

One Buyer to Rule Them All: The 2023 Merger Guidelines on Monopsony

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Introduction

This article addresses Guideline 10 of the U.S. Department of Justice and Federal Trade Commission's 2023 Merger Guidelines that provide for the investigation and challenge of mergers between buyers in an industry and that merger's effect on competition for workers, creators, suppliers, and other providers.

Merger guidelines, originally promulgated by the DOJ, and later by both agencies, provide guidance on how the two agencies will scrutinize or challenge a potential merger.¹ Last updated in 2010, the DOJ and the FTC believed updated guidelines were necessary.²

These guidelines emphasize the market effects of mergers on workers and labor generally through Guideline 10.³ Guideline 10 specifically focuses on the impact mergers between buyers in a market have on the market's suppliers, with a heavy emphasis placed on the market for labor.⁴ Given the DOJ and FTC's recent focus on labor competition in the United States, this aspect of the latest merger guidelines is an important development.⁵ Through its expansion beyond a merger's impact on consumer welfare, Guideline 10 promises to provide safeguards for the labor

¹ See generally FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

² 15 U.S.C. § 18.

³ FED. TRADE COMM'N, MERGER GUIDELINES 26 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

⁴ *Id.*

⁵ *Kroger-Albertsons Merger Tests FTC's Focus on Labor Competition*, BLOOMBERG L., <https://news.bloomberglaw.com/antitrust/kroger-albertsons-merger-tests-ftcs-focus-on-labor-competition> (last visited Feb. 16, 2024).

market that will allow workers to bargain for better wages and benefits and incentivize investment in training for skilled workers.

The Merger Guidelines Then and Now

The merger guidelines trace their history back to the first merger guidelines published in 1968 by the DOJ.⁶ The purpose of those guidelines was to “acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under” the Sherman Act and Section 7 of the Clayton Act, under which most merger challenges are raised.⁷ A revised and narrower set of guidelines were put forth by the DOJ in 1982, and again in 1984, to once again “describe the general principles and specific standards normally used by the Department in analyzing mergers.”⁸ Through these guidelines, the DOJ hoped “to reduce the uncertainty associated with enforcement of the antitrust laws in this area.”⁹

1992 saw the first revision of the guidelines that included the FTC.¹⁰ The 1992 revisions modified previously established tools and policies of the agencies and had a slight focus on the rules governing the mergers and acquisitions of firms in distress.¹¹ After minor revisions in 1997, the next revision was the 2010 horizontal merger guidelines with a focus on upward pricing pressures and the post-recession economy.¹² Vertical merger guidelines were later published in

⁶ *1968 Merger Guidelines*, ARCHIVES - U.S. DEP’T OF JUST, <https://www.justice.gov/archives/atr/1968-merger-guidelines> (last visited Feb. 16, 2024).

⁷ *Id.*

⁸ *1984 Merger Guidelines*, ARCHIVES - U.S. DEP’T OF JUST, <https://www.justice.gov/archives/atr/1984-merger-guidelines> (last visited Feb. 16, 2024).

⁹ *Id.*

¹⁰ *1992 Merger Guidelines*, ARCHIVES - U.S. DEP’T OF JUST, <https://www.justice.gov/archives/atr/1992-merger-guidelines> (last visited Feb. 16, 2024).

¹¹ *Id.*

¹² *Horizontal Merger Guidelines (08/19/2010)*, ANTITRUST DIV. - U.S. DEP’T OF JUST., <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (last visited Feb. 16, 2024).

2020 with a focus on combinations of companies at different levels of a supply chain.¹³ In 2021, however, the vertical merger guidelines were withdrawn in a 3-2 vote by the FTC Commissioners, with the majority stating that the guidelines contravened the Clayton Act, a statute that does not recognize efficiencies as a defense to unlawful mergers.¹⁴

The latest DOJ and FTC joint publications are the 2023 Merger Guidelines. The 2023 guidelines “set forth several different analytical frameworks . . . to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.”¹⁵

The 2023 guidelines place a continued emphasis on “fair, open, [and] competitive markets” while also covering a broad range of economic topics, “from price competition to competition for the terms and conditions of employment, to platform competition.”¹⁶ While previous versions of the merger guidelines have discussed the impact of monopsony and provided for evaluation of

¹³ FED. TRADE COMM’N, VERTICAL MERGER GUIDELINES (2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

¹⁴ Press Release, Federal Trade Commission, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>.

¹⁵ FED. TRADE COMM’N, MERGER GUIDELINES 2 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

¹⁶ *Federal Trade Commission and Justice Department Release 2023 Merger Guidelines*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines> (last visited Feb 4, 2024) (quoting FTC Chair Lina M. Khan) (“Fair, open, competitive markets have been essential to America’s dynamic, thriving economy, and policing unlawful mergers is our front line of defense against harmful corporate consolidation. The 2023 Merger Guidelines reflect the new realities of how firms do business in the modern economy and ensure fidelity to statutory text and precedent.”); Id. (quoting Attorney General Merrick B. Garland) (“These finalized Guidelines provide transparency into how the Justice Department is protecting the American people from the ways in which unlawful, anticompetitive practices manifest themselves in our modern economy. . . [The Merger Guidelines] emphasize the dynamic and complex nature of competition ranging from price competition to competition for the terms and conditions of employment, to platform competition. This approach enables the agencies to assess the commercial realities of the United States’ modern economy when making enforcement decisions and ensures that merger enforcement protects competition in all its forms.”).

proposed mergers between competing buyers, the 2023 guidelines' newfound emphasis on monopsony's effects on labor reflect President Biden's stated priorities in the July 9, 2021 Executive Order on Promoting Competition in the American Economy.¹⁷

Monopsony theory may be one of the most important principles in the 2023 guidelines given its implications on the modern economy. Monopsonies are characterized by markets in which there is a single large buyer, offering that buyer complete control over that market.¹⁸ This wealth of power offers the monopsonist various advantages; for instance, as a primary or, at times, only supplier of jobs in an area, there is unparalleled power to set wages for the monopsonist.¹⁹ This power artificially depresses wages and is bad for the economy as a whole.

A market that is not a pure monopsony may exhibit degrees of monopsony due to geographical or other immobilities that make it difficult for workers to find alternative employment.²⁰ One such example of this is the market for supermarket workers. While there are several firms that may employ a supermarket worker, in practice, it is difficult for workers to switch supermarkets to take advantage of potentially higher wages given various barriers to moving jobs and a lack of wage information in that labor market.²¹

Monopsonies in labor markets present several problems from the standpoint of economic efficiencies. Monopsonies artificially depress wages which leads to societal inequality on the

¹⁷ *Horizontal Merger Guidelines (08/19/2010)*, ANTITRUST DIV. - U.S. DEP'T OF JUST., <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (last visited Feb. 16, 2024); President Joseph R. Biden, Executive Order on Promoting Competition in the American Economy (July 9, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

¹⁸ *Monopsony: Definition, Causes, Objections, and Example*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/monopsony.asp> (last visited Feb. 4, 2024).

¹⁹ *Id.*

²⁰ *Monopsony*, ECONOMICSHHELP, <https://www.economicshelp.org/labour-markets/monopsony/> (last visited Feb. 4, 2024).

²¹ *Id.*

whole.²² It is also economically inefficient when workers are paid below their marginal revenue product, the increment to revenues caused by the increment to output produced by the last laborer employed, which occurs as a direct result.²³ Firms with monopsony power also often exhibit a degree of monopoly selling power, enabling them to increase profits at the expense of consumers.²⁴ It is for these reasons the DOJ and the FTC saw it prudent to include Guideline 10 in their new merger rules.²⁵

Experts Consider Guideline 10 a Continued Extension of Enforcement Power

Guideline 10 states that when a merger between buyers, including employers, occurs, the agencies will assess whether it may substantially lessen competition for workers, creators, suppliers, or other providers, or tend to create a monopoly.²⁶ Justification for increased scrutiny in these circumstances comes from markets in which two competing buyers merge. When this occurs, competition decreases through elimination of competition between the merging buyers or through an increase in coordination between the necessarily fewer existing buyers.²⁷ Buying power becomes more concentrated and an existing dominant buyer's position may be strengthened, if not created.²⁸ "Where a merger between employers may substantially lessen competition for workers,

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ FED. TRADE COMM'N, MERGER GUIDELINES 26 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf ("A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers. It can likewise lead to undue concentration among buyers or entrench or extend the position of a dominant buyer."); *see also id.* ("Firms can compete to attract contributions from a wide variety of workers, creators, suppliers, and service providers. The Agencies protect this competition in all its forms.")

²⁶ FED. TRADE COMM'N, MERGER GUIDELINES 3 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf; *see also id.* at 26 ("Firms can compete to attract contributions from a wide variety of workers, creators, suppliers, and service providers. The Agencies protect this competition in all its forms.")

²⁷ FED. TRADE COMM'N, MERGER GUIDELINES 26 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf ("A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers.")

²⁸ *Id.* ("It can likewise lead to undue concentration among buyers or entrench or extend the position of a dominant buyer.")

that reduction in labor market competition may increase unemployment, lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality.”²⁹

Guideline 10 is the logical extension of the agencies’ recent enforcement activities, continuing the shift away from pure analysis on the transaction’s impact on consumer welfare to a broader consideration of its effect on market participants.³⁰ Building on the DOJ’s recent victory in the Penguin Random House/Simon & Schuster transaction³¹, experts see Guideline 10 as the agencies’ tool to analyze the impact of a merger on labor as a standalone basis for challenging the transaction.³² This analysis will likely focus on “lower wages or slow wage growth,” “worsen[ing of] benefits or working conditions,” or “degradations of workplace quality.”³³

Some have questioned the methods the agencies will use to assess some of these attributes and form a well-functioning market definition given the intangible nature of their stated

²⁹ *Id.*

³⁰ *FTC and DOJ Issue Final Merger Guidelines That Expand Reviews and Limit Combinations*, HOLLAND & KNIGHT, https://www.hkklaw.com/en/insights/publications/2023/12/ftc-and-doj-issue-final-merger-guidelines-that-expand-reviews?utm_source=mondaq&utm_medium=syndication&utm_term=Anti-trustCompetition-Law&utm_content=articleoriginal&utm_campaign=article (last visited Feb 4, 2024) (“Consistent with other enforcement activities by the FTC and DOJ, the Guidelines focus on labor markets and a merger’s impact on workers, creators, suppliers or other providers. The Guidelines thus continue the FTC and DOJ’s desire to move away from the exclusive focus on a transaction’s impact on consumer welfare to a more expansive consideration of its potential impact on other industry participants. The Guidelines therefore assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly”).

³¹ *See generally Long Story Cut Short: Court Blocks Merger Reducing from Five to Four the Number of Competitors for the Purchase of Book Publishing Rights*, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, <https://www.friedfrank.com/news-and-insights/long-story-cut-short-court-blocks-merger-reducing-from-five-to-four-the-number-of-competitors-for-the-purchase-of-book-publishing-rights-10822> (last visited Feb. 4, 2024).

³² *Back to The Future? FTC and DOJ Propose New Merger Guidelines*, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, https://www.friedfrank.com/news-and-insights/Back-to-The-Future-FTC-and-DOJ-Propose-New-Merger-Guidelines-11223#_ednref17 (last visited Feb. 4, 2024) (“Harm to Labor as a Standalone Basis for Merger Challenges: Consistent with the continued focus on antitrust enforcement in the labor markets, the draft Guidelines state that the agencies will evaluate the impact of a merger on labor as a standalone basis for challenging the transaction. The principle that mergers can reduce competition among employers as buyers of labor builds on the DOJ’s recent victory in the Penguin Random House/Simon & Schuster transaction, where a district court enjoined the proposed merger of the two book publishers based on the DOJ’s claim that the deal would harm competition for a highly specialized class of workers—authors of anticipated top-selling books.”).

³³ FED. TRADE COMM’N, *MERGER GUIDELINES 26* (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

characteristics.³⁴ Others have argued that Guideline 10 should be limited to “stating that merger analysis applies to buyer markets and . . . that labor markets are buyer markets,” contending that the “rest of the guideline is a digression on the nature of labor markets that cites neither law nor economics.”³⁵ Relative to the other guidelines, “Guideline [10] ³⁶ should be commended for mentioning lower wages as an anticompetitive harm. The other guidelines would benefit from focusing more on effects on prices, quality, and innovation, instead of structural presumptions.”³⁷

Guideline 10 Will Enable Workers to Bargain for Better Wages and Benefits

Guideline 10 promises to address inequities in worker bargaining power that are exacerbated where there is only one meaningful buyer in the labor market. Labor markets are characterized by high fragmentation, high switching costs, and high search frictions that exponentially increase the investment required by workers to find alternative employers to whom they can sell their labor or leverage to negotiate better conditions with their current employer. Guideline 10’s monopsony analysis promises to address moments where this investment is nearly

³⁴ *DOJ/FTC Draft Merger Guidelines: More Second Requests and More Merger Litigation*, STEPTOE LLP, <https://www.steptoel.com/en/news-publications/antitrust-and-competition-blog/dojftc-draft-merger-guidelines-more-second-requests-and-more-merger-litigation.html> (last visited Feb. 4, 2024) (“The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for labor.” Notable in this section is the adoption of worker “attributes” as market-defining characteristics beyond education/skills. There is also repeated discussion of individual worker issues – “the individual needs of workers may limit geographical and work scope of the jobs that are competitive substitutes;” “workers may seek not only a paycheck but also work that they value in a workplace that matches their preferences.” How can individual workers’ interests and needs, which vary as much as the human experience, be accounted for in a unified market definition? The guidelines don’t say.”).

³⁵ *Comments of the International Center for Law and Economics on the FTC & DOJ Draft Merger Guidelines*, INT’L CTR FOR L. AND ECON, <https://laweconcenter.org/resources/comments-of-the-international-center-for-law-and-economics-on-the-ftc-doj-draft-merger-guidelines/> (last visited Feb. 4, 2024) (“For example, the guidelines say, “labor markets are often relatively narrow.” What is the justification for this claim in the merger guidelines, of all documents?”).

³⁶ In the draft guidelines circulated by the FTC for comment, Guideline 10 existed as Guideline 11. This article addresses Guideline 10 from the finalized 2023 Merger Guidelines, and any reference to draft Guideline 11 in cited materials has been updated accordingly to reflect discussion on the finalized Guideline 10.

³⁷ *Comments of the International Center for Law and Economics on the FTC & DOJ Draft Merger Guidelines*, INT’L CTR FOR L. AND ECON, <https://laweconcenter.org/resources/comments-of-the-international-center-for-law-and-economics-on-the-ftc-doj-draft-merger-guidelines/> (last visited Feb. 4, 2024).

impossible for workers to make: when their current employer is the only available buyer in the market.

Increased employer market power can be a driving force behind depressed wages, reduced hiring and output, and increased economic inequity among workers overall.³⁸ This understanding underpins much of the FTC and DOJ's stated rationale in Guideline 10. In a manner analogous to seller markets, the agencies state that competition between buyers can take the form of raising payments offered to suppliers through expansion of supply networks, transparent and predictable contracting and payment practices, and increased technology investment to reduce friction between buyers.³⁹

Where there are multiple options to whom workers may sell their labor, workers have some leverage to advocate for better wages and working conditions. In contrast, a reduction in competition among buyers can lead to artificially suppressed input prices and purchase volume, which has a larger effect of disincentive suppliers to invest in capacity or innovation.⁴⁰ There are numerous characteristics of labor markets that, while not unique to the form of market, coalesce to make workers particularly susceptible to the harms of a reduction in competition.

Labor markets tend to be highly fragmented, with employers who buy labor being more highly concentrated than workers who sell it.⁴¹ This can put workers in a weaker negotiating position – absent the potential of collective bargaining to consolidate workers, the fragmented nature of the market can leave workers at the whim of an employer who dictates terms that workers must accept if they do not want to be discarded for another worker who will not refuse.

³⁸ Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537–38 (2018).

³⁹ FED. TRADE COMM'N, MERGER GUIDELINES 26 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

⁴⁰ *Id.*

⁴¹ Joe Perkins, Catalina Campillo, & Gabriele Corbetta, *Monopsony in labour markets: a new enforcement priority for competition authorities*, COMPASS LEXECON (Sept. 28, 2023) <https://www.lexology.com/library/detail.aspx?g=060dfcc3-0d7a-4c7d-a095-668965e95aab>.

This negotiating position is made even weaker due to the fact that, compared to other suppliers, labor markets face higher switching costs and search frictions.⁴² Because workers (ideally) supply labor to only one employer at a time, they are left particularly vulnerable to the costs of switching employers. These costs can be made exponentially higher where there is only one available buyer in a geographic market, forcing workers to move locations, possibly needing to find a new home and new school for their children in order to do so. Even the process of searching for a viable alternative employer requires significant investment in research, applications, and interviews – as the Guideline notes, it is not enough that an employer meet the salary and skill range.⁴³ Employers have a variety of demands on worker skill, experience, availability, and other qualities, and workers have other demands regarding what they value in a workplace.

This inherent need for employer and worker needs to match further reduces what are viable competitors. For workers, obtaining the bargaining leverage of a competing buyer may require more investment than they are capable of giving, reducing their ability to advocate for better wages or working conditions. Where a buyer possesses a monopsony on the market, that leverage becomes nearly impossible.

Guideline 10 promises a system where workers can be confident that their leverage in the form of competing buyers will not wholly disappear through merger. By conducting merger analysis with an eye to an employer's ability to freeze wages, slow wage growth, exercise increased leverage in worker negotiation, generally reduce benefits, the FTC and DOJ will be able

⁴² *Id.*

⁴³ FED. TRADE COMM'N, MERGER GUIDELINES 27 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.

to ensure that workers, wages, and workplace conditions are protected despite the vulnerabilities of labor markets.

Guideline 10 Will Incentivize Investment in Training for Skilled Workers

The Guideline’s reinvigorated focus on the effects of monopsonies will also pay dividends for “skilled” workers whose profession requires heavy investment of employee time and money into obtaining the requisite training. Imperfect competition in the labor market, however, reduces the incentive for both employees and employers to make this investment.⁴⁴ By compressing wage distribution, employer monopsony power tends to create conditions where the bulk of training costs are borne by the dominant firm.⁴⁵ Even though a monopsonist would receive the majority of the benefits of this training, data shows that the possibility that their training investment may inure to the benefit of a theoretical rival nevertheless leads to underinvestment in training; whatever costs that are incurred may be recouped by paying skilled workers less than their post-training marginal product with the knowledge that the worker has nowhere else to go.⁴⁶ Knowing this, workers themselves are disincentivized to invest in their own training because their return on investment is capped by whatever their monopsonist employer is willing to pay. Through its attention to general reductions in wages and benefits, Guideline 10’s monopsony analysis may ensure that mergers between buyers will not reduce training infrastructure and corresponding compensation, allowing workers to confidently invest in their own betterment.

Guideline 10 is Part of an Invigorated Antitrust Enforcement in Labor Markets

The introduction of labor considerations to monopsony analysis represents just one facet of the Biden Administration’s playbook to address the effects of anticompetitive behavior on labor.

⁴⁴ Andrea Bassanini & Wooseok Ok., *How do firms’ and individuals’ incentives to invest in human capital vary across groups?*, HAL (2004), <https://core.ac.uk/download/pdf/51445567.pdf>.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.*

In his July 9, 2021 Executive Order, President Biden affirmed the Administration will “combat the excessive concentration of industry, the abuses of market power, harmful effects of monopoly and monopsony – especially as these issues arise in labor.”⁴⁷ The order emphasizes the need for agencies in addition to the FTC and DOJ to utilize their statutory authority to police anticompetitive behavior, such as the Department of Agriculture under the Packers and Stockyards Act.⁴⁸

One of the first wins for the DOJ in its championing of labor issues was its case to block Penguin Random House’s \$2.2 billion acquisition of Simon & Schuster.⁴⁹ The 2021 civil complaint alleged that the merger would substantially lessen competition for authors’ publishing rights.⁵⁰ Competition between publishers for the rights to a novel resulted in authors earning more and receiving better editorial, marketing, and other services. Horror icon Stephen King testified at trial, stating that the reducing payment advances makes it “tougher and tougher for writers to find enough money to live on.”⁵¹

On October 31, 2022, the U.S. District Court for the District of Columbia handed down a decision that is sure to haunt Penguin, blocking the \$2.2 billion acquisition. While the DOJ was most likely not worried about millionaires like Stephen King finding enough money to live on, the victory has large implications for lesser-known authors and, as Assistant Attorney General Jonathan Kanter stated, workers more broadly. “[The decision] reaffirms that the antitrust laws protect competition for the acquisition of goods and services from workers,” AAG Kanter stated on the day of the decision.

⁴⁷ Exec. Order No. 14,036, 86 Fed. Reg. 36987 (Jul. 9, 2021).

⁴⁸ *Id.*; 7 U.S.C. §§ 181-229b.

⁴⁹ *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1 (D.D.C. 2022).

⁵⁰ *Id.*

⁵¹ Adam Bednar, *Stephen King Testifies That Merger Between Publishing Giants Would Hurt Writers*, THE NEW YORK TIMES (August 2, 2022), <https://www.nytimes.com/2022/08/02/business/stephen-king-penguin-random-house-antitrust-testimony.html>.

A few months later, on June 29, 2023, the FTC and DOJ proposed rule changes to the Hart-Scott-Rodino Antitrust Improvements Acts that in part sought to address the labor issues presented by mergers like in the Penguin Random House case. The HSR Act controls the information that must be submitted for pre-merger notification of mergers worth over an annually adjusted threshold (now \$119.5 million).⁵² The proposed rules would create a Labor Markets section, requiring each party involved in a merger to provide information about its workers so that the reviewing agency can screen for potential negative effects on labor.⁵³ The section is intended to allow the agencies to identify market labor overlaps that may reduce bargaining power of workers should two entities merge. While the effective date for the substantive rule changes is not yet known, when enacted these HSR changes should prove a useful tool in the agencies' toolkit to address the labor issues contemplated in Guideline 10.

Conclusion

Guideline 10 of the 2023 Merger Guidelines reflects a substantive step in addressing the increasing prioritization of labor issues in competition law. From President Biden's July 2021 executive order to Justice Kavanaugh's concurring opinion in *NCAA v. Alston*, authorities across political aisles and branches of government have signaled a desire to curb the detrimental effects of monopsony on labor markets.⁵⁴ In issuing Guideline 10, the DOJ and the FTC seek to remedy those effects by explicitly assessing the impact of a merger on the labor market specifically, in addition to the impact on competition between buyers. In doing so, Guideline 10 may create a

⁵² *New HSR thresholds and filing fees for 2024*, FEDERAL TRADE COMMISSION (February 5, 2024) <https://www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024>.

⁵³ Proposed Rule, Premerger Notification; Reporting and Waiting Requirements, 88 Fed. Reg. 42178, 42197 (June 29, 2023) (to be codified at 16 C.F.R. pts. 801 and 803).

⁵⁴ Exec. Order No. 14,036, 86 Fed. Reg. 36987 (Jul. 9, 2021); *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring) (stating "a monopsony cannot launder its price-fixing of labor by calling it product definition.")

market where workers are galvanized to advocate for higher wages and improved working conditions and incentivized to invest in their own training.