



April 29, 2020

Hon. Mike Lee, Chairman
Hon. Amy Klobuchar, Ranking Member
Subcommittee on Antitrust, Competition
Policy, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Hon. David Cicilline, Chairman
Hon. F. James Sensenbrenner, Ranking Member
Subcommittee on Antitrust, Commercial,
and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Lee, Chairman Cicilline, Ranking Member Klobuchar, and Ranking Member Sensenbrenner:

Consumer Reports¹ appreciates the dedicated efforts of Congress to provide urgently needed relief and protection to the American people and the American economy during the COVID-19 emergency. We have offered a number of proposals, in our own right and in concert with others, for addressing specific urgent needs and concerns during this difficult and uncertain period. This letter offers three timely proposals in the area of antitrust oversight and enforcement, in the interest of preserving a functioning competitive marketplace that works for consumers and for everyone – both during the emergency, to the fullest extent possible, and in the recovery, as economic activity more fully resumes.

The first two proposals will help make sure that antitrust enforcers are able to focus the necessary resources to efficiently and appropriately deal with the potential wave of acquisitions that are truly necessitated by the current economic disruption, including acquisitions of the assets of companies unable to survive. The third will help make sure that health insurers play their appropriate role in getting new vaccines and treatments widely and efficiently distributed.

¹ Consumer Reports (CR) is a nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests, including promoting strong antitrust laws and sound and effective antitrust enforcement. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

Focusing Merger Enforcement on Acquisitions Made Necessary by the COVID-19 Disruption

Antitrust law provides procedures for reviewing a proposed acquisition when one of the companies is in bankruptcy, or is headed there as a “failing firm.” In either type of situation, a timely acquisition may be the best means of keeping the bankrupt or failing company’s assets operating in the marketplace, for the benefit of consumers and the economy.

Unfortunately, during the period of the current emergency and its aftermath, there is a genuine prospect of there being so many such companies that antitrust enforcement resources could be overwhelmed. Therefore, it is critically important that our antitrust agencies be able to focus on keeping these assets in the marketplace, while also ensuring that doing so does not cause undue harm to competition. This will require the usual careful analysis of each proposed acquisition.

Mergers should not be pursued during this period for opportunistic reasons, creating extra burdens for antitrust enforcers. But unfortunately, history shows we cannot count on all corporations to refrain from taking advantage of opportunities for profiteering. So Congress needs to act.

A temporary moratorium on mergers and acquisitions that are not urgently and demonstrably necessary for preserving a bankrupt or failing firm’s assets in the marketplace is one very straightforward approach Congress could take. Short of that, at a minimum, Congress should give the Justice Department and the Federal Trade Commission two kinds of express authority to suspend non-essential merger activity during the emergency, and as recovery is still getting underway.

First, Congress should give the agencies authority to extend the “waiting period” that applies under current law to mergers and acquisitions that are subject to pre-notification under the Hart-Scott-Rodino (H-S-R) Act. This waiting period is designed to ensure that there is time to conduct an appropriate review when a proposed acquisition has the potential to harm competition in violation of the antitrust laws. The agencies should have flexibility to extend the waiting period for all pending mergers and acquisitions, or for specified ones. An agency should also be authorized to extend the waiting period for any and all mergers and acquisitions under its review for a minimum of an additional three months, with the option for additional extensions of three months at a time, as the agency deems warranted.

Second, Congress should empower the agencies to temporarily enjoin any acquisition the agency deems to raise competitive concerns, by application to the court, without the necessity of marshalling and meeting the ordinary proof requirements for obtaining an injunction. This authority would apply to any acquisition, including those that do not meet the H-S-R size thresholds for required pre-merger notification. Once the emergency and its aftermath are behind us, any such temporary injunction would be lifted unless the agency re-applies within a reasonable time and meets the ordinary proof requirements.

These changes are predictably going to be warranted for any future pandemic emergencies, so we recommend Congress ultimately consider making them permanent, to apply in any similar emergency periods in the future.

Ensuring That Health Insurers Have Appropriate Incentives to Help Widely and Efficiently Distribute COVID-19 Vaccines and Treatments

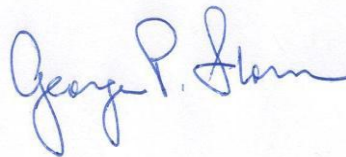
Health insurance coverage will be a critical factor in getting any vaccine or treatment for COVID-19 quickly distributed to all who need it. But under current law, health insurers have a conflict of interest that Congress needs to address. Health insurers have a statutory exemption from the antitrust laws, dating back to an unnecessary and ill-advised addition to the McCarran-Ferguson Act when Congress was preoccupied with another national emergency, the Second World War. It is widely acknowledged that this exemption is counter-productive to promoting a competitive health care marketplace, and should be removed. Legislation to remove it has passed the House twice by an overwhelming, near-unanimous bipartisan vote – in 2010, and again in 2017.

It is particularly important to remove this antitrust exemption now, as our nation is engaged in a massive undertaking to develop effective vaccines and treatments for COVID-19. Unless the exemption is removed, health insurers could, for example, agree among themselves to set higher prices or impose cost-shifting conditions for coverage of a vaccine or treatment. This would deliver higher profits for the insurers, but at the expense of slowing availability of the vaccine or treatment – with no accountability under the antitrust laws.

Removing the McCarran-Ferguson antitrust exemption for health insurers now is essential for avoiding this risk.

In this emergency period, there are many urgent needs that Congress, and all of us, are focused on. Consumer Reports hopes the need for appropriate antitrust oversight and enforcement to preserve a functioning competitive marketplace, both during the emergency and after, will not be overlooked. We are supporting a number of constructive clarifications and reforms to the antitrust laws, and will renew our call for Congress to consider them favorably at the appropriate time. For now, we urge you to consider the timely measures described above.

Sincerely,



George P. Slover
Senior Policy Counsel
Consumer Reports

cc: Hon. Jerrold Nadler
Hon. Lindsay Graham
Hon. Jim Jordan
Hon. Dianne Feinstein