DEPARTMENT OF JUSTICE

A Partnership to Promote and Protect Competition for the Benefit of Consumers

BERNARD (BARRY) A. NIGRO, JR.
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for Delivery at
GCR Live 7th Annual Antitrust Law Leaders Forum

Miami, FL

February 2, 2018

I. Introduction

Thank you very much for the kind introduction, and to GCR for hosting this wonderful event. It is an honor to speak to such an impressive group here in Miami. This is an exciting time to be at the Antitrust Division. We have had four agency heads in 12 months, and are happy to now have Assistant Attorney General Delrahim in his office. While the news is inundated with a variety of proposals for antitrust reform, I am struck by how the Department's approach to antitrust enforcement has remained steady, consistently focused on promoting and protecting competition for the benefit of consumers.

For example, I recently read a speech that Attorney General Robert F. Kennedy delivered in November 1961 before the Economic Club of New York on the topic of antitrust enforcement.[1] RFK delivered the speech at the height of the Cold War, when Nikita Khrushchev was plotting to test RFK's brother, President John F. Kennedy, during his first year in office. RFK warned that the Soviet Union "opposes us on every front," including the battle for economic growth.[2] RFK, the chief law enforcement officer of the United States, told the audience that in the face of the Soviet threat, "I believe we can proceed as *partners*—united in a national purpose," going on to say that "in this long and critical struggle, the American system of free enterprise must be our major weapon."[3] RFK explained that the partnership between law enforcement and business is crucial in the area of antitrust, the goal of which is to "protect and promote the competitive interests of business—small and large—as well as to protect the public."[4]

---

[1] "Vigorous Antitrust Enforcement Assists Business," Remarks of Attorney General Robert F. Kennedy Before the Economic Club of New York (Nov. 13, 1961), *available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-13-1961.pdf.
[2] *Id.* at 2.
[3] *Id.* at 3, 10-11 (emphasis added).
[4] *Id.* at 4.

While RFK's words were spoken more than 50 years ago, they still ring true. The Antitrust Division still shares a common goal with the business community of promoting and protecting competition for the benefit of consumers. The Division fulfills its mission by bringing law enforcement actions against activities that threaten the free market. And, it seeks to respect the American system of free enterprise by allowing competition to flourish. I want to talk about how the Antitrust Division can be more effective at accomplishing these goals during the merger review process if the parties appearing before us understand that our interests and their interests often align. Cooperation between the parties and enforcers or "partnership"—to use RFK's word—can be effective in ensuring both that procompetitive transactions are promptly approved and that consumers do not suffer the risk of harm from anticompetitive transactions.

II. A Partnership to Promote the Welfare of Consumers

Importantly, the Division's commitment to promote and protect competition for the benefit of consumers means that we should not be a roadblock to transactions that are procompetitive. Most transactions do not raise competitive concerns. For example, last year the Antitrust Division opened an investigation into only 2.7% of proposed transactions, and issued second requests in only 1.6% of proposed transactions.[5] To be sure, we have a responsibility to conduct a full and thorough review of a transaction during the HSR process, and we should not clear transactions during the initial waiting period if they raise a competitive problem and more information is needed—we want to be confident that harm to consumers will not result. At the same time, we do not want to unnecessarily prolong our review where harm is unlikely to occur. Prolonging the review of procompetitive or competitively neutral transactions does not help, but hurts, American consumers.

[5] U.S. Department of Justice, Antitrust Division Workload Statistics FY 2007 – 2016, *available at* https://www.justice.gov/atr/file/788426/download.

As my colleague, Deputy Assistant Attorney General Kempf, explained in a speech this past November, shortening our review of transactions "furthers the Antitrust Division's mission, which is to promote competition."[6] The Division shares Deputy Kempf's ambition to cut the length of our investigations, because when a transaction is procompetitive, not only do consumers benefit, but the interests of the Division and the parties in avoiding a prolonged review ought to be aligned. To that end, we are considering ways that we can improve our internal review processes at both the staff and front office level.

We have a long way to go. Last month, a report was released showing that the duration of the DOJ's and FTC's merger reviews increased from 2016 to 2017.[7] We also see this trend, which appears to be based to some extent on the increasing number of multinational deals and extended time frame of many of our international counterparts. This is a trend we need to reverse, but the Antitrust Division cannot do it alone.

Most importantly, we need the help of the parties—early and often—to undertake a proper analysis before concluding that any possible anticompetitive concerns are unfounded. Going into any HSR review, the parties have an enormous information advantage. They can capitalize on this advantage to the benefit of their shareholders and consumers by being more proactive during the initial waiting period.

How can the parties "win" at this stage and persuade the Division to clear the transaction rather than issuing a second request? I like to analogize the initial review period to the pleading stage in civil litigation, and the parties' advocacy during that period to a 12(b)(6) motion, or

[6] Donald G. Kempf, Jr., Deputy Assistant Attorney General – Antitrust Division, "Merger Reviews: Do They Take Too Long?" at 2 (Nov. 17, 2017), https://www.justice.gov/opa/speech/file/1012156/download.

[7] Matthew Perlman, "Length of US Merger Reviews Continues To Climb," Law360.com (Jan. 17, 2018), https://www.law360.com/articles/1002166/length-of-us-merger-reviews-continues-to-climb (finding that the duration of the DOJ's and FTC's merger investigations rose from 9.7 months in 2015, to 9.9 months in 2016, to 10.8 months in 2017).

perhaps an early summary judgment motion, that can dispose of a case without the need for extensive discovery.

My first suggestion is: don't always rush your HSR filing. The public announcement of a transaction, or the terms of the transaction agreement, can create pressure to expedite the HSR filing in the hope that the sooner the antitrust review process starts, the sooner it will end. That logic is not always the case, however, if the rush to a judgment results in a second request that otherwise could have been avoided. If you believe you have a strong argument that a second request is unnecessary, and that with more than the time permitted during the initial waiting period, you can persuade us, then consider deferring your HSR filing and using the time to provide us with arguments, based on facts that we can confirm, why the transaction poses no risk of harm to consumers.

My second suggestion follows from the first: as soon as possible, give us your strongest arguments for why a more fulsome investigation is not merited. In the initial waiting period, a high level white paper re-hashing the rationale for the deal and the reasons not to worry often won't cut it. Arguments for closing our investigation without a second request should include facts that we can confirm through your document productions and through our own independent investigation and interviews of third parties. Parties should be prepared to provide key information to us within the first few days of their HSR filing, if not *before* filing, to avoid jamming the staff. This includes, for example:

- Names and phone numbers of major customers.
- Bid data for key transactions.
- Areas of product overlap.
- Internal analyses of competitors in areas of product overlap.

- Business and strategic plans for areas of overlap.
- Analyses of the proposed transaction conducted internally or by consultants.

It is important to note that we cannot conduct our review effectively during the initial waiting period unless you provide us the information we need *early*. Parties too often expect us to work miracles by providing critical information us too late in the process, leaving inadequate time to confirm the facts and vet the arguments.

My third suggestion is: if you decide to pull-and-refile the HSR, actively use the extra time to your benefit. Too often, parties pull-and-refile because they took a wait and see approach during the initial waiting period and now need to play catch-up. The result is that we find ourselves in the same position we were in at the end of the initial period—key questions remain unanswered, and the parties rehash their initial pitch while providing little additional evidence.

The bottom line is that the parties' substantial information advantage is an asset you should exploit from the start to build a compelling "motion to dismiss." Unfortunately, parties often wait to make their strongest advocacy pitches and evidentiary submissions too late in the process. They wave their hand like they're using a Jedi mind trick hoping to convince us there's nothing to see, even though significant areas of concern are obvious: "These are not the droids you're looking for. … Move along, move along." Having served in leadership roles at both the FTC's Bureau of Competition and the Antitrust Division, I can assure you that if there are significant areas of possible anticompetitive harm, we will almost certainly find them. But we are not, in 30 to 60 days, magically going to get what we need to determine that possible harm to consumers posed by a potentially problematic transaction is unfounded. You need to get it to us, and we are here to listen.

III. A Partnership to Fully Remedy Harm to Competition and Consumers

Though cooperation is important to promptly clearing procompetitive transactions that benefit consumers, it is also critical in effectively remedying anticompetitive transactions. The question with anticompetitive transactions is whether or how a transaction can be fixed to promote and protect competition for the benefit of consumers. We take seriously the choice of remedy, because consumers bear the risk of mistakes, and if we get it wrong, the consequences can be irreversible. Our client is the American consumer, and therefore it is our view, having been presented with an anticompetitive transaction, that the risk of a failed remedy must be borne by the parties, not the consumer. Any remedy must be complete and effective—or, as the Supreme Court put it, "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'"[8] If we cannot reach a solution with the parties that will accomplish these goals, then we are left with no choice but to sue to block. That includes instances where a transaction may have already cleared HSR. The lesson of the Parker-Hannifin post-clearance challenge should be that the Division will not look the other way if it determines—even after the HSR waiting period has expired—that the transaction is anticompetitive.[9]

A. Antitrust Enforcers Are Not Regulators

While I have been discussing the importance of cooperation and partnership, in crafting a remedy, the Division and its leadership do not approach their mission as that of a friendly regulator. To the contrary, as Assistant Attorney General Delrahim has emphasized, antitrust is law

[8] Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) (*quoting* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961)).

[9] Press Release, Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business (Sept. 26, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.

enforcement, not regulation. The Division will therefore continue to favor structural remedies over regulatory, behavioral remedies.

The imposition of a behavioral remedy inverts the Division's role into something it is not—the hall monitor for private businesses operating in a free market economy. Even worse, a behavioral approach raises serious risks of false negatives and false positives. Antitrust economists and attorneys across the ideological spectrum have recognized that behavioral decrees may simply be ineffective at remedying harm to competition. As FTC Commissioner Terrell McSweeny explained last year, behavioral relief "at best only delays the merged firm's exercise of market power."[10] In addition, trying to regulate corporate behavior creates challenges monitoring and enforcing compliance. It should be no surprise that we find ourselves too often in the business of expending scarce taxpayer resources investigating possible violations of regulatory decrees, all aimed at ensuring that consumers do not suffer the harm the decree attempted to regulate away.

Behavioral decrees also can be the source of false positives. As a tool in our tool kit, it may be tempting for us to impose a behavioral decree where certain aspects of a transaction raise concerns—even if the transaction does not strictly violate Section 7. That approach is fundamentally flawed. Unless we conclude that a particular aspect of a transaction would be anticompetitive, we should not impose a "cure" at all. We are not in the business of prescribing long-term therapeutic relief to a healthy marketplace. Nor are we part of a cooperative enterprise to enhance our power over industry, particularly when doing so harms our client—the American consumer. Imposing a regulatory decree where none is merited can threaten to slow innovation

[10] Reflections on an Active Year in Merger Enforcement, Keynote Remarks of Commissioner Terrell McSweeny, GCR Live 5th Annual Antitrust Law Leaders Forum, at 5-6, Feb. 5, 2016, *available at* https://www.ftc.gov/system/files/documents/public_statements/914983/mcsweeny_-_gcr_miami_keynote_speech_2-5-16.pdf.

and impose unnecessary costs that may be passed on to the public in the form of higher prices or lower quality.

B. Protecting Consumers Requires a Remedy that Promotes and Protects Competition

Our responsibility to American consumers obligates us to accept only a complete and effective solution to anticompetitive transactions. This is why, in addition to the many problems with regulatory decrees, the Division favors structural fixes that promote and protect competition rather than substitute competition with regulation.

I want to be clear what we mean when we refer to structural remedies. The most effective and complete form of a divestiture is the sale or spin-off of an ongoing or stand-alone business that will create an *independent competitor* to the merging companies. Yet, we have witnessed a trend toward the use or proposed use of asset carve outs that attempt to create a stand-alone business from a collection of assets that previously did not function in the form they will take for purposes of the divestiture. Asset carve-outs put us—just a bunch of government lawyers—in the position of having to guess whether this collection of assets, reconstituted in the hands of a new owner, and often dependent on the old owner and future competitor for critical inputs and support, will promote and protect competition by creating an independent and effective competitor. These types of proposals are inherently suspect, for several reasons.

First and foremost, we can be confident that a clean divestiture of a stand-alone business, unlike an asset carve-out, in the hands of a qualified divestiture buyer will have the resources it needs to be an independent and effective competitor. Where courts have analyzed whether a proposed remedy is sufficient—that is, in "litigating the fix" cases—they have been understandably concerned by proposals whose scope would fail to preserve competition. In *United States v. Aetna*, for example, Judge Bates rejected the merging parties' fix because there was

persuasive evidence that the divestiture buyer "would struggle to put together a competitive provider network in the available time frame."[11] In other words, the goal of a divestiture is not to simply remove the offending combination; rather, it is to promote and protect competition by preserving the status quo competitive dynamic in the market from day one.

In addition, asset carve outs are fraught with execution risk, especially when they involve assets in multiple foreign jurisdictions that require non-antitrust regulatory approvals in order to transfer the business to an independent competitor. The GE/Baker Hughes merger is illustrative. Last year, General Electric acquired Baker Hughes in a transaction that would have combined two of the leading providers of refinery process chemicals and services in the United States.[12] In June 2017, the parties and the Division entered into a consent decree that required GE to divest its Water & Process Technologies unit, so that the divested entity would operate as a completely independent, economically viable, and ongoing business concern.[13] Subject to the decree, the parties closed the transaction. The decree required GE to complete its divestitures within 90 days[14]—that is, in September 2017—so that a global competitor would exist promptly after the close of the transaction. But as the deadline neared, we learned from the parties that they would not be able to complete the necessary global divestitures until well into 2018 due to various complications related to the regulatory approvals.[15]

[11] United States v. Aetna Inc., 240 F. Supp. 3d 1, 73 (D.D.C. 2017).
[12] Complaint, United States v. General Electric Co. & Baker Hughes Inc., No. 1:17-cv-01146, ¶ 1 (ECF No. 1) (D.D.C. June 12, 2017), *available at* https://www.justice.gov/atr/case-document/file/973111/download.
[13] Competitive Impact Statement, United States v. General Electric Co. & Baker Hughes Inc., No. 1:17-cv-01146, at 2 (ECF No. 3) (D.D.C. June 12, 2017), *available at* https://www.justice.gov/atr/case-document/file/973116/download; [Proposed] Final Judgment, United States v. General Electric Co. & Baker Hughes Inc., No. 1:17-cv-01146, at 7 (ECF No. 2-2) (D.D.C. June 12, 2017), *available at* https://www.justice.gov/atr/case-document/file/973131/download.
[14] *Id.* at 5.
[15] Press Release, Justice Department Require General Electric Company to Make Incentive Payments to Encourage Completion of Divestitures Agreed to as a Condition of Baker Hughes Merger, Oct. 17, 2017, *available at* https://www.justice.gov/opa/pr/justice-department-requires-general-electric-company-make-incentive-payments-encourage.

Another reason why divestiture of a stand-alone business is preferred is because an asset carve-out does not fully sever the business line's relationship with the divestiture seller. When the divested business has an ongoing relationship with its prior owner as a result of various entanglements, it raises a question whether the divestiture will promote and protect competition. Judge Bates in *Aetna* identified this risk as well, noting that courts are "skeptical" of divestitures that require a continuing relationship between the seller and the buyer that "leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor."[16]

Our skepticism toward less-than-complete divestitures is well-supported by empirical research. In particular, the FTC's 2017 Merger Remedies report found that divestiture remedies between 2006 and 2012, by and large, were either "successful" or "qualified successful."[17] The report nevertheless identified instances where divestitures did not succeed. Why did some divestitures succeed while others failed? The truth lies in the numbers. As the FTC found, divestitures of "ongoing businesses" had a 100% success rate and 0% failure rate, whereas divestitures of "selected assets" had an estimated 60% success rate, a 10% "qualified success" rate, and a 30% rate of failure.[18] Parties proposing divestitures would be well-advised to review this study and its proposed best practices.

To be clear, we will not rush our review if doing so risks a less-than-complete remedy that fails to fully promote and protect the competitive status quo from which consumers benefit. Parties may understandably resist a divestiture, but doing so when it is integral to completely and

[16] United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).
[17] FTC'S MERGER REMEDIES 2016-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS, at 18 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.
[18] *Id.* at 22.

effectively remedying an anticompetitive transaction places too much risk on the American consumer.

C. Protecting Consumers Through Effective Law Enforcement

Regardless of the type of remedy, it is important to make it effective and ensure that the government can take the necessary actions to swiftly address a violation. As Assistant Attorney General Delrahim highlighted last week in a speech before the New York State Bar Association, the Division is including new provisions in its consent decrees designed to improve their effectiveness and the Division's ability to enforce them and protect competition.[19]

A key provision requires defendants to agree that, in any civil contempt action or similar action brought by the United States, the government may establish the violation and the appropriateness of any remedy by a preponderance of the evidence. By comparison, the clear-and-convincing standard of proof that applies in the absence of such an agreement compromises the Division's ability to enforce critical commitments made by the parties to remedy an anticompetitive transaction. Unfortunately, when the ability to enforce such commitments is limited, it is the consumer who suffers. The parties' agreement to a preponderance standard encourages a stronger commitment to compliance and a more cooperative approach to promptly resolving potential violations.

With respect to consent decree duration, the new provisions also embrace a cooperative, carrot-and-stick approach to enforcement. The new decree provisions allow the United States to terminate the decree upon notice to the court and the defendants if it determines that there is no longer a risk of harm—freeing the parties, the court, and the Division from ongoing oversight obligations. Otherwise, we risk becoming a regulatory agency, and we already have our hands full

[19] Makan Delrahim, "Improving the Antitrust Consensus," at 6-9 (Jan. 25, 2018), *available at* https://www.justice.gov/opa/speech/file/1028896/download.

dealing with over 1000 decrees, some more 100 years old, all of which we are currently reviewing. On the other hand, the new provisions permit the United States to apply to the court for an extension of the decree's term if a court finds the parties have been out of compliance with its requirements.

Finally, the new decree provisions ensure that the parties bear the cost of enforcement actions. They require defendants to agree to reimburse the taxpayers for attorneys' fees, expert fees, and costs incurred in connection with any consent decree enforcement effort.

This past December, in the week before Christmas, the Defense, Industrials, and Aerospace Section of the Antitrust Division filed settlements resolving its prosecutions against three unlawful mergers—Vulcan/Aggregates USA,[20] Transdigm/Takata,[21] and Parker-Hannifin.[22] Each decree required divestitures instead of behavioral conditions, and each included these provisions. The Division will continue to insist that these terms be included in future merger and civil non-merger settlements as a way to promote and protect competition and avoid the harm to consumers that results from anticompetitive transactions and ineffective decree enforcement.

Conclusion

To sum up, we should not lose sight of the fact that the ultimate goal of the antitrust laws—to protect competition—benefits private enterprise and American consumers alike. RFK had the wisdom to recognize the unique role antitrust law plays in our free market system, and that it can only fulfill its promise through vigorous law enforcement. At the Antitrust Division, we hope to

[20] Press Release, Justice Department Requires Vulcan to Divest 17 Aggregate Facilities in Order to Acquire Aggregates USA, Dec. 22, 2017, *available at* https://www.justice.gov/opa/pr/justice-department-requires-vulcan-divest-17-aggregate-facilities-order-acquire-aggregates.

[21] Press Release, Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired from Takata, Dec. 21, 2017, *available at* https://www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired.

[22] Press Release, Justice Department Reaches Settlement with Parker-Hannifin, Dec. 18, 2017, *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin.

carry that mantle, and in partnership with private industry, to promote and protect competition for the benefit of consumers.