

FIRST SUPPLEMENT TO MEMORANDUM 2023-49

Antitrust Law: Status Update (Comment Letter)

The staff received the attached letter authored by the American Economic Liberties Project, the Economic Security Project, the Institute for Local Self-Reliance, and the United Food and Commercial Workers, Western States Council relating to the draft of a uniform act on Antitrust Pre-Merger Notification prepared by the Uniform Law Commission (ULC). Professor Daniel Crane is making a presentation on the ULC's draft at the Commission's December 21, 2023, meeting.

Respectfully submitted,

Sharon Reilly
Executive Director



Economic
Security
Project



December 14, 2023

California Law Review Commission
c/o UC Davis School of Law
400 Mark Hall Drive
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Honorable Chair Carrillo and Commission Members:

At your upcoming December meeting, you will hear a presentation on the Uniform Law Commission's (ULC) proposed state legislation on antitrust pre-merger notification. We write to provide context for that presentation. While laudable in its goal to provide parallel notification to State enforcement authorities, the ULC's proposed state legislation would undermine federal efforts and recently-passed California laws designed to protect workers and ensure equitable access to food and healthcare.

Pending changes to federal pre-merger notification rules reflect potential harms to workers and impacts of private equity on market concentration.

Pre-merger notification is the foundation for merger review, providing federal agencies with critical information they need to assess whether a proposed merger "may .. substantially lessen competition" in violation of the law.¹ In 1976, Congress adopted the Hart-Scott-Rodino Act (HSR), which requires companies to file pre-merger notifications with the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) for acquisitions over a certain dollar threshold. In 2023, that threshold was set at acquisitions over \$111.4 million.²

On June 29, 2023, the FTC and DOJ announced proposed improving pre-merger notifications to facilitate more effective and efficient merger review, particularly with respect to private equity dealmaking and the labor market implications of proposed

¹ Clayton Act, Section 7, 15 U.S. Code § 18

² Federal Trade Commission, "HSR threshold adjustments and reportability for 2023," February 16, 2023, <https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023>

mergers.³ In particular, the rules require reporting of past “serial” acquisitions, whereby private equity firms “roll up” large numbers of smaller firms with the cumulative effect of concentrating markets.⁴ These smaller transactions can evade merger scrutiny, even though antitrust laws have been interpreted to “arrest anticompetitive tendencies in their incipency.”⁵

As to labor markets, the proposed changes acknowledge recent research showing that labor markets are more concentrated than previously understood, and that mergers can harm worker wages, benefits, and overall employment.⁶ Even so, merger review of impacts to workers and labor markets has been left wanting. The proposed changes would help change course, providing federal antitrust agencies with necessary information to understand the anticipated status of workers after consummation of a proposed merger.

Public comments received in response to these proposed changes are overwhelmingly positive.⁷ Yet, despite broad recognition of private equity’s impacts on market concentration, and of the labor impacts of mergers, the proposed federal changes face many hurdles to final passage and implementation. States can play a significant role in advancing these critical changes, not just by matching those changes *if* they are adopted, but with a groundswell of legislative support for their goals.

California’s pre-merger notification laws protect workers, patients, and food access.

In recent years, many states (including California) have enacted state-level pre-merger notification requirements, recognizing that State enforcement authorities, including State

³ Federal Trade Commission, “Premerger Notification; Reporting and Waiting Period Requirements,” Posted June 29, 2023, <https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements>

⁴ American Economic Liberties Project, “The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions,” December 2022, <http://www.economicliberties.us/wp-content/uploads/2022/12/Serial-Acquisitions-Working-Paper-R4-2.pdf>

⁵ *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963), <https://supreme.justia.com/cases/federal/us/374/321/>

⁶ Jose Azar, Ioana Marinescu, Marshall Steinbaum, “Labor Market Concentration,” National Bureau of Economic Research, Working Paper 24147, December 2017, https://www.nber.org/system/files/working_papers/w24147/revisions/w24147.rev0.pdf; Hepner, Lee, “Response to Draft Merger Guidelines: The Proposed Merger Guidelines Take Historic Steps To Center Labor Impacts In Merger Review,” September 18, 2023 <http://www.economicliberties.us/wp-content/uploads/2023/09/2023-09-18-Merger-Guidelines-Labor-Comment.pdf>

⁷ Federal Trade Commission, “FTC Seek Comments on the Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules: Project No. P239300,” accessed December 14, 2023, <https://www.regulations.gov/docket/FTC-2023-0040>

Attorneys General, are often better situated to assess the impacts of mergers on local communities.

California lawmakers have passed two bills in as many years to enhance pre-merger notification requirements in the healthcare, pharmaceutical, and grocery industries:

- **CA Senate Bill 184 (2022)**⁸, the “Health Care Quality and Affordability Act,” requires health care entities with over \$25 million in annual revenue to provide at least 60 days advance notice of any merger or asset transfer, along with substantial information (including the entities’ past transactions) to allow the Office of Health Care Affordability (OHCA) to review proposed mergers for their impact on market competition or the state’s ability to meet drug cost targets.
- **CA Assembly Bill 853 (2023)**⁹ requires pre-merger notification to the Attorney General’s Office of certain grocery store and retail pharmacy mergers, including information required to assess a proposed grocery store merger’s effects on consumer choice, food pricing, access to food, and food deserts, and impacts to grocery workers, including wages, benefits, and unemployment. Similarly, as to retail pharmacy mergers, the bill requires disclosure of potential effects on patient choice, medicine pricing, access to medications, and factors affecting the supply of licensed pharmacists, pharmacy technicians, and pharmacists-in-charge.

These bills go further than current federal pre-merger notification requirements - *and appropriately so*. Consider the requirement for healthcare entities to report their past transactions. Such a requirement is critical to understanding the cumulative effects of serial acquisitions in the healthcare industry, primarily conducted by private equity firms, on drug prices, patient choice, and access to care.

The above bills reflect the real, observed impacts of recent mergers, and allow for more effective scrutiny of mergers for their impacts on workers. Right now, Kroger and Albertsons, the nation’s two largest retail grocery chains, are pursuing a merger that by some estimates could result in the loss of 5,750 union jobs in the Los Angeles region alone.¹⁰ The labor impacts of mergers have long been a blind spot in federal merger scrutiny, and California is leading the charge to put those worker impacts front and center.

⁸ CA Senate Bill 184 (2021-2022), <https://legiscan.com/CA/text/SB184/id/2600107>

⁹ CA Assembly Bill 853 (2023-2024), <https://legiscan.com/CA/text/AB853/id/2834113>

¹⁰ Austin, Paige, “Albertsons Merger Threatens 5,750 SoCal Jobs; Newsom Kills Layoff Bill,” Patch, October 11, 2023, <https://patch.com/california/los-angeles/albertsons-merger-threatens-5-750-social-jobs-newsom-kills-layoff-bill>

The Uniform Law Commission's proposed Pre-Merger Notification Bill would undermine current California law and embrace an inadequate status quo.

By contrast, the proposed pre-merger notification bill presented by the Uniform Law Commission takes a more conservative approach. In doing so, the ULC proposal embraces a status quo that federal regulators and states across the country have deemed inadequate to assess the anticompetitive effects of corporate mergers.

While the ULC would provide for parallel notification of State Attorneys General of federal pre-merger documents, the ULC proposal would also undermine more robust and effective methods of merger review, including the above, newly enacted provisions of California law. These revisions to California state law were the result of advocacy by broad coalitions of consumer, labor, and small business advocates, and they reflect a need to protect workers, maintain fair drug prices, and ensure safe and equitable food access for all Californians.

California is at the forefront of recent efforts to enhance review of potentially anti-competitive mergers. In light of current evidence of concentration across the economy, California's more robust, industry-specific approach to pre-merger notification should be expanded to other industries, setting the standard for states' ability to discourage and prevent mergers that threaten consumers, workers and small businesses.

Respectfully submitted,

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