September 18, 2023

The Honorable Jonathan Kanter  
Assistant Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington D.C. 20530

The Honorable Lina Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

RE: Draft Merger Guidelines for Public Comment

The National Consumers League (“NCL” or the “League”), the nation's pioneering consumer advocacy organization and a proponent of workers’ rights, strongly supports the draft merger guidelines that the U.S. Department of Justice (“DOJ” or "Department") and the Federal Trade Commission (“FTC” or "Commission") proposed in July of this year. The guidelines reflect an approach to antitrust enforcement that is grounded in statute and judicial precedent and are a significant improvement from the narrower focus of previous enforcement regimes. By centering market competition as the goal of antitrust law, the DOJ and FTC can appropriately act to protect consumers and workers when mergers pose a threat to the public.

In recent decades, industry consolidation across the U.S. economy has increased dramatically.¹ In some sectors, this phenomenon has drawn intense public scrutiny, usually

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after a significant crisis (e.g., in baby formula manufacturing\(^2\), ocean shipping\(^3\), and live-event ticketing\(^4\)). In other areas, consolidation has generated fewer headlines, despite long-term harms. For example, the air travel\(^5\), grocery\(^6\), and healthcare\(^7\) industries are all critical and yet very concentrated.

Harms from unchecked consolidation affect consumers, workers, competing firms, and our democratic institutions. In spite of its name, the “consumer welfare standard” embraced in antitrust law since the 1980’s has allowed widespread anti-consumer business practices to proliferate. Buyers are unable to seek alternatives to unfair and deceptive junk fees\(^8\) and poor or absent customer service\(^9\) if no alternatives are available.


\(^5\)While four air carriers control two-thirds of the industry, many routes between airports are serviced by an even fewer number of airlines. “Domestic market share of leading U.S. airlines from February 2022 to January 2023,” Statista, August 29, 2023. https://www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines/


In addition, dominant firms have shown an ability to harm consumers even when their products are provided for “free,” something that is most exemplified by the invasive data collection practices of many digital platforms and services.10

For workers, industry concentration can result in monopsony or oligopsony for employment opportunities. This translates to less competition for employee wages and other benefits, leading to lower compensation overall.11 Additionally, in sectors dominated by only a few firms, employers may feel empowered to violate labor laws as they know that the aggrieved workers have few, if any, alternatives.12 Over the past thirty years, as the American economy steadily consolidated, wages stagnated13 and reports of labor law violations (from wage theft14 to dangerous working conditions for minors15) accumulated.

Competing firms also struggle in concentrated markets. Dominant businesses typically have greater resources to entrench their positions16, undercut smaller

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competitors when purchasing supplies\textsuperscript{17}, and create barriers to unfairly retain consumers.\textsuperscript{18} Naturally, as rival firms find it more difficult to compete, the prevailing businesses face less market pressure to change their harmful practices.

Unchecked market concentration also threatens the republican ideals upon which the United States government is founded. For a handful of private firms—with- out any democratic input—to control trillions of dollars’ worth of products, determine the working conditions for millions of workers, and even dictate the flow of information among the population threatens individual freedoms and the efficacy of our political systems.

Consolidation in media markets especially, including traditional mediums such as local publications\textsuperscript{19} and television\textsuperscript{20} as well as digital mediums such as social media\textsuperscript{21}, can give only a few businesses the ability to censor or promote information to hundreds of millions of viewers in the United States and worldwide. This is especially troubling given the inability of many dominant media firms to facilitate healthy dialogue and diminish

\textsuperscript{17} “Walmart became notorious for its aggressive dealings with food companies...Walmart wrested steep discounts from suppliers, which it used to fund its expansion, thereby gaining more market share, which it then leveraged to extract even bigger discounts. All the while, smaller grocers faced rising costs as suppliers scrambled to make up the revenue,” from “Walmart’s Monopolization of Local Grocery Markets,” Institute for Local Self-Reliance, June, 2019. https://cdn.ilsr.org/wp-content/uploads/2019/06/Walmart_Grocery_Monopoly_Report_final_for_site.pdf

\textsuperscript{18} In 2020, the DOJ filed an antitrust lawsuit against Google for practices alleged to unlawfully retain consumers, such as exclusivity and tying agreements. “Justice Department Sues Monopolist Google For Violating Antitrust Laws,” U.S. Department of Justice, October 20, 2020. https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws


\textsuperscript{21} “FTC says Facebook has been a monopoly ‘since at least 2011’ in amended antitrust complaint,” The Verge, August 19, 2021. https://www.theverge.com/2021/8/19/22627032/ftc-facebook-amended-antitrust-complaint-monopoly-instagram-whatsapp
misinformation, likely due to conflicts of interest stemming from profit motives, political leanings, or both.

To be clear, the League does not believe that all mergers and acquisitions are harmful or illegal. However, there are a number of potential harms—both monetary and non-monetary—that may result from mergers which the federal government must fully appreciate when reviewing such deals. In fact, there are recognizable risks to consumers just from the structural transition of a merger itself, which warrants consideration in a merger review.

The Commission and the Department’s draft merger guidelines reflect a return to antitrust enforcement that is grounded in the letter and the spirit of federal competition laws. NCL strongly supports the proposed guidelines and encourages further scrutiny of—and legal enforcement action against—harmful mergers and acquisitions.

Sincerely,

Eden Iscil
Public Policy Manager
National Consumers League

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