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November 9, 2009

The Honorable John Liebowitz
Federal Trade Commission
Office of the Secretary, Room H-135 (Annex P)
600 Pennsylvania Avenue NW,
Washington, DC 20580

The Honorable Christine Varney
Assistant Attorney General for Antitrust
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: HMG Review Project-- Comment, Project No. P09290

Dear Chairman Liebowitz and Assistant Attorney General Varney:

We are writing on behalf of the Service Employees International Union (SEIU), one of the largest and fastest growing labor unions in North America. Our union consists of 2.1 million members. Our members work in three service industry divisions: Health Care, Property Services, and Public Services. Within those divisions, we represent a wide array of workers including nurses, lab technicians, and many other hospital and nursing home workers, home care workers, child care workers, private security officers, employees of state and local governments and their contractors, school bus drivers, and more. We thank you for the opportunity to provide comments on the Horizontal Merger Review Guidelines in response to the questions posed by the Antitrust Division of the Department of Justice and Federal Trade Commission (collectively "the Agencies").

We believe that the Agencies can play a crucial role in protecting consumers, as the concentration of business markets, under certain circumstances, often results in the degradation of both quality and labor standards – injuring consumers and workers alike. Unfortunately, this potential of common interest between consumers and workers has not traditionally been recognized by antitrust practitioners, who all too often have uncritically looked at reduced staffing levels, reduced wages, and reductions in other labor standards that may follow a merger or acquisition – particularly in non-union settings -- as simply "operational efficiencies" that will reduce input costs and arguably benefit consumers with lower output prices. Far too little attention has been given to the possibility that lower labor standards may often reflect a business's ability – through greater market power – to exert downward pressures on labor standards in a less competitive labor market or to degrade the quality of product or service in a less competitive product market through, among other means, the degradation of the labor standards and labor quality of those involved in providing those products or services.

We believe that the Agencies, to a far greater extent than is currently the case, should examine whether evidence of lower labor standards, labor costs, employment levels, etc., may reflect potential market power. To that end, we urge the Agencies to revise the Horizontal Merger Review Guidelines to far more closely:

1) examine the competitive effects of a merger on applicable input-side markets, including labor markets;
2) monitor the non-price effects of mergers, especially service and product quality, including instances where reduced service and quality standards are effectuated through reductions in labor standards and labor quality; and
3) evaluate whether reduced labor costs that are claimed to reflect efficiencies may instead reflect product or service quality degradation effectuated through reductions in labor standards and labor quality..

Though SEIU does not engage in regular practice before the Agencies, we believe we can provide a unique perspective on antitrust law enforcement that would result in a more accurate merger review process. To that end, we submit these comments. These comments will focus primarily on addressing Question 12, which focuses on large buyers, and Question 15, which focuses on whether the guidelines should be updated to more explicitly address the non-price effects of mergers.

I. The Agencies should revise the guidelines and examine whether a merged entity will be able to exercise monopsony power over input markets.

Question 12 asks whether the guidelines should be amended so that it protects smaller buyers from the effects of reduced competition when two producers merge. While we believe this is an important question to consider, we believe that the Agencies should be asking whether the guidelines should be amended to protect small sellers from being taken advantage of by large buyers, including workers (i.e., small sellers of labor). In other words, the Agencies should consider revising the guidelines to focus more explicitly on the possibility that the merger of two competitors may create monopsonistic conditions in which the merged entity could be a large buyer of labor services and could exercise market power to exert downward pressure on wages and other terms of employment.

We fear that there has generally been a lack of attention to issues of monopsony – especially with respect to potential effects on workers -- under traditional analyses in the antitrust field. Focusing overwhelmingly on output side competition, labor costs are often viewed primarily as an input side cost that is simply passed on to the consumer. This means that the lower the costs of labor, the lower the costs of the consumer good and vice versa. We believe this myopia can have grave consequences for competition on input-side markets, including labor markets, especially in situations in which a merger leaves fewer (and far larger) buyers of labor services, and especially with respect to highly skilled or specialized labor.

Trends in the nursing industry illustrate this serious potential problem, and we believe that such conditions may exist in other industries. As is readily apparent, nurses are essentially selling their highly skilled services as employees. The primary buyers for many types of specialized nursing services are hospitals. The basic laws of supply and demand require that, if there is a shortage of a good or service, that price, in this case wages, would increase until a market clearing price or wage was determined. This has not occurred in nursing, where persistent shortages have co-existed with low wages. In many large labor markets, including but not limited to Chicago, Memphis, Albany, and San Antonio, plaintiff lawyers have brought antitrust litigation based on theories of collusion between concentrated buyers of nursing services (i.e., employers), after initially observing that the wages being offered to nurses remained flat despite the existence of a well-documented acute need for their services in these markets. The Department of Justice noticed this dynamic as well and took action. If the market for nursing services were competitive, then the wages of nurses should have increased (leading to increases in supply). However, this never occurred.

While these suits allege that the various hospitals have engaged in a conspiracy to suppress wages, the possibility of these large employers effectively engaging in such collusion should also focus added attention on the possibility that similar wage patterns in other, more concentrated markets may reflect labor monopsony conditions. Current antitrust law's overwhelming focus on product prices gives far less attention to this potential than is merited. The rapid consolidation of hospitals may have led to labor markets where there were fewer buyers of nursing services (both as a general matter and within various specialties), and because there were so few buyers, they could exercise their market power to decrease wages below an efficient level.

In markets with monopsonies, nurses have fewer options within the relevant local market to sell their work. Where a health care company dominates a given market, health care employees are deprived of the ability to choose between employers that offer fair wages, decent benefits, and adequate staffing. They are also incentivized to exit the market. This is what has happened to the nursing markets in past years. Nurses, frustrated that they were not able to earn better wages at hospitals, have often left and entered different industries. We suspect that hospital monopsony power over labor inputs has played a role in removing incentives for paying decent wages, and consumer care has suffered as a result of the resulting critical shortage of qualified nurses in the market.

The argument we are presenting here, that the Agencies should insure that buyers do not dominant enough to exercise market power, is not a new one. The DOJ made such an argument in *United States v. Aetna.*[1] In that case, the State of Texas and the United

[1] 64 Fed. Reg. 44, 946 (DOJ Aug. 18, 1999).

States government sought to enjoin a merger between insurance giants Aetna, Inc. and Prudential Insurance Company of America because it would create an entity that would exercise market power in the purchasing of physician services in several markets The DOJ asked for injunctive relief and divestiture because it felt that newly merged insurance company would be the only "buyer" of the physicians' services in many circumstances, and that as a result the newly merged entity would be able to pay unduly suppressed reimbursement rates to its physician network. The DOJ noted that physicians would, as individual market actors, have extremely limited power to negotiate contract terms with the insurance company, and may be incentivized to leave the market, to the detriment of consumers. The parties entered into a final consent decree that required Aetna to divest two of its subsidiaries in markets where the merger would have essentially extinguished competition.

If the Agencies were to revise the guidelines now they would simply be bringing the guidelines in line with clearly permissible agency practices and the arguments made in the *Aetna* case. The Agencies clearly recognize that the existence of large buyers in a market may be able to mitigate the anticompetitive effect of a merger among sellers. However, the Agencies should, in rewriting the guidelines, include in their discussion of large buyers instructions that enforcement agents review the anticompetitive effects that a merger could have to ensure that the merged entity does not become a monopsonist that can effectively control the price it pays to receive sellers' inputs, including in labor markets.

II. The Agencies should revise and update the guidelines to focus increased attention on the non-price effects of mergers, including how market power may result in product or service degradation, which may at times be effectuated through degradation of labor standards.

The merger guidelines have been woefully inadequate in focusing attention on non-price exercises of product market power.[2] It has generally been recognized that monopoly rents may be collected through degradations of product and service quality rather than through raises in the nominal price of those products or services. Indeed, to the extent that the focus of the Agencies has been overwhelmingly on price, one would expect that non-price means of exercising market power would be increasingly utilized. Accordingly, we would strongly support increased attention in the guidelines to non-price factors such as product and service quality degradation.

Even though it has not been widely noted, this issue is of particular importance to workers because there is often a significant correlation between a firm's desire to maintain or increase product or service quality and a firm's maintenance or improvement of its labor standards. A firm that follows a business model in which maintaining product or service quality is a low priority will often lower its labor standards, accepting the

[2] See e.g. Neil W. Averitt & Robert H. Lande, Using the "Consumer Choice Approach" to Antitrust Law, 74 Antitrust L.J. 175 (2007)(arguing that current focus on price is unable to adequately account for non-price competition in highly regulated industries or when competition is on the basis of innovation).

higher turnover rates, lower skill levels, lower morale (and associated lowering of quality) that may result.

While the link between labor standards and service or product quality has been the subject of a substantial literature in the field of labor economics, it has largely been ignored in the antitrust field. The link between a firm's ability to injure workers by degrading wages or other labor standards and its exercise of monopsony power in a labor market is well understood, even if this abuse has not been sufficiently focused upon in the merger guidelines. But labor standards are not only threatened by abuses of market power in monopsony contexts. Under certain conditions, a firm's acquisition of product market power may also result in it having a greater ability to degrade labor standards. For example, where product market power allows a firm to reduce product or service quality without losing its customer base to the extent that it would in a competitive market, that firm may have a far greater latitude to cut labor standards (and associated labor costs) without fear of injury from the resulting poorer products or services. This potential has been largely ignored in the antitrust field.

The historic tendency of the Agencies has been to associate the degradation of labor standards (i.e. lower labor costs) with "operational efficiencies" and "consumer welfare" is misplaced on economic grounds. Reductions in labor costs are often cited as efficiency gains by firms seeking to make the case that those combinations will eliminate redundancies and thus result in greater efficiencies that will benefit consumers. This may well be so in some cases; but it may also be very far from the case in other instances. The idea that labor cost savings may instead be associated with product or service quality degradations (and monopoly rent recoupment) does not seem to have been entertained, even though it seems logical from an economic perspective.

In this regard, the antitrust world has largely ignored the implications of literature developed in the field of labor economics, which has focused on the potential of decent labor standards to reduce job turnover, encourage investments in worker skills, improve morale and innovation, and thereby increase product/service quality. According to this literature, degradation of labor standards may, in many circumstances, result in lower "quality" labor, and thus lower product or service quality.[3]

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[3] *See e.g.* Alan B. Krueger and Alexandre Mas (2003), Strikes, Scabs and Tread Separations: Labor Strife and the Production of Defective Bridgestone/Firestone Tires, NBER Working Paper No. 9524, February 2003 (Finding that labor strife closely coincided with lower product quality); Jody Hoffer Gittell, Andrew von Nordenflycht, Thomas A Kochan, Mutual Gains or Zero Sum? Labor Relations and Firm Performance in the Airline Industry, 57 Industrial & Labor Relations Review 163 (2004) (finding that sustained improvement in service quality and financial performance required fundamental improvements in the quality of labor relations); and Rosemary Batt and Lisa M. Moynihan, Human Resource Management, Service Quality, and Economic Performance in Call Centers, Center for Advanced Human Resource Studies Working Paper Series (2006) (finding that firms using "high-road" human resource practices realized higher revenue per call).

This "efficiency wage" literature holds that the immediate lower labor costs associated with the lowering of labor standards may or may not result in greater firm efficiencies based on many other factors. Lower wages, poorer working conditions, lower investments in training, layoffs and associated speed-ups, etc., may often result in an inability to recruit or retain high quality workers, thus leading to higher turnover, greater labor instability, poorer morale, the "dummying down" of jobs, etc. These factors may result in lower output or lower quality of product or service (even if nominal output remains constant).

In a competitive market, these outcomes should, in theory, result in lost customers, as those who value higher quality go elsewhere. But where the firm has product market power it may be able to retain customers sufficient to maintain lower quality than would be the case in a competitive market (and to maintain the associated lower labor costs and labor standards and gain the resulting savings). Indeed, to the extent that antitrust enforcement efforts focus overwhelmingly on nominal price, one would expect that "monopoly price increases" might increasingly take the form of lowering costs (including labor costs) in contexts where customers will disproportionately have no alternative but to accept somewhat lower quality products and services.

The implications of these insights for evaluating business reorganizations have not been widely studied. They are, however, intuitively understood by our members in the health care industry, where the "goods" include the services provided by nurses and other health care workers. They know that – unless workers are protected by a strong union – business reorganizations may often result in a smaller force of workers having to serve patients or customers with far fewer resources, often leaving those consumers far less well-served. In this context, a merger between two health care firms that leads to reduced staffing levels, wage and benefit cuts, and increased job turnover will often have the effect of lowering the quality of patient care and service.

Of course, it is quite correct to note that the antitrust laws, at least with respect to product market activities, are not directly concerned with protecting workers from job losses resulting from business reorganizations; they are concerned instead with protecting consumers from the greater market power and reduced consumer choice that flows from excessive business concentrations. The point here is simply that under certain circumstances the degradation of labor standards is part of the story (and possibly a key part of the story) of a firm's alteration of its business practices to account for the fact that its concentration has left consumers with far less effective choices in the product market. A firm can obtain monopoly rents from its market through (i) raising nominal prices, (ii) reducing non-labor input costs despite associated reductions to output quality, or *(iii) reducing labor input costs despite associated reductions in output quality (with those quality reductions flowing from the resulting higher turnover rates, the lower skill levels, the lower morale, and/or the generally lower labor quality).* All are efforts to take advantage of product market power, and it should not make a difference which the firm chooses. The Agencies' historic practice of focusing overwhelmingly on only the first of these should be revised, and the Agencies, moving forward, should be vigilant to look for each of these possibilities.

As we have argued here, the antitrust laws, properly applied, can be a means of protecting workers against exploitation by those with concentrated market power. We believe that the interests of both consumers and workers do align. The Agencies can play a crucial role in protecting consumers and workers when the concentration of business markets leads to the degradation of both quality and labor standards and injure consumers and workers alike. We look forward further discussion of our ideas with the agencies at the workshops being held. Please feel free to contact either of the undersigned at 202-730-7490 or 202-730-7813 if you have any questions about the matters contained in this letter.

Sincerely yours,

Walter Kamiat
Associate General Counsel

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