this consolidation of the economy and the increasing scale of corporate mergers, real wages grew by only 0.7 percent.¹² Accompanying this period of wage stagnation was a rapid growth in income inequality.¹³ So, not surprisingly, a recent study confirmed

⁸ In 1976, Congress passed the Hart-Scott-Rodino Act, which requires parties to report transactions exceeding certain dollar thresholds (currently any transaction over \$111.4 million) to both the Federal Trade Commission (the “FTC”) and the Department of Justice (the “DOJ”) for antitrust review.

⁹ William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act*, Speech Before The Conference Board (Oct. 31, 1996), available at: <https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>.

¹⁰ *Id.*

¹¹ U.S. Dep’t of Justice and Fed. Trade Comm’n, Hart-Scott-Rodino Annual Report (Fiscal Year 2021), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

¹² Michael R. Strain, *Have Wages Stagnated for Decades in the US?*, AM. ENTER. INST. (June 27, 2022), available at <https://www.aei.org/articles/have-wages-stagnated-for-decades-in-the-us/>

¹³ Lawrence Mishel, Elise Gould, & Josh Bivens, *Wage Stagnation in 9 Charts*, ECON. POLICY INST. (Jan. 6, 2015), available at <https://www.epi.org/publication/charting-wage-stagnation/>

that, “in local markets[,] ... concentration is high, and increasing concentration is associated with lower wages.”¹⁴ Even labor markets with many dispersed employers can exhibit considerable monopsony power, and this is especially true in low-wage segments of the labor market.¹⁵ Another study found a direct link between merger and acquisition activity, increased labor concentration, and lower wages.¹⁶

Guideline 11 of the Draft Merger Guidelines recognizes the importance of competition in labor markets and describes some of their unique characteristics, namely that labor markets are rarely, if ever, characterized as a competitive marketplace where buyers and sellers can view the different wage rates for different positions and skill sets, easily selecting the best fit based on that information. As noted in the Guidelines, labor markets exhibit high “switching” costs and search frictions. This refers to the fact that, with limited flows of information between workers and employers and the effort required on both sides to find an appropriate match,¹⁷ employees have fewer opportunities to use the competitive value of their

¹⁴ Jose Azar, Ioanna Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, *J. of Human Resources, Special Issue: Monopsony in the Labor Market (Supplement)*, 57 J. HUMAN RES. 167, 197 (2022), available at: <http://jhr.uwpress.org/content/57/S/S167.full.pdf+html>.

¹⁵ Ihsaan Bassier, Arindrajit Dube, Suresh Naidu, *Monopsony in Movers: The Elasticity of Labor Supply to Firm Wage Policies*, 57 J. HUMAN RES. S50 (2021), available at <https://jhr.uwpress.org/content/wpjhr/early/2021/04/05/jhr.monopsony.0319-10111R1.full.pdf>.

¹⁶ Efraim Benmelech, Nittai K. Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUMAN RES. 200 (2022), available at <https://muse.jhu.edu/article/850939>.

¹⁷ *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1207 (N.D. Cal. 2013)

services to negotiate for higher wages.¹⁸ Guideline 11 lists a variety of factors contributing to high switching costs, including the process of finding, applying, interviewing for, and acclimating to a new job; geographic limitations; and the need for the worker and the employer to agree to the match. Even if two occupations or positions seem very similar, it does not mean the cost of switching from one to the other is low.

Despite these unique features that distinguish labor markets from most others, concentration and monopsony power remain harmful for similar reasons as in other markets. In fact, the proximate harms of highly concentrated markets may appear at even lower rates of concentration in labor markets than elsewhere.¹⁹ This is because the monopsonist employer can simply hire someone else if a job applicant demands higher wage.²⁰

The historic trend toward increased concentration in labor markets and other buyer-side markets, more generally, is rightly at the center of Guideline 11, as is the notion that direct evidence – like the ability to unilaterally set wages – can support a

¹⁸ *Id.*

¹⁹ Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 Cornell L. Rev. 1343, 1354 (2020)

²⁰ *Cf.* Robert H. Lande, *Beware Buyer Power*, Legal Times, at 2 (July 12, 2004), available at https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1712&context=all_fa (arguing that that power buyer can take their business elsewhere if a seller refuses its demand of lower prices for inputs). Conversely, a power buyer that accounts for 20 percent of a manufacturer’s sales is an important part of that seller’s business, and the result is a seller who “may be willing to make this sale at only slightly above average variable cost and to cover their overhead from the profits on sales to their other customers, who end up paying more. *Id.*

finding that the merging firms are dominant. The Agencies propose that, “in light of their characteristics, labor markets are often relatively narrow.” **Guideline 11 can be improved upon by making clear that buyer-side power, not just in labor markets, can exist at lower levels of market concentration than in product markets.**²¹ We propose that, similar to the structural presumption of a 30% market share set by the *Philadelphia National Bank* decision, Guideline 11 should set a lower structural presumption of 20%, based on the reality that harms from buyer power tend to manifest at lower market shares.

III. Labor Market Impacts Should be Incorporated in All Merger Review.

Even where a proposed merger is not being scrutinized or challenged based on labor market concerns, interagency analysis of the potential labor market impacts of a current proposed merger are a way to invite workers and labor unions to the table, even as to mergers that are not being challenged for their potential impacts to labor markets. Such review will also enhance merger review on its own, as examining the likely effects of a merger on workers will be an excellent source of information about the merger’s likely impacts on both labor and product markets. Workers directly feel the impacts on labor markets, and workers are often more acutely aware of the anticipated layoffs from mergers – which stem from cuts in output after a firm gains market power in the product market – than antitrust enforcers have historically been.

²¹ *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 937 (7th Cir. 2000) (toy retailer was able to exert substantial buyer power with 20% of the national wholesale market, and a 30% share of the market among large, traditional toy manufacturers).

Both the FTC and DOJ have recently entered into Memoranda of Understanding with the National Labor Relations Board (NLRB) to enhance coordination and information sharing, training, and outreach in the context of antitrust enforcement.²² In addition, several agencies have independent authority to review and challenge mergers.²³ These interagency partnerships should be expanded upon to facilitate seamless sharing of information across jurisdictions, bring greater resources to bear on merger review, and broaden the scope of that review even beyond the scope of a second request.

To demonstrate the importance of a methodical, concurrent review of labor market impacts even as to proposed mergers being scrutinized for non-labor market impacts, here we review three recent mergers that demonstrate the impacts of mergers on labor markets.

US Airways and American Airlines (2013)

In 2013, the Association of Professional Flight Attendants, Allied Pilots Association, and Transport Workers Union endorsed a merger between US Airways and American Airlines, amid American's declaration of bankruptcy and an

²² *Memo. of Understanding Between the U.S. DOJ and the NLRB*, July 26, 2022, available at: <https://www.justice.gov/opa/press-release/file/1522096/download>; *Memo. of Understanding Between the FTC and the NLRB Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, July 19, 2022, available at: https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf.

²³ The Surface Transportation Board has authority to enjoin anticompetitive mergers of common carriers involved with interstate transportation; the Secretary of Transportation to enjoin airline mergers; the FCC to enjoin mergers of telecommunications common carriers; and the Federal Reserve Board to enjoin bank mergers. 15 USC § 21.

accompanying threat to reduce \$1.25 billion in costs by eliminating 13,000 jobs. Labor support came despite statements from both airlines' executives that they did not need the merger to succeed and a pre-merger analysis finding that the merger would lead to a reduction in size of the merged airlines.²⁴ Despite obvious impacts to the labor market, if only owed to the near-term loss reduction in employment, the basis for challenging the merger was that lessened competition for commercial air travel in local markets would result in passengers paying higher airfares and receiving less service.²⁵

Unsupervised by the formal merger proceedings, the labor unions were left to negotiate their own deals as the DOJ wound its own case toward settlement. A year after the signing of an implementation schedule for commitments made during the merger process, all five US Airways unions began raising concerns that they were not seeing the agreed-upon benefits.²⁶ In a letter to American CEO Doug Parker, leaders of the five unions wrote that they had generally supported the merger, but “now that the merger has taken place, we expect management to move forward immediately to

²⁴ Press Release, *Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines*, U.S. Dep't of Justice (Aug. 13, 2013), available at: <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-challenging-proposed-merger-between-us-airways-and>.

²⁵ *Id.*

²⁶ Ted Reed, *American Airlines Merger Left US Airways Workers Behind, Five Unions Say*, THE STREET (Apr. 8, 2014), available at: <https://www.thestreet.com/investing/stocks/american-airlines-merger-left-us-airways-workers-behind-five-unions-say-12632498#:~:text=STOCKS-.American%20Airlines%20Merger%20Left%20US%20Airways%20Workers%20Behi nd%2C%20Five%20Unions,Airways%20workers%20have%20been%20delayed>.

keep its commitments to all of its employees.” They continued, “we told you then we would support it, but only if our concerns were addressed. Now months later, many of us are still waiting for critical issues to be addressed and resolved.” Each of the unions cited specific post-merger problems, including stalled contract negotiations, unequal pay and work conditions between the merging parties’ dispatchers and simulator engineers, and additional frictions among customer service agents and pilots. The US Pilots Association filed a string of grievances, complaining that the airlines “keep putting us off.”

The US Airways-American Airlines merger created the largest airline in the world, and executives heralded their success with ambitions of being the most profitable airline, too. From the perspective of the workers whose interests fell outside the scope of the government’s formal merger review, the outcome was less successful.

Albertsons and Safeway (2014)

In March 2014, Safeway, the nation’s second-largest grocery store operator, announced that it would be acquired by private equity firm Cerberus Capital Management. The announcement of the Safeway merger arrived a year after Cerberus’ acquisition of supermarket chain Albertsons for \$3.3 billion. In January 2015, the FTC filed a Complaint challenging the acquisition, listing 130 geographic markets in which Albertsons and Safeway competed vigorously and directly on the bases of price, quality, product variety, and services, and offer consumers the

convenience of one-stop shopping for food and other grocery products.²⁷ Absent intervention, consumers would face higher prices and lower quality food and other grocery products. Notably, the FTC's Complaint did not allege effects to relevant labor markets.

The FTC allowed the merger to proceed, contingent on a remedy that the merged supermarkets would divest of more than 168 supermarkets (among other concessions) to Haggen, a small grocery chain based in Washington State.²⁸ Noting "good relationships with both Safeway and Cerberus," the United Food and Commercial Workers International supported the merger and won commitments that at least some of their member employees would be able to choose between staying at their Haggen's store or transferring to an Albertsons or Vons supermarket with benefits intact. While the FTC had not alleged effects to relevant labor markets in its Complaint, the FTC's final Decision and Order prohibited Albertsons and Safeway from interfering with or impeding the mobility of workers with outstanding or accepted offers of employment at divested supermarkets. The Order further directed Albertsons and Safeway to remove any non-compete or confidentiality provisions of employment that would impede employees from accepting employment with a divested supermarket.

²⁷ Press Release, *FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger*, Fed. Trade Comm'n (Jan. 27, 2015), available at: <https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger>.

²⁸ Decision and Order, *In the Matter of Cerberus et al.*, Fed. Trade Comm'n, Case No. 141-0108 (July 2, 2015).

Along all relevant metrics, Cerberus' and Albertsons' acquisition of Safeway was an unmitigated disaster for competition in the retail grocery market – and especially for the sector's workers. The tenfold expansion of Haggen's retail store volume, five-fold increase in staff, and expansion across seven new states was far too much for Haggen to handle. By October 2015, at which point the divestiture agreement had already soured, the Wall Street Journal noted, "Haggen's workers may be feeling the most immediate effects of the restructuring." Citing court papers that Haggen had hired 8,000 employees as part of its divestiture agreement, the prevailing assumption was that "many of those jobs [would be] going away."²⁹ In a matter of months, thousands of union members were watching their jobs disappearing in real time.

Fueled by criticism from employees that their union had isolated them from key information and failed to appear on their behalf, UFCW locals began filing grievances in August 2015 against Haggen, Albertsons, and Vons for the "illegitimate dismissal of senior workers, disabled workers, and prior plans to close a large number of stores shortly after Haggen's acquisition of nearly 150 Albertsons locations."³⁰ The president of Los Angeles-based UFCW Local 770 stated, "We will not stand idly by as

²⁹ Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL STREET JOURNAL (Oct. 9, 2015), available at <https://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394>.

³⁰ *Union Files Grievance Charges Against Haggen, Vons and Albertsons*, PROGRESSIVE GROCER (Aug. 24, 2015), available at: <https://progressivegrocer.com/union-files-grievance-charges-against-haggen-vons-and-albertsons>.

management tries to pull the wool over their employees' eyes.”³¹ State employment departments in Oregon and Washington organized “rapid response” teams in anticipation of 1,000 grocery workers facing imminent layoffs.³² California lawmakers moved quickly to draft and adopt a bill requiring successor grocery employers to retain eligible grocery workers for a 90-day period. As Haggen rebuilt their operational strategy based around just 37 stores, public agencies (and public coffers) bore the cost of triaging the resulting harm to workers.

The FTC’s scrutiny of the Cerberus-Albertsons-Safeway merger focused disproportionately on the product market harms of the proposed merger, giving relatively little consideration to potential labor harms. In doing so, the FTC seemingly ceded that analysis to the private sector stakeholders. Separate from federal agency shortcomings, the post-merger history of the transaction illustrates the probability of harm to union workers even when isolated labor victories led to labor support for a proposed merger.

AT&T and T-Mobile (2011)

When government agencies undertake more direct and thorough investigation of potential labor market harms, we see different results. The 2011 proposed merger of AT&T and T-Mobile provides the clearest example of the value of concurrent review

³¹ *Id.*

³² Tom Banse, “*Rapid Response Teams*” Organized For Mass Layoffs At Haggen Grocery Stores, NORTHWEST NEWS NETWORK (Nov. 28, 2015), available at: <https://www.nwnewsnetwork.org/economy-business-finance-and-labor/2015-09-28/rapid-response-teams-organized-for-mass-layoffs-at-haggen-grocery-stores>.

of labor market impacts, even as to a merger that was not being scrutinized for its labor impacts.

In March 2011, AT&T announced its intent to purchase T-Mobile USA for \$39 billion, in a bid to combine two of only four mobile wireless providers with nationwide networks. The DOJ filed a lawsuit to block the acquisition, alleging that it would eliminate actual and potential competition between the merging parties, lead to higher prices, decrease the quality and quantity of services, and reduce innovation and product variety.³³ Nevertheless, the CWA supported it, in part because AT&T was the only wireless company with a unionized workforce and, according to CWA, “a long tradition of non-interference” with employees seeking to organize. Based on representations from the merging parties, CWA argued that the merger would create “as many as 96,000 good, family-supporting jobs” via AT&T’s commitment to increase capital expenditures by “at least \$8 billion over the next seven years.”³⁴

A study by the Federal Communications Commission – which included an independent analysis of labor effects of the proposed merger – told a different story, determining that the merger would result in a net *reduction* of direct employees.³⁵

³³ Press Release, *Justice Department Files Antitrust Lawsuit to Block AT&T’s Acquisition of T-Mobile*, U.S. Dep’t of Justice (Aug. 31, 2011), available at: <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile>.

³⁴ Communications Workers of America, *CWA: The Facts Support AT&T/T-Mobile Merger* (June 20, 2011), available at: [https://cwa-union.org/news/entry/cwa the facts support attt-mobile merger](https://cwa-union.org/news/entry/cwa_the_facts_support_attt-mobile_merger).

³⁵ Staff Analysis and Findings, Fed. Commun. Comm’n, WT Docket No. 11-65, 108 at ¶263 (Nov. 29, 2011).

While the 2010 Merger Guidelines made a minor caveat for immediate post-merger reductions in purchases, the FCC's study appeared to show the merger would have a direct impact on CWA workers. In a telling footnote, the FCC relied on a letter from CWA's Telecommunications Policy Director, which described how three acquisitions by AT&T Mobility in the past decade had caused direct employment to fall from 70,000 employees in 2002 down to 67,000 a decade later.³⁶ AT&T announced that it would abandon the deal a month after the FCC's report was released.³⁷

The FCC's report on the failed 2011 AT&T-T-Mobile merger provided extensive analysis and support for the DOJ's complaint, pre-litigation scrutiny of public statements made by merging parties in support of the merger, and, critically, an opportunity for the impacted labor union to engage with an analysis of potential labor harms. The FCC faced industry push-back for taking the "unusual step" of making its report public.³⁸ Establishing an expectation that such reports will be made public would shield agencies from undue interference, both politically and by market participants.

These studies demonstrate a need for merger guidelines that provide a roadmap for how to engage with labor unions and other federal agencies during the

³⁶ *Id.*, 108 at ¶262 n.682.

³⁷ Press Release, *Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc.*, U.S. Dep't of Justice (Dec. 19, 2011).

³⁸ Jim Puzzanghera, *AT&T fires back at FCC report criticizing T-Mobil deal*, LA TIMES (Dec. 2, 2011), available at <https://www.latimes.com/business/la-xpm-2011-dec-02-la-fi-att-fcc-20111202-story.html>.

review process. Appendix 1 of the Draft Merger Guidelines identifies sources of information that the Agencies draw on during merger review. Among those sources, the Agencies provide that “workers and representatives from labor organizations” are well-suited to provide information regarding wages, job search frictions, and their own industries. **Appendix 1 should be updated to provide a formalized and consistent process by which the Agencies engage with labor unions and unrepresented workers early in the merger process and throughout a merger challenge, irrespective of the basis of the challenge. Appendix 1 should also be updated to set a clear expectation that review of prior conduct by merging parties is part of the merger review process, including interagency sharing of relevant job market information and labor violations. Finally, the expectation should be established that any report flowing from the review of potential impacts to job markets will be subject to public review and consumption.**

IV. CONCLUSION

We applaud the Agencies for incorporating guidance on how the Agencies intend to review proposed mergers for possible labor market harms, rectifying an over century-long neglect of those harms. We thank you for your consideration of these suggestions and look forward to the swift implementation of the revised guidelines.