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Client Alert

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DOJ Updates Merger Remedies Manual

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On Thursday, September 3, 2020, the Department of Justice's Antitrust Division issued a revised Merger Remedies Manual (the "Manual"), which outlines the agency's policies regarding merger remedies in transactions that raise competitive concerns and reflects DOJ practice, which has been in place for many years.[1] According to Assistant Attorney General Makan Delrahim, the updates to the Manual are intended to "provide greater transparency and predictability regarding the division's approach to remedying a proposed merger's competitive harm."[2] DOJ last updated the Manual in 2011, however DOJ withdrew its 2011 guidance in 2018 and reverted to its 2004 guidelines pending this update.[3]

KEY POINTS

- **Structural Remedies**: DOJ strongly prefers structural remedies (i.e., divestitures) in both horizontal and vertical mergers.[4] Conduct remedies, which require ongoing monitoring and oversight, are acceptable to DOJ only under limited circumstances and are paired with structural remedies if at all possible.[5] Purely conduct-based remedies are only considered appropriate where the parties can demonstrate that (i) the merger creates significant efficiencies, (ii) a structural remedy is not possible, (iii) the conduct remedy will completely prevent competitive harm, and (iv) the conduct remedy can be effectively enforced.[6]

- **Divestiture Structure**: To be acceptable to DOJ, a proposed divestiture must include all of the assets necessary for the buyer to compete long-term in the market.[7] In particular, the divestiture must address any aspect required to compete effectively that the proposed buyer lacks or cannot obtain in a timely fashion – e.g., if the buyer lacks a distribution system, the proposed divestiture should include these assets.[8] Accordingly, sales of stand-alone, existing businesses are preferred to sales of individual assets or business lines.[9] "Mix and match" remedies that draw on assets held by both of the merging firms are also disfavored by DOJ.[10]

- **Divestiture Buyers**: DOJ generally requires the merging parties identify an upfront buyer. This is particularly true in transactions where (i)

the divestiture does not involve a stand-alone business, (ii) the divestiture primarily consists of intellectual property, or (iii) the business is so specialized that few acceptable buyers exist.[11] In evaluating potential buyers, DOJ considers their experience in the relevant industry, their financial capabilities, and their incentives to compete in the market.[12] The Manual specifically addresses the possible benefits of private equity in comparison to traditional corporate buyers, noting that private equity firms tend to have easy access to capital, in-house expertise, and are more willing to make long-term investments.[13] Private equity buyers may also partner with individuals or entities with relevant industry experience, which can make them more attractive buyers to DOJ.[14]

- **Office of Decree Enforcement and Compliance**: As part of a recent internal reorganization, DOJ has created a new office responsible for enforcement of judgments and consent decrees. The Office of Decree Enforcement and Compliance will now be responsible for overseeing and enforcing both structural and conduct remedies.[15]

TAKEAWAYS

- DOJ's positive view toward private equity buyers is consistent with their preference for divestitures of stand-alone businesses. Where the divested assets are already in a position to compete, there is less need for a buyer with significant industry ties. For companies in industries with few participants, private equity buyers can provide a way to make a merger palatable while still meeting the agency's divestiture requirements.
- The views toward private equity buyers, however, directly contrasts with prior statements from certain Democrats such as Senator Warren. As a result, a Biden/Harris victory could lead to a further revision of the Manual that would remove the positive views toward private equity buyers.
- DOJ has long preferred structural remedies over conduct remedies, but these revisions now make this preference explicit. The Manual repeatedly emphasizes that DOJ policy is to avoid remedies that require on-going government regulation – i.e., conduct remedies.[16] This is also in line with the thinking of Assistant Attorney General Makan Delrahim, who has previously stated that "antitrust enforcement is law enforcement, not regulation."[17]

[1] *Justice Department Issues Modernized Merger Remedies Manual*, DOJ (Sept. 3, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual.
[2] *Id.*
[3] *See* Antitrust Division Policy Guide to Merger Remedies, DOJ (June 2011), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf; Makan Delrahim, Assistant Attorney General, DOJ, It Takes Two: Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.
[4] Merger Remedies Manual at 13, DOJ (September 2020), *available at* https://www.justice.gov/atr/page/file/1312416/download.
[5] *Id.* at 13-14.
[6] *Id.* at 16.
[7] *Id.* at 6-7.
[8] *Id.*
[9] *Id.* at 8-9.
[10] *Id.* at 11.
[11] *Id.* at 22.
[12] *Id.*
[13] *Id.* at 23-25.
[14] *Id.*
[15] *Id.* at 33-34.
[16] *Id.* at 4.
[17] Makan Delrahim, Assistant Attorney General, DOJ, Statement of Assistant Attorney General Makan Delrahim Before the U.S. House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Dec. 12, 2018), *available at* https://www.justice.gov/opa/speech/statement-assistant-attorney-general-makan-delrahim-us-house-representatives-subcommittee.