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Memorandum

DOJ Issues Updated Merger Remedies Guidance

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On September 3, 2020, the Department of Justice's Antitrust Division ("DOJ") issued an updated Merger Remedies Manual ("2020 Manual"), which provides important guidance and transparency to parties involved in (or contemplating) transactions which may require remedies (*e.g.*, divestitures) to secure DOJ approval. The updates have been expected since 2018, when Assistant Attorney General ("AAG") Makan Delrahim withdrew the prior 2011 Policy Guide to Merger Remedies—the 2011 policy had endorsed the type of conduct remedies disfavored by the current DOJ.

The following are some of the key takeaways, including positive news for private equity firms as buyers of divested assets directed by the DOJ.

A Restatement of Fundamental Merger Remedy Principles

The DOJ confirmed its commitment to fundamental principles, including the fact that remedies must preserve competition, not protect competitors, and avoid creating ongoing government regulation. Further, the risk of a failed remedy should fall on the merging parties, not on consumers, and the remedy must be enforceable.

Reaffirmation of the DOJ's Strong Preference for Structural Remedies

Motivated by the AAG's withdrawal of the 2011 Policy, the 2020 Manual underscores the DOJ's clear preference for structural remedies (the sale of a business or assets by merger parties) in both horizontal and vertical mergers. As the 2020 Manual notes, "[s]tructural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market." The DOJ's preference for clean structural remedies and disfavor of stand-alone conduct remedies has been one of its signature policies. Notably, the 2020 Manual does leave open the possibility of stand-alone conduct relief where the <u>parties are able to prove</u> that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm; and (4) the remedy can be enforced effectively.

The DOJ Requires Upfront Buyers in Most Cases

The 2020 Manual confirms that an "upfront buyer" requirement (approval of a specific package of assets and buyer of those assets prior to DOJ approval of a merger) will be the default in most cases.

Historically, the DOJ has often agreed to approve (and permit parties to close) subject to approval of the divestiture buyer as part of post-decree divestiture process. But there has been a recent trend towards upfront buyer requirements at the DOJ and FTC.

Private Equity Purchasers May Be Preferred in Some Cases

The 2020 Manual weighs into a current debate over whether private equity firms are acceptable divestiture buyers or should be subject to heightened scrutiny. According to DOJ, it will "use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms. Indeed, in some cases a private equity purchaser may be preferred." The 2020 Manual refers to an FTC study finding that "in some cases funding from private equity and other investment firms was important to the success of the remedy" because of the firm's flexibility, commitment, and willingness to invest. This is, of course, a positive development for private equity firms which have faced more opposition at the FTC (particularly by Democratic FTC Commissioners).

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