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Joseph J. Simons, Chairman
Rohit Chopra, Commissioner
Noah Joshua Phillips, Commissioner
Rebecca Kelly Slaughter, Commissioner
Christine S. Wilson, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons and Commissioners Chopra, Phillips, Slaughter, and Wilson:

Justice Catalyst, Towards Justice, and Professor Eric Posner commend the Federal Trade Commission for holding hearings on competition and consumer protection. In particular, we commend your decision to discuss antitrust in labor markets at hearing #3 on October 16, 2018. We submit this comment to that docket.

In addition to our comments, we also urge you to consider materials prepared for a June 2018 convening on labor market competition hosted by Justice Catalyst and the Harvard Law School Labor and Worklife Program.[1] The attached white papers were prepared by practitioners and scholars examining anticompetitive practices in labor markets.

The below signatories make the following recommendations to the Federal Trade Commission:

> **Unfair Employment and Labor Practices in Context of Monopsony Power:** Borrowing from the work of A.O. Hirschman, labor scholar and former Department of Labor Administrator David Weil has argued that workers principally have two mechanisms for exercising power in the labor market: exit and voice. He explains that "[i]n the labor market, 'exit and voice' takes the form of either quitting a job or using channels — unions, internal dispute resolution, rights granted by government — to seek changes in conditions at work."[2] Under its authority to regulate competition in labor markets, the FTC clearly has the power to regulate impediments to worker exit, for example, non-compete agreements and no-poach or no-hire provisions. But impediments to worker voice also corrode labor market competition by reducing worker power to obtain higher wages or better working conditions. In at least some contexts, the FTC has the authority to regulate impediments to worker voice as well. The FTC should issue a rule providing that where an employer has market power, thus creating structural impediments to the

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[1] Unrigging the Market: Convening to Restore Competitive Labor Markets (June 13, 2018), " https://lwp.law.harvard.edu/event/unrigging-market-convening-restore-competitive-labor-markets.
[2] David Weil, *Workers Shouldn't Have to Sing Away Their Right to Class Action Lawsuits*, Harv. Bus. Rev. June 5, 2018, https://hbr.org/2018/06/workers-shouldnt-have-to-sign-away-their-rights-to-class-action-lawsuits.

exercise of worker exit, it is anticompetitive to engage in an unfair labor practice under the National Labor Relations Act or to force employees to waive their right to participate in class action lawsuits via an arbitration clause or class waiver.

Merger Reviews: When reviewing mergers, the FTC not only fails to review for monopsony power in labor markets, it sometimes considers lower labor costs to be an *efficiency*.[3] The FTC should clearly and unequivocally reject the approach of considering lower labor costs, such as fewer employees, an efficiency. The FTC should not encourage layoffs.

In addition, going forward, it should meet its stated goal of "assess[ing] competition in each relevant market affected by a merger independently"[4] by considering whether mergers will lead to monopsony power in the labor market. The FTC may wish to be especially skeptical of mergers among companies that employ people in the same geographic area, in areas with a smaller labor force, or in specialized professions, where a merger can sharply reduce the number of available employers.

Note that the logic behind weighing labor efficiencies against anticompetitive effects in the consumer market is seriously flawed. Lowered input costs are only passed through to consumers in competitive markets. In non-competitive markets, where there is less pressure to compete by lowering prices, firms will simply fire employees, lower wages, and divert the difference to profits.

Noncompete Agreements: Agreements restraining a person's ability to work for a competitor are agreements in restraint of trade in the labor market. Traditionally, noncompete agreements were justified because they were seen as necessary to protect trade secrets, confidential information, and client lists. But less anticompetitive nondisclosure agreements could protect that information just as easily. And, much more than protecting those interests, noncompete agreements are often used in today's economy to reduce worker bargaining power by limiting their opportunities to employment. Indeed, some companies include noncompete agreements that are clearly unenforceable under state law, simply to scare employees into not seeking outside employment.

[3] For example, according to the FTC's horizontal merger guidance, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." DOJ and FTC, Horizontal Merger Guidelines, 29 (Aug. 19, 2010). In describing efficiencies most likely to be considered cognizable and substantial, the guidance says "efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output." *Id.* at 31. In layman's terms, the FTC's most favored efficiencies include facility closures that result in layoffs.

[4] *Id.* at 30.

We urge the FTC to take Commissioner Chopra's suggestion and start a rulemaking regarding noncompete agreements.[5]

No-Poach or No-Hire Clauses: Similar to noncompete agreements, "no poach" or "no hire" clauses are agreements between firms not to solicit or hire each other's employees. The DOJ and FTC announced in 2016 that it would pursue naked no-poach agreements among competitors criminally.[6] We commend the agencies for this announcement.

But the FTC's work on this issue should extend beyond blatant and naked, interbrand restraints between competing firms. We are particularly interested in the FTC examining the anticompetitive nature of no-poach or no-hire agreements within brands, where the threat of DOJ enforcement may seem more remote. In particular, the FTC should consider two business models that commonly use no-poach or no-hire agreements among horizontal competitors within the brand. Both franchise[7] and multi-level marketing structures rely heavily on agreements not to poach from horizontal competitors in order to reduce costs for downstream firms and decrease bargaining power among workers. Franchisees agree not to poach employees from other franchisees. Similarly, participants in multi-level marketing structures agree not to poach "down-line" participants from other participants.

The fact that these restraints occur within a single brand should not insulate them from regulatory scrutiny. No-poach agreements should be considered a form of horizontal price fixing, and if vertical actors (franchisor, multi-level marketing company) facilitate and organize such agreements among horizontal competitors, those conspiracies should be considered cartel ringmaster conspiracies. Just as agreements between horizontal actors to reduce supply are considered price fixing because of the price inflationary effect, agreements between franchisees not to compete for employees is price fixing because of the deflationary effect on wages within the brand.

Anticompetitive Conduct in the Fissured Labor Market: Commentators have explained that firms are increasingly deciding not to employ workers directly but instead to outsource their labor needs by contracting with other firms, franchising,

[5] Comment of Federal Trade Commissioner Rohit Chopra, Docket ID FTC-2018-0074, p. 11 (Sept. 6, 2018).
[6] Dept. of Justice, "Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation," Oct. 20, 2016, *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.
[7] Washington Attorney General Bob Ferguson has been investigating no-poach clauses in franchise agreements. Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide, Jul. 12, 2018, *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers. The FTC should do the same.

or classifying workers as independent contractors as opposed to employees. This trend is often referred to as "workplace fissuring."[8]

Many have examined the harmful consequences of workplace fissuring on labor standards enforcement.[9] The FTC should examine how it harms labor market competition.

Consider for example, staffing agencies that specialize in employing service workers. In some geographic markets, those workers may have been employed directly by many distinct employers, for example, hotels, hospitals, and stadiums. There are likely to be many fewer staffing agencies competing to employ those workers directly, and when firms decide to outsource their work to staffing agencies, they sharply reduce the number of employers in a market. Once these employers have market power, they can extract rents from their workers. And to make matters worse, many staffing agencies force their clients to sign no-hire agreements with them, effectively locking the staffing agency employees into work for the staffing agency by preventing them from moving to one of the staffing agency's clients.

As to the FTC's specific questions, we present the following responses:

1. **Is a lack of competition among employers a significant contributor to observed macroeconomic trends in labor markets, such as the declining labor share and/or real wage stagnation? What are other explanations for these trends?**

While there are surely other causes, recent evidence suggests that those industries with larger increases in concentration exhibit a larger decline in labor share.[10]

Indeed, insufficient competition in the labor market should come as no surprise. Regulatory agencies and private enforcement are considerably more focused on product market power than labor market power. But firms will be indifferent between saving a dollar by decreasing labor costs and capturing an extra dollar by increasing consumer prices. With so much attention to anticompetitive conduct in the consumer market and so little in the labor market, we would expect firms to increasingly engage in anticompetitive labor market conduct.[11]

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[8] https://qz.com/916064/the-concept-of-labor-market-fissure-explains-a-lot-of-whats-wrong-with-the-economy/.
[9] http://www.fissuredworkplace.net/the-problem.php.
[10] David Autor, et. al., Concentrating on the Fall of the Labor Share, Working Paper 23108, *available at* http://www.nber.org/papers/w23108.pdf. However, there is controversy over whether and how much national and local labor markets are concentrating. Kevin Rinz, US Census Bureau, Labor Market Concentration, Earnings Inequality, and Earnings Mobility, Working Paper 2018-10 (Sept. 2018), *available at* https://irs.princeton.edu/sites/irs/files/concentration.pdf.
[11] https://promarket.org/ftc-should-focus-labor-monopsony/.

2. **How should the agencies approach defining relevant labor markets for purposes of antitrust analysis? What (if any) reliable evidence is available on the existence and effect of employer concentration in properly defined labor markets?**

In her article entitled *Fighting monopsony, a lack of competition that harms workers*,[12] Dr. Ioana Marinescu from University of Pennsylvania proposed a method for defining relevant labor markets and listed the reliable evidence available for analyzing labor markets under those definitions. Her proposed method is to use the typical Herfindahl-Hirschman Index (HHI), with market shares based on share of job vacancies of all the firms that post vacancies in the market. Dr. Marinescu would define each individual market by commuting zone, Standard Occupational Classification (SOC), and quarter, and noted that relevant data is available from Burning Glass Technologies, EMSI, and Indeed. Based on this methodology and data, Dr. Marinescu uncovered a striking degree of concentration, with an average HHI of 3,953. Labor markets in rural and middle-America appear to have higher HHIs.

This approach is reasonable because it focuses on job vacancies instead of total jobs. Just as market definitions of the auto market would not be based on the total number of cars on the road, and instead would be based on auto sales, so too should the labor market. Dr. Marinescu uses pre-existing job categories (SOC) and pre-existing geographical boundaries that are based on worker commutes. A temporal market criterion is also reasonable because people typically only look for jobs for a limited period of time.

The sources used by Dr. Marinescu appear robust, but the FTC should use its position as a federal agency to partner with the Department of Labor's Bureau of Labor Statistics to obtain even better data. The Bureau of Labor Statistics publishes a monthly Job Openings and Labor Turnover Survey, which is broken down by ownership, sector, and by region, but not by occupation or metropolitan area.[13] Contrast that to DOL's labor statistics, which are broken down by month, occupation, and metropolitan area, among other things.[14] The FTC should partner with the BLS to seek data on job openings that are similar to BLS's published occupational statistics.

3. **Does available evidence suggest a causal relationship between employer concentration and labor market outcomes, such as wage? Does this evidence suggest a change in antitrust enforcement is needed?**

Research by David Autor, et. al. showing that labor share declines are higher in more concentrated markets is both compelling as to a causal connection, and indicative of a research method for determining causation that the FTC might consider—measuring whether wage growth is lower in more concentrated labor markets and higher in less concentrated markets. And at least one survey of the literature concluded that

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[12] https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_marinescu_june_13_2018.pdf.
[13] https://www.bls.gov/jlt/jltask.htm#detail.
[14] https://www.bls.gov/oes/.

concentration levels in labor markets do appear to affect wages and that concentration has grown over time.[15]

Of course, labor market concentration is not the only factor impacting wages and is not the only cause of recent wage stagnation. But it is a major cause.

4. **Should the agencies and courts apply the consumer welfare standard to the analysis of monopsonistic labor markets in which firms are buyers and workers are sellers?**

No. As Senator John Sherman (R-OH) said during the debates surrounding passage of the Sherman Act in 1890, "[i]t is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances."[16] Employee welfare is an equal purpose of the antitrust laws. Labor mobility and employee welfare should be the focus when assessing monopsonistic labor markets.

In addition, the FTC and courts should not presume that monopsonistic labor markets result in lower consumer prices. That is because upstream monopsonies do not reduce downstream prices. Theoretically, upstream monopsonies resulting in lower labor prices should reduce the supply of labor, and thus the supply of the consumer product or service, effectively *increasing* consumer prices. Further, even in a market where companies are somehow able to maintain supply of labor while decreasing the price of labor, cost savings would only pass through to consumers in a competitive market. If the market is not competitive, firms would simply use their market power to extract further profits after lowering labor costs. So, at the very least, monopsonistic labor markets should not be considered a *positive* development to be weighed against the detriment of less competitive consumer markets.

5. **How should the agencies and courts resolve cases where evidence suggests output in the product market is likely to increase but employment and wages are likely to decline because of reduced competition in a properly defined labor market?**

The FTC's current Horizontal Merger Guidance puts it well: "The Agencies normally assess competition in each relevant market affected by a merger *independently* and normally will challenge the merger if it is likely to be anticompetitive in *any* relevant market."[17] When a merger impacts both a consumer market and a labor market, and the merger will be anticompetitive in the labor market, the agencies should challenge that merger regardless of the impact of the merger on the consumer market. While this language has been in the

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[15] https://www.epi.org/files/pdf/145564.pdf. However, there is not consensus on the trends in relevant concentration levels. *See* Rinz, *supra,* note 10.

[16] Debate in the Senate March 21, 1890. 21 Cong. Reg., pp. 2455-2474.

[17] Horizontal Merger Guidelines, at 30 (emphases added).

agencies' guidelines for years, the agencies have not met their stated goal of assessing each relevant market affected because they have not been considering the labor market.

Congress passed the Sherman Act in 1890 to protect the process of competition, under the Congressional philosophy that competition itself is a virtue to be protected. Any analysis by the FTC, or any economist for that matter, that predicts the future will involve a significant degree of speculation and uncertainty. In "close cases," the FTC should defer to Congress's original intent and policy philosophy and err on the side of more competition in both consumer and labor markets.

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