

Congress of the United States

Washington, DC 20510

June 21, 2022

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Assistant Attorney General Jonathan Kanter,

We are writing today regarding our concerns over Reckitt Benckiser Group PLC's proposed sale of its Enfamil infant formula manufacturing arm in the midst of an ongoing, dangerous national shortage.¹ In May 2022, following the closure of Abbot's Sturgis, Michigan plant, national out-of-stock rates for infant formula exceeded 70 percent, threatening the health and safety of millions of infants, children, and adults,² while President Biden warned that it would take "a couple more months" before infant formula manufacturing was back to normal.³ Given the consolidation in the infant formula market and impact of this shortage on American families, we urge you to use your authority granted under the Clayton Act to closely examine whether such a transaction would likely harm competition or prolong the crisis.⁴

As we noted in our May 2022 letter to the Department of Agriculture,⁵ just four companies control nearly 90% of the infant formula market and this concentration severely weakened supply chain resiliency.⁶ As a result, the infant formula marketplace was susceptible to supply shocks, like Abbott's recall and its temporary closure of its Sturgis, Michigan factory. In the weeks following this recall, out-of-stock rates reached up to 90% in some states, causing a widespread public health crisis that disproportionately impacts low-income family and high-risk infants.⁷

Given the ongoing crisis, we are extremely concerned by reports that Reckitt Benckiser Group, which owns the Enfamil brand of baby formula and is the second biggest infant formula

¹ Wall Street Journal, "Enfamil Maker Reckitt Shuts Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, <https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305>.

² New York Magazine, "The Baby-Formula Shortage Could Ease by Late July," Bindu Bansinath and Mia Mercado, June 6, 2022, <https://www.thecut.com/2022/06/baby-formula-shortage-fda.html>.

³ Wall Street Journal, "Baby Formula Shortage Worsens, Hitting Low-Income Families Hardest," June 1, 2022, https://www.wsj.com/articles/baby-formula-shortage-worsens-hitting-low-income-families-hardest-11654088402?mod=hp_lead_pos11.

⁴ 15 U.S.C. 18.

⁵ Letter from Senator Cory Booker and colleagues to USDA Secretary Tom Vilsack, May 13, 2022, <https://www.booker.senate.gov/news/press/booker-duckworth-klobuchar-lead-8-senators-in-urging-usda-to-address-infant-formula-shortages>.

⁶ Politico, "Infant formula shortage suddenly Topic A in Washington," Helena Bottemiller Evich and Meredith Lee, May 13, 2022, <https://www.politico.com/news/2022/05/13/unconscionable-pelosi-vows-action-on-infant-formula-shortages-00032459>.

⁷ CNN Health, "Despite moves to increase supply, families are still feeling the pain of the baby formula shortage," Brenda Goodman, June 6, 2022, <https://www.cnn.com/2022/06/06/health/families-struggle-formula-shortage/index.html>; Washington Post, "Formula shortage is worst for low-income families, high-risk infants," Frances Stead Sellers, May 18, 2022, <https://www.washingtonpost.com/health/2022/05/18/baby-formula-shortage-impact/>.

manufacturer in the U.S., is pushing ahead with a sale process that could shallow out the market.⁸ Private equity firm Clayton Dubilier & Rice (CDR), which submitted a non-binding bid to purchase Reckitt Benckiser's infant nutrition unit,⁹ already has a history of saddling its acquisitions with debt,¹⁰ and of profiting from a public health crisis when one of their subsidiaries exported "large shipments" of personal protective gear and respirator equipment out of the U.S. at the beginning of the coronavirus (COVID-19) pandemic.¹¹ If private equity investors take over a key infant formula manufacturer with the intent to further consolidate and merge operations when the market is already failing families and their children, matters will be even worse for consumers.¹²

Reckitt Benckiser's potential sale to private equity, during a shortage that has resulted in the company temporarily holding up to 55% of the U.S. market, represents a potential antitrust issue and a threat to the already consolidated market.¹³ It is understood that Reckitt Benckiser's sale would guarantee "operational disruption" and likely weaken the company with massive debt at a time when their success is essential to families across the country.¹⁴ You have previously acknowledged the weaknesses inherent to oligopolies, accurately placing the blame for the fragility of the infant formula market squarely on the high level of concentration in this industry.¹⁵ In addition, your division has addressed the role of private equity in concentrating markets by "rolling up" aspects of the American economy, unchecked by regulators.¹⁶ Section 7 of the Clayton Act prohibits acquisitions where the effect "may be substantially to lessen competition,"¹⁷ and this may well apply to any private equity firm with a noted history of selling off assets, laying off workers, and loading companies up with debt—regardless of whether any competing companies are in the firm's investment portfolio. In September 2021, Federal Trade Commission Chair Lina Khan called for greater scrutiny of mergers that involved private equity firms, warning that their "business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations."¹⁸ Just last week, Chair Khan re-emphasized these concerns, noting that private equity

⁸ Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, <https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305>; The American Prospect, "A Formula for Public Ownership," Robert Kuttner, May 27, 2022, <https://prospect.org/blogs-and-newsletters/tap/formula-for-public-ownership/>.

⁹ Bloomberg, "Reckitt's \$7 Billion Formula Sale Draws Muted Interest," Ruth David and Dinesh Nair, May 27, 2022, <https://www.bloomberg.com/news/articles/2022-05-27/reckitt-s-sale-of-baby-formula-unit-said-to-draw-muted-interest#xj4y7vzkg>.

¹⁰ Wall Street Journal, "Buyout Firms Set Record for Loading Companies With Debt to Pay Themselves," Chris Cumming, October 25, 2021, <https://www.wsj.com/articles/buyout-firms-set-record-for-loading-companies-with-debt-to-pay-themselves-11635156003>.

¹¹ The Intercept, "KEY MEDICAL SUPPLIES WERE SHIPPED FROM U.S. MANUFACTURERS TO FOREIGN BUYERS, RECORDS SHOW," Lee Fang, April 1, 2020, <https://theintercept.com/2020/04/01/coronavirus-medical-supplies-export/>.

¹² Vox, "What is private equity, and why is it killing everything you love?" Emily Stewart, January 6, 2020, <https://www.vox.com/the-goods/2020/1/6/21024740/private-equity-taylor-swift-toys-r-us-elizabeth-warren>.

¹³ Wall Street Journal, "Enfamil Maker Reckitt Shops Baby-Formula Unit Amid Shortage," Saabira Chaudhuri and Ben Dummett, May 27, 2022, <https://www.wsj.com/articles/enfamil-maker-reckitt-shops-baby-formula-unit-amid-shortage-11653655305>.

¹⁴ Axios, "Baby formula makers hit the auction block," Dan Primack, May 31, 2022, <https://www.axios.com/2022/05/31/baby-formula-makers-hit-the-auction-block>.

¹⁵ Department of Justice, "Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture," May 18, 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association>.

¹⁶ Financial Times, "Crackdown on buyout deals coming, warns top US antitrust enforcer," 2022, <https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1>.

¹⁷ 15 U.S.C. 18.

acquisitions had caused concrete damage to the lives of ordinary Americans.¹⁹ The ruinous model of private equity does not promote long-term competition; it reduces quality and safety and drives vulnerable target companies out of business.

The Department of Justice has wide authority under the Clayton Act to investigate any proposed transaction for potential anticompetitive effects.²⁰ We encourage your division to give serious weight to the fragility of this particular market and the urgent need for strong, competing firms if Reckitt Benckiser and CDR move forward with a deal. If CDR's history suggests that its acquisition of Enfamil would endanger the manufacturing arm's ability to compete going forward or threaten the supply of infant formula during this period of crisis, your division should sue to block the deal immediately without considering any remedies.

The ongoing crisis of infant formula shortages call for your division to pay close attention to any possible merger or acquisition in this sector. However, we urge the Department of Justice to closely examine *any* private equity-backed deal with similar caution and fully oppose in court any such transaction involving firms with checkered acquisition histories that are likely to hollow out their targets and weaken competition.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator



Katie Porter
Member of Congress



Cory A. Booker
United States Senator



Bernard Sanders
United States Senator

¹⁸ Federal Trade Commission Chair Lina M. Khan, "Vision and Priorities for the FTC," Memorandum, September 22, 2021, https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

¹⁹ Financial Times, "Lina Khan vows 'muscular' US antitrust approach on private equity deals," Stefania Palma, Mark Vandeveld, and James Fontanella-Khan, June 8, 2022, <https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797>.

²⁰ 15 U.S.C. 18.