



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

¹ Grullon, Larkin, and Michaely, “Are U.S. Industries Becoming More Concentrated?” *Swiss Finance Institute Research Paper No. 19-41*, May 31, 2015. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047

after a significant crisis (e.g., in baby formula manufacturing², ocean shipping³, and live-event ticketing⁴). In other areas, consolidation has generated fewer headlines, despite long-term harms. For example, the air travel⁵, grocery⁶, and healthcare⁷ 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 fees⁸ and poor or absent customer service⁹ if no alternatives are available.

² “The National Baby Formula Shortage and the Inequitable U.S. Food System,” *Center for American Progress*, June 17, 2022. <https://www.americanprogress.org/article/the-national-baby-formula-shortage-and-the-inequitable-u-s-food-system/>

³ “The Impact of Alliances in Container Shipping,” *International Transport Forum*, 2018. <https://www.itf-oecd.org/sites/default/files/docs/impact-alliances-container-shipping.pdf>

⁴ *Break Up Ticketmaster*. <https://www.breakupticketmaster.com/>

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/>

⁶ “Learn More,” *Stop The Merger*, 2023. <https://www.nogrocerymerger.com/learn-more>; “Commentary: Breaking the Market Power Bottleneck in U.S. Beef—A Roadmap for Building an Independent Ranching and Processing Sector,” *American Antitrust Institute*, September 14, 2021. <https://www.antitrustinstitute.org/work-product/commentary-breaking-the-market-power-bottleneck-in-u-s-beef-a-roadmap-for-building-an-independent-ranching-and-processing-sector/>; “Revealed: the true extent of America’s food monopolies, and who pays the price,” *The Guardian*, July 14, 2021. <https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation>

⁷ “Hospital Consolidation Continues to Boost Costs, Narrow Access, and Impact Care Quality,” *University of Pennsylvania Leonard Davis Institute of Health Economics*, January 19, 2023. <https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality/>; “The Pharmacy Benefit Mafia: The Secret Health Care Monopolies Jacking Up Drug Prices and Abusing Patients and Pharmacists,” *American Economic Liberties Project*, June 22, 2022. <https://www.economicliberties.us/our-work/the-pharmacy-benefit-mafia-the-secret-health-care-monopolies-jacking-up-drug-prices-and-abusing-patients-and-pharmacists/>

⁸ “Comments of Consumer Reports; Advance Notice of Proposed Rulemaking Unfair or Deceptive Fees Trade Regulation Rulemaking,” *Consumer Reports*, February 8, 2023. <https://advocacy.consumerreports.org/wp-content/uploads/2023/02/CR-Comment-for-FTC-re-Junk-Fees-02-23.pdf>; Comments from 42 national and state consumer advocacy organizations outlining the harms of junk fees. “Comment Submitted by Consumer Federation of America,” *Federal Trade Commission*, February 16, 2023. <https://www.regulations.gov/comment/FTC-2022-0069-6095>

⁹ “Airlines still owe travelers billions in refunds for flights canceled in 2020,” *CBS News*, December 2, 2021. <https://www.cbsnews.com/news/airlines-owe-billions-refunds-cancelled-flights-2020/>; “Frontier Airlines drops its customer service line,” *NPR*, November 26, 2022. <https://www.npr.org/2022/11/26/1139291958/frontier-airlines-drops-its-customer-service-line>

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

¹⁰ “The Data Big Tech Companies Have On You,” *Security.org*, February 6, 2023.

<https://www.security.org/resources/data-tech-companies-have/>

¹¹ “Barriers to Economic Equality: The Role of Monopsony, Monopoly, and Discrimination,” *White House*, 2022. <https://www.whitehouse.gov/wp-content/uploads/2022/04/Chapter-5-new.pdf>

¹² “Amazon faces new round of penalties for worker safety violations,” *Reuters*, February 1, 2023.

<https://www.reuters.com/legal/litigation/amazon-faces-new-round-penalties-worker-safety-violations-2023-02-01/>;

“U.S. company fined for hiring kids to clean meatpacking plants,” *Reuters*, February 17, 2023.

<https://www.reuters.com/world/us/us-company-fined-hiring-kids-clean-meatpacking-plants-2023-02-17/>;

“Injuries at meatpacking-related company are too high, even as private equities profit, advocates say,” *NBC News*, April 6, 2022. <https://www.nbcnews.com/news/us-news/injuries-meatpacking-related-company-high-even-private-equities-profit-rcna16734>

¹³ “Wage Stagnation in Nine Charts,” *Economic Policy Institute*, January 6, 2015.

<https://www.epi.org/publication/charting-wage-stagnation/>

¹⁴ “More than \$3 billion in stolen wages recovered for workers between 2017 and 2020,” *Economic Policy Institute*, December 22, 2021, <https://www.epi.org/publication/wage-theft-2021/>;

“Employers steal billions from workers’ paychecks each year,” *Economic Policy Institute*, May 10, 2017.

<https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>

¹⁵ “DEPARTMENT OF LABOR, INTERAGENCY TASK FORCE ANNOUNCE RECENT ACTIONS TO COMBAT EXPLOITATIVE CHILD LABOR WITH NEW PARTNERSHIPS, INNOVATIVE TACTICS, RAMPED UP ENFORCEMENT,” *U.S. Department of Labor*, July 27, 2023.

<https://www.dol.gov/newsroom/releases/osec/osec20230727>

¹⁶ In 2019, the Department modified and extended its consent decree with Live Nation/Ticketmaster due to the company’s abuse of its vertical and horizontal integration to maintain its market dominance. “Justice Department Will Move To Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster,” *U.S. Department of Justice*, December 19, 2019. <https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live>

competitors when purchasing supplies¹⁷, and create barriers to unfairly retain consumers.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—without 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 publications¹⁹ and television²⁰ as well as digital mediums such as social media²¹, 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

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>

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>

¹⁹ “The State of Local News,” *Local News Initiative*, June 29, 2022.

<https://localnewsinitiative.northwestern.edu/research/state-of-local-news/report/>

²⁰ “Media Consolidation Means Less Local News, More Right Wing Slant,” *Insights by Stanford Business*, July 30, 2019. <https://www.gsb.stanford.edu/insights/media-consolidation-means-less-local-news-more-right-wing-slant>; “Sinclair’s takeover of local news, in one striking map,” *Vox*, April 6, 2018, <https://www.vox.com/2018/4/6/17202824/sinclair-tribune-map>; “Cable Company Got Its Price, With Tradeoffs,” Cable-Company Consolidation chart shows major acquisitions and mergers by the top 4 U.S. cable-TV providers. *The Wall Street Journal*, February 13, 2014.

<https://www.wsj.com/articles/SB10001424052702304434104579380553437485142>

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 motives²², political leanings²³, 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.²⁴

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
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²² “Whistle-Blower Says Facebook ‘Chooses Profits Over Safety,’” *The New York Times*, June 23, 2023. <https://www.nytimes.com/2021/10/03/technology/whistle-blower-facebook-frances-haugen.html>;

“Twitter and Tesla’s interests at odds in Elon Musk’s quiet China visit,” *The Guardian*, June 1, 2023. <https://www.theguardian.com/technology/2023/jun/01/elon-musk-china-visit-twitter-tesla>

²³ “Hate Speech’s Rise on Twitter Is Unprecedented, Researchers Find,” *The New York Times*, December 2, 2022. <https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html> “Fox, Dominion reach \$787M settlement over election claims,” *Associated Press*, April 19, 2023. <https://apnews.com/article/fox-news-dominion-lawsuit-trump-2020-0ac71f75acfacc52ea80b3e747fb0afe>

²⁴ Clement, Nan. “M&A Effect on Data Breaches in Hospitals: 2010-2022,” September 13, 2023. https://www.nanclement.com/jmp_nc.pdf; “Researcher Explores Effect of Hospital Mergers on Data Breaches,” *The University of Texas at Dallas*, August 2, 2023. <https://news.utdallas.edu/business-management/hospital-mergers-hacking-2023/>