

Department of Justice Antitrust Division Roundtable  
National Diversity Coalition Submission  
May 31, 2018

The Department of Justice's Antitrust Division seeks a flexible, dynamic consumer welfare standard that is well-equipped to face threats to competition.

Today, the consumer welfare standard is premised on the idea that consumers benefit from free market competition because it increases economic efficiency, often in the form of lower prices or increased output. Courts and agencies in the United States traditionally analyze consumer welfare based on whether restraints or mergers may raise prices or reduce output. The National Diversity Coalition agrees with this approach.

Unfortunately, too often traditional antitrust analysis listens to the voices of academics, Ivy League experts, and statisticians in lieu of consumers.

Ironically, this leaves consumers feeling voiceless in a process purporting to determine effects on consumer welfare. In fact, it can appear that the historical process for assessing consumer welfare goes to great lengths to avoid direct consumer engagement. Current jurisprudence likewise can favor centralized analysis, sanitized from direct consumer interaction and input, over the consumers' perspective of the marketplace.

Today, the National Diversity Coalition seek to speak for the simple proposition that the voice of consumers must be part of anti-trust enforcement and it is inalienable from an assessment of consumer welfare. It is necessary to incorporate evidence gathered directly from consumers into antitrust analysis to unlock the power of efficient markets.

We are emboldened by the Division's increased openness under this Assistant Attorney General to include the voice of consumers and their advocates in its work. For instance, we commend Assistant Attorney General Delrahim and his staff for including us in this important discussion. We also acknowledge that the Department of Justice has recently recognized the need to consider ways to increase the voice of the consumer in antitrust analysis. For instance, we support the division's recent call for "[a]cademics and enforcers should consider whether tools such as NPS [Net Promoter Scores] and similar benchmarks are useful for measuring quality as a byproduct of competition."

We support the adoption of quantitative inputs into the assessment of consumer welfare to assess things like a merger's impact on product quality. However, we also believe that the use of such statistical approaches must not be misunderstood as a substitute for direct consumer engagement. Currently, we are concerned that there exists a disconnect between academics and enforcers on the one hand and consumers on the other. Increasing direct engagement with consumers remains essential. Consumers play an immutable role in the efficient functioning of markets that can't be replaced by academics and centralized regulations.

Likewise, their voices must be prioritized when determining the consumer impact from certain mergers and restraints of trade.

The National Diversity Coalition and its partners believe that actual consumer input and opinions are the best evidence of the impact of corporate actions on consumer welfare. Increased consumer input will help the Department of Justice identify wrong-doing, assess remedial measures, prioritize enforcement, and enhance economic liberty and the functioning of efficient markets.

To assess consumer welfare absent the consumer voice itself poses a threat to the reliability of findings and the ability of enforcers to fully protect consumers and innovation.

To that end, we offer the following recommendations for the Antitrust Division's consideration.

1. The Antitrust Division should ensure the consumers voice is properly part of the three phases of its antitrust Oversight: Assessment, Enforcement, Monitoring.
  - a. Assessment. We believe the Antitrust Division should establish a Consumer Advisory Board to formalize the participation of at-risk consumers in the assessment of antitrust matters. It would strengthen the connection between consumers and the Antitrust Division and enable the Antitrust Division to surface troubling behavior directly from those effected. The Federal Communications Commission and Department of Treasury, amongst others, have successfully development community advisory boards to ensure their leadership is aware of key issues affecting the welfare of at-risk consumers and communities – including those most vulnerable such as consumers living paycheck to paycheck. We urge the Antitrust Division to establish a Consumer Advisory Board to increase its connectivity to consumer welfare and to demonstrate an openness to the consumer's voice in assessing the impact of corporate actions.
  - b. Enforcement. We believe formal public guidance is necessary relating to the use of community comments, feedback and evidence during the enforcement process and in resolving appropriate remediation steps. Clear, public guidance is needed to ensure that corporations remain responsive to consumers and their welfare throughout an enforcement action. Today, many corporations with whom we meet perceive that the consumers have no role in antitrust enforcement matters once the Division has initiated proceedings, and in fact reduce communications with consumer advocates during the pendency of such proceedings.
  - c. Monitoring. Formal monitoring of a transaction's actual impact on consumer welfare, post-transaction, is also critical. Consumers opinions must be monitored, pricing and output evaluated, and consumer feedback gathered

following a merger. This ensures that the Company's commitments are being fulfilled and that there are no unexpected impacts on consumer welfare. Consumer surveys and benchmarks can help ensure that there do not materialize unintended impacts on trade. The lack of systemic, public on-going monitoring and consumer feedback post-transaction often rewards corporations who do not follow through on their stated plans as submitted during an antitrust review.

2. The National Diversity Coalition believes that a company's governance structure also plays a key role in the ability of the Department and others to build confidence that a merger or trade policy will not ultimately harm consumers.
  - a. The National Diversity Coalition has experienced several instances of companies who do not follow through on their commitments relating to post-transaction behavior or take actions that directly contradict commitments made during merger application processes.
  - b. A Company's corporate citizenship, including Board diversity, as well as key policies and procedures, and a Company's history of community support should each play a role in determining whether the Company can be trusted to monitor and mitigate consumer impact post-transaction.

We are encouraged by the outreach efforts made by the Antitrust Division and its recent support for greater ways to measure consumer welfare based on the actual voice of consumers. We believe that including the voice of consumers through the antitrust process is a necessary, if underappreciated, part of the Antitrust process. We urge the Antitrust Division to proactively engage with consumers and their advocates and to only use expert reports and statistics as a complement (but not a substitute) for direct consumer input.

Sincerely,

Faith Bautista  
Chief Executive Officer

Steven Sugarman  
Senior Advisor and Chief Counsel