

**BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE &
THE FEDERAL TRADE COMMISSION
Washington, D.C.**

**Re: U.S. Department of Justice & Federal Trade Commission
Draft Vertical Merger Guidelines**

**COMMENT OF
THE COMMUNICATIONS WORKERS OF AMERICA,
SERVICE EMPLOYEES INTERNATIONAL UNION,
THE UNITED FOOD AND COMMERCIAL WORKERS, and
CHANGE TO WIN**

The Communications Workers of America, Service Employees International Union, the United Food and Commercial Workers, and Change to Win submit this comment to the Federal Trade Commission and the Department of Justice (the “agencies”) in response to the draft joint 2020 Vertical Merger Guidelines (the “draft Guidelines”) released by the agencies on January 10, 2020.

Introduction

The petitioning parties (“Petitioners”) include three of the country’s major labor unions, representing millions of working people across all industries and sectors of the economy. The Communications Workers of America (“CWA”) represents working people in telecommunications, customer service, media, airlines, health care, public service and education, manufacturing, and other industries. Service Employees International Union (“SEIU”) unites 2 million diverse members working in the healthcare industry, in the public sector, and in property services in the United States, Canada, and Puerto Rico. United Food and Commercial Workers (“UFCW”) is the largest private sector union in the United States, representing 1.3 million professionals and their families in grocery stores, meatpacking, food processing, retail shops and other industries. Change to Win, a democratic federation of labor unions, has engaged the Federal Trade Commission on a number of issues, including fair competition in the franchise and pharmacy benefit manager industries, toward the goal of eliminating anticompetitive and abusive business practices that harm both workers and consumers.¹

Petitioners concur in the assessment of the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) that challenging anticompetitive mergers—whether vertical, horizontal, or conglomerate—is essential to a fair economy, and that updated guidelines are imperative for stakeholders and enforcers to understand and police the full range of competitive consequences of today’s non-horizontal mergers. As written, however, the draft Guidelines fail to capture two of the primary threats posed by contemporary mergers: harm to workers, and anti-competitive use of data. The draft Guidelines should be revised to include all of the harms that merger review can and should consider.

A. The Agencies Should Consider the Labor Market Consequences of Non-Horizontal Mergers

The draft Guidelines fail to reflect the FTC’s declared practice of considering potential labor market harms posed by mergers. Last fall, FTC Commissioner Philips testified “the FTC has now made it standard practice to screen for harms from enhanced labor monopsony power as part of every merger review.”² Only months later, upon release of the draft Guidelines, FTC Chairman Simons announced that

¹ See, e.g., Change to Win, Comments regarding Proposed Consent Order *in the Matter of CVS Caremark Corp.*, FTC File No. 072 3119 (Mar. 19, 2009), https://www.ftc.gov/sites/default/files/documents/public_comments/cvs-caremark-corporation-file-no.0723119-540386-00001/540386-00001.pdf, and Service Employees Int’l Union, Petition for Investigation of the Franchise Industry (May 2015), https://www.americanbar.org/content/dam/aba/publications/franchise_lawyer/ftc-req-for-investigation_final-may-19-2015.pdf.

² *Antitrust & Economic Opportunity: Competition in Labor Markets: Before the Subcommittee On Antitrust, Commercial And Administrative Law of the Judiciary Committee of the United States House of Representatives*, 116th Cong. at 8 (Oct. 29, 2019) (statement of Noah Phillips, Commissioner of the Federal Trade Commission), available at <https://docs.house.gov/meetings/JU/JU05/20191029/110152/HHRG-116-JU05-Wstate-PhillipsN-20191029.pdf>. Chairman Simons made the same assertion in testimony before the Senate a year earlier. *Oversight of the Enforcement of the Antitrust Laws: Before the Subcommittee on Antitrust, Competition Policy and Consumer*

the draft Guidelines “should reflect the current enforcement approach.”³ The draft Guidelines, however, omit any mention of the labor market consequences of vertical mergers. This is inconsistent with the FTC’s stated practice and, therefore, the agencies’ goal of implementing Guidelines that reflect their actual practices. More importantly, it represents an abrogation of the agencies’ duties to enforce the antitrust laws, “which”—in the agencies’ words—“apply to competition among firms to hire employees.”⁴ Petitioners urge the agencies to reconcile the draft with the law and the FTC’s current enforcement approach.

As written, the draft Guidelines explain that the agencies will specifically use the elements of their 2010 Horizontal Merger Guidelines that concern product and geographic market definition—namely, what customers will substitute for a given product and how far they will travel for that substitute. We believe this is insufficient. The Horizontal Guidelines provide a detailed analytic framework for evaluating these product market effects of mergers but fail to acknowledge the potential deleterious effects of mergers on labor markets. This omission has contributed to long-standing under-enforcement of antitrust principles in the interest of working people.⁵

The draft Guidelines should rectify this, and ensure that vertical merger reviews will include (i) defining one or more labor markets affected by the proposed merger, and (ii) determining whether the proposed merger would harm workers in that market(s) by reducing wages and/or employment. Once a labor market is defined, the agencies can measure its concentration using similar indices to those used to determine concentration in product markets.

One recent study designated sixty percent of labor markets in the United States as “highly concentrated,”⁶ which means that millions of Americans already face limited choice and less power over their working conditions than they would in a competitive market.⁷ In highly concentrated markets, the absence of competition means that workers are paid less than the value they bring to their employers, and cannot easily find new, better jobs. A highly concentrated labor market can have the same consequences as the nefarious labor market practices on which FTC commissioners have rightly focused, such as no-poach agreements among employers and non-compete agreements employers impose on their employees: lower wages, slower wage growth, and worker susceptibility to abusive working

Rights of the United States Senate. Committee on the Judiciary, 115th Cong. (Oct. 3, 2018) (statement of Joseph Simons, Chairman of the Federal Trade Commission), available at <https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs.pdf>.

³ Press Release, *FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment*, FTC (Jan. 10, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment>

⁴ ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, DEPARTMENT OF JUSTICE ANTITRUST DIVISION & FEDERAL TRADE COMMISSION (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

⁵ No merger has ever been blocked on the ground that it will make a labor market less competitive. See Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 *INDIANA L. J.* 1031, 1032 (2019).

⁶ Jose Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data*, NBER Working Paper No. 24395 (2018), <https://ssrn.com/abstract=3133344>.

⁷ Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?* SSRN Scholarly Paper ID 3335174 at 10-11 (2019), <https://papers.ssrn.com/abstract=3335174>.

conditions.⁸ The decades-long erosion of legal protections for labor and organizing rights only heightens the effect of market concentration and anti-competitive employment practices.⁹

In highly concentrated markets, and particularly where workers and their unions lack a seat at the bargaining table, workers are vulnerable to employer collusion to suppress their wages¹⁰ and “take it or leave it” limits on their ability to change jobs or start their own businesses through overbroad non-compete agreements.¹¹ Concentrated markets support wage stagnation¹² and undermine labor mobility to the extent that—as Commissioner Phillips recently observed—the likelihood that “American workers will move to new places and start new jobs” is at its lowest level since the 1940s, when the Department of Labor began collecting such data.¹³ The agencies’ merger review process can and should guard against concentration in labor markets to avoid further limiting competition and depressing wages for workers at all skill levels. The draft Guidelines should be revised accordingly.

B. The Agencies Should Consider the Role of Data as a Unique and Important Asset

In his statement regarding the release of the draft Guidelines, Commissioner Chopra asserted that “data has become a currency, a price that must be paid to participate in economic or social activity.”¹⁴ Petitioners concur. This holds true across the economy. Technology firms pioneered the collection and monetization of data, but today every industry is aware of its competitive significance. In 2018, Chairman Simons testified that the FTC “consider[s] all potential theories of harm in our merger

⁸ Letter from Rohit Chopra, Commissioner of the Federal Trade Commission to Ass’t Attorney General Makan Delrahim, Antitrust Div., Dept. of Justice, re: Department of Justice Initiative on Competition in Labor Markets at 2-3 (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf

⁹ See Protecting the Right to Organize Act of 2019, 116th Cong. § 1, H.R. Rep. 116-347 at 8-10 (discussing “longstanding weaknesses” in federal labor law that “contributed to the decline of union membership, which in turn has contributed to wage stagnation and greater income inequality”).

¹⁰ *E.g.*, *Cason-Merenda v. VHS of Mich., Inc.*, 2016 U.S. Dist. LEXIS 31335, 2016-1 Trade Reg. Rep. (CCH) P79,484 (granting attorney’s fees after a class of 20,000 registered nurses settled with a group of defendant hospitals for \$90 million the nurses lost as a result of the hospitals’ wage collusion). Also see Eliana Docketerman, *Google & Apple Settle Lawsuit Alleging Wage-Fixing*, TIME (Apr. 24, 2014), <https://time.com/76655/google-apple-settle-wage-fixing-lawsuit/>.

¹¹ *E.g.*, *People v. Jimmy John’s Franchise LLC*, Circuit Court of Cook County, Illinois, No. 2016-CH-07746, Complaint (June 8, 2016), <https://will.illinois.edu/nfs/JimmyJohnsComplaintFILED.pdf> (fast food sandwich franchise limiting the employment options of its “at will, low-wage employees...for years after leaving employment...[with] no legitimate business interest to warrant the imposition of any non-competition agreements”). To settle the lawsuit, the sandwich chain agreed to stop requiring such workers to sign non-competes as a condition of employment. Press Release, *Madigan Announces Settlement with Jimmy John’s for Imposing Unlawful Non-Compete Agreements* (Dec. 7, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html.

¹² *For most U.S. workers, real wages have barely budged in decades*, Pew Research Ctr. (Aug. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>.

¹³ *Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), (statement of Noah Phillips, Commissioner of the Federal Trade Commission) (Jan. 9, 2020) (citing Sabrina Tavernise, *Frozen in Place: Americans Are Moving at the Lowest Rate on Record*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/us/american-workers-moving-states-.html>).

¹⁴ Also see *The World’s Most Valuable Resource is No Longer Oil, but Data*, THE ECONOMIST (May 6, 2017), <http://www.economist.com/news/leaders/21721656-data-economy-demands-new-approachantitrust-rules-worlds-most-valuable-resource>.

reviews,” and that the agency would take enforcement action based on “evidence that data is being used anti-competitively in violation of the antitrust laws.”¹⁵ Although data is one of the important and unique assets that merging firms may bring to a non-horizontal merger, the draft Guidelines fail to account for its significance.

Particularly in today’s growing digital markets, data has disproportionate self-reinforcing power. One firm’s data attracts users who, in turn, contribute data that makes the firm’s product or service more valuable to other users. In markets characterized by such “network effects,” a firm’s growth tends to accelerate exponentially as it acquires more users. The speed of the firm’s growth makes it increasingly difficult for new upstart businesses to compete.

Network effects are particularly strong in data-heavy markets like ecommerce, search, and social media. And, once data has been collected in one market, it can be leveraged for advantage even in an apparently unrelated market. Data shared vertically on a supply chain can be used to inform product development and improvement, but can also facilitate market foreclosure to rivals, appropriation of intellectual property, and price discrimination.¹⁶ Large firms with access to enormous amounts of data may be able to rely on that data to identify potential competitors before others—including regulators—can.¹⁷ Notably, data can facilitate the same degree of wage suppression as intentional employer collusion, such as when employers access to databases containing hundreds of millions of salary and employment history records.¹⁸

In short, a data-driven market gives dominant firms a “‘God’s eye view’ of activities in their own markets and beyond.”¹⁹ The draft Guidelines should, accordingly, specify that agencies must assess merging firms’ access to data, its value, and the competitive threat that data can pose in the firms’ markets and outside of them.

¹⁵ *Oversight of the Enforcement of the Antitrust Laws: Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the United States Senate. Committee on the Judiciary, 115th Cong.* (Nov. 6, 2018) (Response to Questions of Joseph Simons, Chairman of the Federal Trade Commission).

¹⁶ During Congressional testimony by small- and medium-sized businesses in January, a bipartisan group of lawmakers was receptive to the complaint that attempting to compete against vertically-integrated technology companies is “like playing a soccer game....You might be the best team in the league, but you’re playing against a team that owns the field, the ball, the stadium and the entire league, and they can change the rules of the game in their own favor and anytime.” Cecelia Yang, *Please Stop Big Tech, Small Rivals Tell Lawmakers*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/technology/antitrust-hearing-boulder-colorado.html>.

¹⁷ As Chairman Simons testified, “the possibility that large firms buying start-ups might foreclose the development of emerging rivals that might ultimately unseat them is a legitimate and real theory of competitive harm (and not unique to the technology industry).” *Oversight of the Enforcement of the Antitrust Laws*, *supra* note 13. Also see *Fuel of the Future – Data is Giving Rise to a New Economy*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/briefing/2017/05/06/data-is-giving-rise-to-a-new-economy>.

¹⁸ See Chopra Letter, *supra* note 8; Joel Winston, *Facebook & American’s Largest Companies Quietly Give Worker Data to Equifax*, FAST COMPANY (Nov. 8, 2017), <https://www.fastcompany.com/40485634/equifax-salary-data-and-the-work-number-database>.

¹⁹ *The World’s Most Valuable Resource*, *supra* note 14.

Conclusion

Petitioners call on the DOJ, the FTC, and all federal and state competition authorities to protect workers from the unbridled market power of increasingly large and concentrated employers. At the same time, competition enforcement should level the playing field for all those who come into contact with concentrated markets, particularly the small- and medium-sized businesses that supply goods and services on the digital platforms that have come to dominate our economy.

Petitioners support the joint FTC and DOJ effort to set forth transparent standards for meaningful non-horizontal merger review. The scope of the draft Guidelines must be expanded, however, if they are to accurately reflect the FTC's position that protecting workers from the anticompetitive effects of a merger is an enforcement priority, and that the agency considers the potentially anticompetitive use of data in its non-horizontal merger reviews. The agencies play a critical role in ensuring that working people receive the protection of the federal antitrust laws not only in their capacity as consumers, but in their capacity as producers of the goods and services that fuel our economy. Petitioners respectfully submit that the FTC and the DOJ must revise the draft Guidelines to fully reflect this role.

Respectfully submitted,

Communications Workers of America
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