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## DOJ's Updated Merger Remedy Manual Reaffirms Longstanding Principles and Formalizes Recent Practice

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On September 3, the Antitrust Division of the U.S. Department of Justice released an updated version of the Merger Remedies Manual that replaces the version released in 2004. The most significant changes to the Manual memorialize current practice and do not alter Division policy, but rather demonstrate a renewed emphasis on existing policies.

### **Longstanding Principles Affirmed by Updated Manual**

The updated manual affirms several principles that have long been fundamental features of the Division's approach to merger remedies. In particular, the updated manual emphasizes that behavioral remedies remain disfavored. In contrast to structural remedies, which affect the structure of the market through the sale of businesses or assets, behavioral remedies govern and restrict the conduct of the merged entity. The Division sees behavioral remedies as inappropriate in most circumstances because they constrain the operation of the free market, can inadvertently restrain procompetitive behavior, and are difficult to tailor narrowly to address competitive concerns as markets evolve over time. The 2020 Manual's emphasis on structural remedies is essentially a return to longstanding Division policy, following a period from 2011 to 2018 when the Division's merger remedy guidance expressed more openness to behavioral remedies. The Division rescinded that guidance in 2018 and reinstated the 2004 Merger Remedies Manual.

The Manual articulates the Division's position that to the extent merger remedies carry any risk of failure that risk should be borne by the parties rather than by consumers. Consistent with that principle, the Manual notes that where there is a trade-off between accepting a smaller but riskier divestiture package versus requiring a larger divestiture package that is more likely to restore pre-merger competition, the Division's preference is to require

the larger divestiture package in order to minimize the risk that a failure to restore pre-merger competition will harm consumers.

The Manual also expresses the Division's longstanding position disfavoring mix-and-match divestitures. Mix-and-match divestitures combine assets of each of the merging parties and are less common than divestiture of just one party's assets. In the Division's view, mix-and-match divestitures increase the risk that the divestiture will not be effective in preserving competition. When assets from multiple parties are configured into a mix-and-match divestiture package, it is difficult for the Division to predict with certainty whether the new combination of assets will constitute a viable entity that can be operated efficiently and will compete effectively.

Another existing Division policy memorialized in the Manual relates to the inclusion of prior notice provisions in consent decrees. Prior notice provisions require the merged entity to notify the Division prior to making future acquisitions that would otherwise be non-reportable under the Hart-Scott-Rodino Act. The Manual notes that such provisions may be appropriate in cases where there are remaining competitors in the market whose acquisition by the merged entity would not be subject to HSR reporting requirements.

Finally, the Manual contains an overview of five standard provisions that must be included in consent decrees as a matter of course, which are designed to bolster the effectiveness and enforceability of consent decrees. These provisions (1) create a preponderance of the evidence standard for the Division to establish a violation of the consent decree and the remedy for that violation, (2) give the Division the right to apply to the court for a one-time extension of the decree in the event that the court finds a party has violated it, (3) allow the Division to terminate a decree upon notice to the court and parties that the remedy is complete and the decree therefore is no longer necessary or in the public interest, (4) provide for the enforceability of any decree provisions that are specific and reasonably detailed, even if they are not clear and unambiguous on their face, and (5) require that the parties reimburse the Division for its costs in the event of a successful enforcement action.

### **Confirmation of Recent Trends**

The Manual formalizes a recent trend of requiring an upfront buyer before the DOJ will approve a merger. Historically, the Division typically approved a divestiture package and allowed the parties to close the deal before identifying a buyer for the divestiture assets. More recently, the Division began requiring merging parties to identify and reach a purchase agreement with an acceptable divestiture buyer before the Division will enter into a consent decree. The Manual confirms that requiring an upfront buyer will be the norm going forward, and that there will only be limited circumstances in which the Division may deem an upfront buyer unnecessary.

The Manual also makes clear that the Division views private equity firms as acceptable divestiture buyers, subject to evaluation under the same criteria as other potential purchasers. Indeed, the Manual states that a private equity buyer may even be preferable in certain instances. The Division cites a recent Federal Trade Commission study of merger remedies, which found that the flexibility and commitment offered by private equity purchasers are sometimes key to the success of a divestiture remedy. The Manual thus weighs in on a recent debate about the appropriateness of private equity firms as divestiture buyers and establishes that the Division is receptive to the practice.

### **Office of Decree Enforcement and Compliance to Oversee Merger Remedies**

The Manual states that the newly created Office of Decree Enforcement and Compliance will be responsible for overseeing and enforcing compliance with merger remedies. The Division announced the creation of this office in August of this year as part of a broader reorganization. The Manual emphasizes the importance of strict

enforcement of remedies, and notes that this new office will oversee ongoing reviews of decree compliance and evaluations of potential consent decree violations.

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