

DOJ Issues Merger Remedies Manual as Both DOJ and FTC Step Up Efforts to Enforce Consent Decrees

Separate DOJ/FTC Guidance Highlights Differences Between Agencies' Approaches to Remedies

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The U.S. Department of Justice (DOJ) Antitrust Division issued a new *Merger Remedies Manual* on September 3, clarifying the analytical framework it is using to evaluate remedies that may address competitive harms stemming from proposed mergers and acquisitions, as well as from consummated mergers.¹ In announcing the modernized *Manual*, Assistant Attorney General Makan Delrahim said that it reflects DOJ's "renewed focus on enforcing obligations in consent decrees and reaffirms the Division's commitment to effective structural relief."² The *Manual* also "includes new sections explaining the approach that the [D]ivision takes with consummated transactions."³

The *Manual* replaces the 2004 *Antitrust Division Policy Guide to Merger Remedies* issued during the Bush administration,⁴ which has been in effect since Delrahim announced in 2018 that he was withdrawing an updated Policy Guide issued in 2011, during the Obama administration.⁵ Of note, the *Manual* was issued by the DOJ alone. This is unlike both the *Horizontal Merger Guidelines*, which have been issued jointly by the Federal Trade Commission (FTC) and the DOJ since 1992, and the *Vertical Merger Guidelines* issued jointly earlier this year, which similarly reflect both agencies' views.

Three points are particularly noteworthy: the *Manual* (1) reinforces certain well-established principles regarding remedies to address horizontal mergers, (2) attempts to institutionalize Delrahim's opposition to the use of conduct remedies to address vertical mergers, and (3) reinforces efforts to ensure the effectiveness of and compliance with consent agreements.

¹ U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MERGER REMEDIES MANUAL (2020) [hereinafter *Manual*], available at <https://www.justice.gov/atr/page/file/1312416/download>.

² Press Release, U.S. Dep't of Justice, *Justice Department Issues Modernized Merger Remedies Manual* (Sept. 3, 2020), available at <https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual>.

³ *Id.*

⁴ U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004) [hereinafter *2004 Merger Remedies Guidelines*], available at <https://www.justice.gov/atr/page/file/1175136/download>.

⁵ U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2011) [hereinafter *2011 Merger Remedies Guidelines*], available at <https://www.justice.gov/atr/page/file/1098656/download>.

The Manual Reinforces Established Principles of Merger Remedies

Guiding Principles. The new *Manual* highlights key principles that guide the DOJ when structuring remedies:

1. The purpose of a remedy is to preserve competition at premerger levels.
2. Remedies should not create ongoing government regulation of the market.
3. Temporary relief should not be used to remedy persistent competitive harm.
4. The remedy should preserve competition, not protect competitors.
5. The risk of a failed remedy should fall on the merging parties, not on consumers.
6. The remedy must be enforceable.

Scope of Divestiture Package. The *Manual* emphasizes that a divestiture must include the assets necessary to ensure that the divestiture buyer will be a viable, long-term competitor in the marketplace, as well as to ensure that the buyer has the *incentive* to preserve competition.

The *Manual* outlines “red flags” indicating that a remedy will not be acceptable, which include (1) divestiture of less than a standalone business, (2) mixing and matching of assets from merging parties, (3) allowing the parties to retain critical intangible assets that may make it more difficult for the divestiture buyer to differentiate its product or reduce its incentive to compete, (4) ongoing entanglements between the merging parties and the divestiture buyer that may leave the divestiture buyer dependent on the merged firm or facilitate collusion, and (5) substantial regulatory or logistical hurdles.

The *Manual* also describes the criteria used to vet potential divestiture buyers, stating that a divestiture buyer will be approved only after the DOJ is satisfied that an acquisition by the buyer does not cause competitive harm, the purchaser has the incentive to use the assets to compete in the relevant market, and the purchaser has “managerial, operational, technical and financial capability.”⁶ Interestingly, the *Manual* suggests that in some cases a private equity purchaser may be preferred, citing a 2017 FTC merger remedy study that found that flexibility in financing was an important determinant of a remedy’s success.⁷ This is despite concern expressed by FTC Commissioner Rohit Chopra regarding private equity divestiture buyers, unless subject to prior notice obligations on subsequent sales.⁸

The *Manual*’s emphasis on the vetting of potential buyers reflects the agency’s increasing scrutiny of divestiture buyers and packages. Indeed, despite Delrahim committing in 2018 to speed up both investigation and remedy phases,⁹ investigations have been delayed in recent years. The DOJ has recently said that while the average time to notify parties of its

⁶ *Manual*, at 24.

⁷ *Id.*

⁸ See, e.g., Statement of Commissioner Rohit Chopra, Linde AG, Praxair, Inc., and Linde PLC, FTC File No. 1710068 (Oct. 22, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

⁹ See Press Release, U.S. Dep’t of Justice, *Assistant Attorney General Makan Delrahim Delivers Remarks at the 2018 Global Antitrust Enforcement Symposium* (Sep. 25, 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>.

position is 5.7 months, “discussions regarding a proposed fix or a meeting with the Front Office adds time.”¹⁰

Manual Codifies DOJ’s Current Opposition to Conduct Remedies to Address Vertical Merger Concerns

Although the DOJ and FTC have rejected conduct remedies—such as price controls—to address mergers between horizontal competitors, both agencies have in the past accepted conduct remedies to address vertical transactions. This practice was codified in the *2011 Merger Remedies Guidelines*, which reasoned that in some situations conduct remedies may be the “best choice” to preserve competition while allowing efficiencies to be realized from a proposed merger.¹¹

During the Trump administration, the DOJ has expressed skepticism of conduct remedies. Indeed, in one of his first speeches as Assistant Attorney General in November 2017, Delrahim argued that “antitrust is law enforcement, it’s not regulation.”¹² While recognizing that “at times antitrust enforcers have experimented with allowing illegal mergers to proceed subject to certain behavioral commitments,” he said “[t]hat approach is fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market,” thus foreshadowing DOJ’s effort to enjoin the AT&T/Time Warner merger.¹³ The *Manual* takes the position that structural remedies are the preferred approach in *both* horizontal and vertical mergers, given that they are “clean[,] . . . certain, [and] effective.”

The new *Manual* places the burden on merging parties to show that conduct relief is an appropriate remedy by establishing 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. Although the *Manual* is critical of conduct remedies standing alone, the DOJ takes the position that “[t]ailored conduct relief may be useful . . . to facilitate effective structural relief,” such as requiring a temporary supply agreement with a divestiture buyer and imposing restrictions on the merged firm rehiring employees transferred to the divestiture buyer.

Current FTC leadership has expressed skepticism of conduct remedies but has accepted them in some cases. Thus, in June 2018, FTC Chairman Joseph Simons argued that “the best approach is a non-behavioral remedy” and said that the FTC will accept behavioral remedies “rarely, in very limited circumstances.”¹⁴

¹⁰ Makan Delrahim, Remarks at Media Institute Luncheon, “*Getting Better*”: Progress and Remaining Challenges in Merger Review (Feb. 5, 2020), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-media-institute-luncheon>.

¹¹ *2011 Merger Remedies Guidelines*, *supra* Note 5, at 3–4.

¹² Makan Delrahim, Keynote Address at American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

¹³ *Id.*

¹⁴ Kirk Victor, *Simons signals ‘interest’ in high-tech platforms, other priorities*, FTCWATCH, MLEX US

Notably, in June 2018, the FTC accepted a consent agreement imposing behavioral remedies to address a vertical merger between Northrop Grumman, a missile provider, and Orbital ATK, a supplier of solid rocket motors used in Northrop Grumman's and its competitors' systems. Northrop Grumman committed to maintain a firewall between the businesses as well as to supply competitors on nondiscriminatory terms.¹⁵

Similarly, in January 2019, the Commission accepted a conduct remedy to resolve concerns stemming from the acquisition by Staples, a reseller of office products, of Essendant, a distributor of office products that supplied Staples's competitors. The FTC alleged that the merger would provide Staples with access to commercially sensitive business information on Essendant's reseller customers and those resellers' end customers, which could allow Staples to offer higher prices when bidding against a reseller for an end customer's business. To resolve those concerns, the settlement required the establishment of a firewall restricting access to information of Essendant's customers.¹⁶

Meanwhile, the DOJ's refusal in AT&T/Time Warner in 2018 to accept behavioral remedies in AT&T/Time Warner similar to those accepted by the Obama DOJ to resolve concerns with the Comcast/NBC Universal merger is one reason that matter was litigated, and AT&T's unilateral commitment to similar conduct explains, at least in part, DOJ's loss.

The DOJ/FTC joint *Vertical Merger Guidelines's* failure to address remedies was a notable omission given this divergence.

Interestingly, at the FTC, the current Democratic Commissioners have expressed skepticism of conduct remedies, though their primary concern appears to be related to under-enforcement rather than to conduct remedies conceptually. For example, Commissioner Slaughter dissented in *Staples/Essendant*, expressing concern that "the [FTC's] approach to vertical integration has led to substantial under-enforcement." She argued that "among the enforcement actions that the Commission brings, many are settled with behavioral remedies rather than divestitures, and few of our enforcement actions challenge vertical mergers outright. . . . Where the Commission identifies competitive concerns, it should be more willing to challenge and seek to block vertical mergers."¹⁷ Commissioner Chopra has expressed the view that remedies approved by the majority did not go far enough to preserve competition, noting that Essendant would

(July 2, 2020), available at <https://www.mlexwatch.com/articles/3184/simons-signals-interest-in-high-tech-platforms-other-priorities>.

¹⁵ Decision and Order, Northrop Grumman Corp. and Orbital ATK, Inc., FTC File No. 1810005 (Dec. 3, 2018), available at https://www.ftc.gov/system/files/documents/cases/181_0005_c-4652_northrop_grumman_orbital_atk_modified_decision_and_order_12-4-18.pdf.

¹⁶ Decision and Order, Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc., FTC File No. 1810180 (Jan. 25, 2019), available at https://www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_do_and_apps_a-g-redacted_public_version.pdf.

¹⁷ Statement of Commissioner Rebecca Slaughter, Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc., FTC File No. 1810180 (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf.

have the incentive to increase prices postmerger, and that while “the firewall will reduce the chance of misuse of data, it does not eliminate it.”¹⁸

Thus, it seems unclear whether a Biden administration may return to the Obama administration’s practice of accepting conduct remedies to resolve concerns raised by vertical mergers, or whether the appointment of a third Democrat at the FTC might lead to alignment between DOJ and the FTC and curtail the use of behavioral remedies.

New Manual Issued as Agencies Attempt to Ensure Effectiveness and Compliance with Consent Decrees

Issuance of the *Manual* coincides with initiatives at the DOJ and FTC to ensure compliance with and the enforceability of consents. At the DOJ, in 2017, Delrahim introduced four new terms into DOJ consent decrees: (1) lowering the standard to establish alleged violations from clear and convincing evidence to a preponderance of the evidence, (2) requiring defendants to compensate the government for attorney’s fees and costs in connection with monitoring and enforcement of consent decrees, (3) allowing the DOJ to extend the consent decree in the event of a violation, and (4) allowing the DOJ unilaterally to terminate the decree.¹⁹ These terms are memorialized in the new *Manual* as “standard provisions.” In August 2020, Delrahim announced the creation of the Office of Decree Enforcement and Compliance to oversee review of decree compliance and investigate potential decree violations.²⁰

The FTC also completed a merger remedy retrospective in 2017 to review its approach to merger remedies, which found that while FTC orders issued between 2006 and 2012 had generally succeeded, improvements could be made to the scope of divestiture packages and certain terms in consent orders.²¹ FTC officials have more recently said that the agency would require the divestiture of on-market, rather than pipeline products, to resolve concerns raised by pharmaceutical mergers to ensure that the “the risk of failure be placed on the parties to the merger,” rather than on consumers.²² Indeed, as a condition to permitting Bristol Myers Squibb’s (BMS) \$74 billion acquisition of Celgene, the FTC required a \$13.4 billion divestiture of Celgene’s Otezla after concluding that

¹⁸ Statement of Commissioner Rohit Chopra, Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc., FTC File No. 1810180 (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448335/181_0180_staples_essendant_chopra_statement_1-28-19_0.pdf.

¹⁹ See Makan Delrahim, Remarks as Prepared for New York State Bar Association Antitrust Section, *Improving the Antitrust Consensus* (Jan. 25, 2018), available at <https://www.justice.gov/opa/speech/file/1028896/download>.

²⁰ Press Release, U.S. Dep’t of Justice, *Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division’s Civil Enforcement Program* (Aug. 20, 2020), available at <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil>.

²¹ U.S. FED. TRADE COMM’N, *THE FTC’S MERGER REMEDIES 2006-2012* (2017), available at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

²² D. Bruce Hoffman, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum, *It Only Takes Two to Tango: Reflections on Six Months at the FTC* (Feb. 2, 2018), available at **Error! Hyperlink reference not valid.**

BMS's oral product to treat psoriasis under development would likely be the next entrant into the market for oral products treating moderate-to-severe psoriasis.²³

The agencies have also recently brought actions to enforce consent decrees. In July 2020, for instance, Alimentation Couche-Tard and CrossAmerica Partners LP agreed to pay a \$3.5 million civil penalty for failing to divest retail fuel stations and provide accurate compliance reports required by a consent decree.²⁴ In December 2019, Live Nation and Ticketmaster agreed to modifications to a 2010 consent decree to resolve concerns that the companies had violated the decree's nonretaliation and nondiscrimination provisions. The modified decree clarifies the types of conduct that violate the decree and extends its term by 5 years.²⁵

Key Takeaways

The DOJ *Manual* reinforces certain well-established principles regarding remedies to address horizontal mergers, including that the purpose of a remedy is to preserve competition at premerger levels and that the remedy should preserve competition, not protect competitors. While the *Manual* is issued by the DOJ alone, in this sense the *Manual* reflects the practice at both the FTC and the DOJ. Looking forward, it remains to be seen if the *Manual* will institutionalize Delrahim's resistance to the use of conduct remedies to address vertical mergers at the DOJ, and, if it does, if that approach will be adopted at the FTC. One thing is certain — merging companies can expect both agencies to continue their efforts to ensure the effectiveness of and compliance with consent agreements.



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²³ Decision and Order, Bristol-Myers Squibb Co. and Celgene Corp., FTC File No. 1910061 (Jan. 9, 2020), available at https://www.ftc.gov/system/files/documents/cases/191_0061_c4690_bms_celgene_decision_and_order.pdf.

²⁴ Proposed Final Judgment, FTC v. Alimentation Couche-Tard Inc., No. 1:20-cv-01816 (D.D.C. July 6, 2020), available at <https://www.ftc.gov/system/files/documents/cases/actfinaljudgment.pdf>.

²⁵ Proposed Amended Final Judgement, United States v. Ticketmaster Entm't, No. 1:10-cv-00139-RMC (D.D.C. Jan. 8, 2020), available at <https://www.justice.gov/atr/case-document/file/1233416/download>.