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Antitrust Division Head Discusses Approach to Merger Remedies

- In a January 24 speech, Jonathan Kanter, the assistant attorney general in charge of the Antitrust Division of the DOJ, set forth his views on how the DOJ should approach merger remedies and signaled that the DOJ may be more willing to litigate merger challenges.

- While many of his statements are in line with existing DOJ guidance on acceptable merger remedies, his speech suggests that he may be less willing to accept a divestiture as a remedy for a problematic merger, especially when a deal involves dynamic markets.

- Where necessary, companies should be prepared to fashion appropriate and viable divestitures and to advocate for their effectiveness.

The head of the Antitrust Division of the Department of Justice (DOJ) said that when it "concludes that a merger is likely to lessen competition, in most situations" the division "should seek a simple injunction to block the transaction," rather than agree to a remedy. He went on to add that while divestitures will be an option in certain circumstances, in his view "those circumstances are the exception, not the rule." Mr. Kanter delivered his remarks at a virtual meeting of the Antitrust Section of the New York State Bar Association.

According to Mr. Kanter, divestitures may be viable solutions where "business units are sufficiently discrete and complete that disentangling them from the parent company in a non-dynamic market is a straightforward exercise." However, Mr. Kanter suggested that companies with "evolving business models" operating in "innovative markets" may find increased resistance to a remedy if the DOJ determines that their deal presents competitive concerns.

This stance may lead to more merger challenges in the courts. Indeed, AAG Kanter welcomed the prospect of more litigation, saying that "settlements do not move the law forward." Mr. Kanter went on to say that "we need new published opinions from courts that apply the law in modern markets in order to provide clarity to businesses" and that "this requires litigation that sets out the boundaries of the law as applied to current markets." He said that the DOJ "need[s] to be willing to take risks and ask the courts to reconsider the application of old precedents to those markets."

The DOJ's approach to merger remedies has changed over time. Past administrations were seen to be amenable to both structural and behavioral remedies – that is, they were willing to accept commitments from companies on their post-deal conduct. However, the prior administration had a clear and strong policy preference for structural remedies involving business unit divestitures, and this is reflected in the Merger Remedies Manual published by the DOJ in 2020.

Mr. Kanter's speech is in line with many of the principles articulated in the remedies manual. For example, he said that his focus is on whether remedies "restore competition," "preserve the competitive process" and "protect competition as the law demands." He also noted that the DOJ is an enforcer, not a regulator. Similarly, the principles in the DOJ's remedies manual state that "remedies must preserve competition," "should not create ongoing government regulation of the market" and "must be enforceable." And Mr. Kanter's view on when a divestiture is a viable remedy – i.e., when it involves a discrete and complete

business unit – is also reflected in the remedies manual, which recognizes that "divestiture of an existing standalone business is preferred" and "divestiture of less than an existing standalone business may not result in a viable entity that will effectively preserve competition."

In this enforcement environment it remains very important for companies to conduct a thoroughgoing antitrust analysis of potential deals and to structure them accordingly. In particular, companies should be prepared to advocate for remedies where necessary, including demonstrating that a divestiture purchaser has the means and desire to make productive use of the assets to be acquired. Indeed, Mr. Kanter expressed concern that "merger settlements that include partial divestitures too often result in what might be called 'concentration creep,'" which "happens when divested assets end up in the hands of someone that does not make effective use of them."

Companies should also prepare at the outset for the possibility of litigation. To be sure, in his speech Mr. Kanter said that the Antitrust Division "is experiencing a historic resource shortage" in the midst of historically high merger filings. At least in the short term, then, the DOJ's apparent increased willingness to litigate may be tempered by practical considerations. Nevertheless, companies should keep the prospect of litigation in mind and adjust deal timelines and terms accordingly.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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