Questions for the Record from Rep. Buck of Colorado for Assistant Attorney General Jonathan Kanter
"Oversight of the Department of Justice Antitrust Division"
November 14, 2023

1. Mr. Kanter, I'm concerned with reports of anti-competitive conduct in the aluminum industry. Purchasers of aluminum – including the beer industry which uses over $2.5 billion worth of aluminum in cans annually – say that they are encountering serious pricing irregularities and potential anti-competitive conduct by aluminum producers, merchants, traders, and others which they believe warrant investigation by the Justice Department. These pricing irregularities have artificially increased the price of aluminum significantly beyond what it should be on the free market, costs which are inevitably passed along to consumers. The beverage industry estimates that U.S. beer, soft drink and other consumers have paid hundreds of millions of dollars in the form of excessive inflated aluminum costs annually due to the artificially high price of aluminum.

   One source of these increased prices appears to be unexplained spikes in the "Midwest Premium" (the MWP), an index that is charged to all end users of aluminum in the United States, supposedly for the cost of storage and transportation of aluminum. For no apparent market-based reasons, the MWP has undergone sharp price spikes in recent years, occasionally followed by sharp declines. These irregular price changes have occurred even though logistical costs of sourcing metal from within the U.S. and around the world has had minimal change, with no significant increases in the cost to transport or store aluminum. One industry ratings source, Platts, has a monopoly on the setting of the Midwest Premium, and credible allegations exist that this MWP is subject to market manipulation in conjunction with major producers and traders.

   In my view these reports of market distortions are highly suspicious and merit serious investigation by the Justice Department's Antitrust Division. I have been told a major beer company has recently raised concerns about this issue with the career staff at the Antitrust Division, and has presented your staff with evidence and legal arguments.

   QUESTION 1: Do you agree that these allegations are disturbing and warrant an antitrust investigation at the Antitrust Division?

RESPONSE:

While longstanding Department policies and practice generally prevent us from commenting on or confirming or denying the existence of any investigation, the Division remains committed to seriously examining complaints of anticompetitive conduct from industry participants with on-the-ground experience of market realities. The Antitrust Division will take all appropriate action when our investigations identify conduct that harms competition or the competitive process in aluminum, or any other market.

QUESTION 2: Will you commit to have the Antitrust Division seriously examine these allegations and the issue of whether anticompetitive conduct is the cause of undue price increases in the aluminum market?

RESPONSE:

Longstanding policy and practice of the Department generally prevent us from commenting on or confirming or denying the existence of any investigation. However, as a general matter, the Division takes seriously all allegations from participants in the market and remains dedicated to promoting and preserving competition in aluminum markets.

2. Mr. Kanter, one specific issue that has arisen with respect to the pricing of aluminum has to do with the prices charged to aluminum end users including a duty on metal not subject to any tariff. Beer manufacturers report that aluminum producers have been overcharging them on the aluminum used in beer cans. With respect to beer cans, I am informed that over 70% of beer cans are made from US recycled used beverage containers and scrap, and aluminum produced in Canada (which is not subject to any tariff), and not from imported aluminum subject to a tariff. However, beer and beverage companies have been paying as if 100% of their aluminum is imported as all aluminum producers are charging a price index called the "duty paid MWP," which as its name suggests, includes a duty—even though no tariff is owed for the bulk of this metal. One major beer manufacturer has requested that the producers charge them a price index that does not include a duty assessment, but all of the producers have unanimously refused to do so.

   The practice of aluminum suppliers charging their customers a price that includes a tariff—when that metal was never subject to any tariff—is abusive and deceptive. Additionally, all aluminum producers unanimously refusing to change this practice is suggestive of collusive conduct.

   QUESTION 3: Mr. Kanter, will you pledge to examine this issue?

RESPONSE:

Longstanding policy and practice of the Department generally prevent us from commenting on or confirming or denying the existence of any investigation. However, the Division seriously examines complaints of anticompetitive conduct from industry participants with on-the-ground experience of market realities, and the Division remains dedicated to promoting and preserving competition in aluminum markets.

3. Mr. Kanter, in the Burnett/Sitzer case in the Western District of Missouri, a jury recently found that through the buyer-broker commission rule Defendants had entered a conspiracy in violation of the Sherman Act and awarded $1.785 billion in damages. According to research conducted by KEEFE, BRUYETTE & WOODS, consumers pay $100 million annually in real estate commissions and it is their belief that the "annual commission pool could decline by upwards of 30% over time as these changes bring additional transparency to consumers around commission rates, which could decline by

200 bps or more." Given that the buyer-broker commission rule affects U.S. consumers throughout the entire country and continues to be in force despite the jury's findings, what actions does the Department of Justice plan to take in the Burnett/Sitzer case and similar cases being filed around the country?

RESPONSE:

Protecting competition in the real estate industry is among the highest priorities for the Antitrust Division. For American families, home ownership is an important vehicle for wealth and equity accumulation. The purchase and sale of a home is often the largest financial transaction a typical American family will ever undertake. Promoting competition for the fees that sellers and buyers face can result in billions of dollars of savings for U.S. homebuyers. Pursuant to our mission, and consistent with the facts and the law, the Antitrust Division will use its enforcement and advocacy tools to address anticompetitive policies, practices, and rules in the residential real-estate industry. By way of example, since 2021, the Antitrust Division has filed five statements of interest and amicus briefs in antitrust cases involving competition and real estate.

QUESTION 4. Given the expiration of the Cooperative Agreement between Verisign and NTIA in November of 2024, will the DOJ undertake a full competition review of the .com space and provide guidance to NTIA, as it did in 2006 and 2012?

RESPONSE:

The Antitrust Division is committed to protecting competition throughout the internet ecosystem. The Division has and will continue to work with NTIA to advocate for robust competition in the Domain Name System. The Antitrust Division will also pursue enforcement when necessary and appropriate under the facts and the law.

Questions for the Record from Rep. Fitzgerald of Wisconsin for Assistant Attorney General Jonathan Kanter
"Oversight of the Department of Justice Antitrust Division"
November 14, 2023

1. On June 29, 2023, the Federal Trade Commission (FTC) and DOJ published a proposal that included changes to the Hart-Scott-Rodino (HSR) premerger notification form. I am concerned about DOJ and FTC's interpretation of the Merger Filing Fee Modernization Act (MFFMA). As you know, a bill I introduced last Congress, the Foreign Merger Subsidy Disclosure Act, was included in this bill. Unfortunately, the proposed changes to the HSR form go far beyond congressional intent. Specifically, the MFFMA ratified the Agencies' prior, longstanding approach to the HSR process: requiring a relatively light initial notification with the possibility of a sweeping second request. Can you explain the decision to go beyond congressional intent?

RESPONSE:

The FTC and DOJ (collectively, the Agencies) have undertaken a review of the HSR premerger notification form that is consistent with the Agencies' statutory authority and responsive to the requirements of the Merger Filing Fee Modernization Act of 2022. As outlined in the Notice of Proposed Rulemaking (NPRM), these changes will "improve the efficiency and effectiveness of [the Agencies'] initial review by providing the information the Agencies need to identify during the initial 30-day waiting period any transaction that may present competition concerns."[1]

   a. **Follow-up**: By the FTC's own estimate, this expansion will on average quadruple the amount of time it takes to file a transaction with the antitrust agencies. Why do you want to quadruple the burden on businesses?

RESPONSE:

Consistent with the Clayton Act, the Division undertakes appropriate investigations to determine whether a merger violates the law. The underlying structure of the HSR form has not changed in decades despite drastic changes in the way businesses are structured and store information and despite advances in economic analysis of competitive effects. The NPRM explains how the FTC "believes that the limited information currently available to the Agencies in the HSR Filing is no longer sufficient to conduct an effective initial screening of the transaction for all types of competitive harm that may result from the transaction. The proposed set of reorganized revenue information, additional documents, and narrative responses would create a much more complete, accurate, and robust basis on which to screen the transaction for the various potential competitive effects, including those that arise from non-horizontal transactions or combinations involving competing employers." The Agencies continue to assess the proposed changes, including the burden they may impose, in light of the public comments received on the NPRM.

[1] *Premerger Notification; Reporting and Waiting Period Requirements*, 88 FR 42178 (June 29, 2023).

b. **Follow-up:** Has DOJ conducted a cost-benefit analysis, or analyzed the cost-benefit analysis from FTC, of this new rule for filing deals and, if so, what were your independent findings?

<u>RESPONSE:</u>

The Division is a law enforcement agency. Our engagement with regulatory process is to provide our relevant expertise to ensure the most effective enforcement of existing laws. The FTC is the relevant rulemaking agency.

c. **Follow-up:** The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires agencies to ensure proposed rules do not have a significant economic impact on a substantial number of small entities. Was an Initial Regulatory Flexibility Analysis conducted prior to issuing the Notice of Proposed Rulemaking?

<u>RESPONSE:</u>

The Division is a law enforcement agency. The FTC is the relevant rulemaking agency.

d. **Follow-up:** In comments to Bloomberg on September 15, 2023, an unnamed FTC official stated that the antitrust agencies want to use the volume of deal filings to obtain massive amounts of granular labor data on industries across the country. Why is this an appropriate way to use a process that Congress created solely for the purpose of determining whether a merger harms competition?

<u>RESPONSE:</u>

As a general matter, antitrust law applies equally to labor markets as to markets for other services and products. The Supreme Court approved this principle, most recently in *NCAA v. Alston*. The Department defers to the FTC regarding comments attributed to officials from that agency.

2. In comments submitted in response to your proposed draft merger guidelines, the U.S. Chamber of Commerce states, "In the past, courts could look to the guidelines with confidence that they reflected a consensus view of the law." They go on to state, "If the agencies adopt the Draft, they will reduce the value of the guidelines to little more than an aggressive policy statement that represents an ideological viewpoint of what some current enforcers think the law should be."

   You cite case law in your draft guidelines, but you did not cite powerful holdings in important circuit court precedent – like *Baker Hughes* and *Heinz* – that state the government cannot simply rely on structural presumptions like market share. The draft

guidelines focus on only the parts of case law that favor structural presumptions – but that view is criticized as old and not reflecting modern precedent. Will the criticism that these guidelines are politically motivated or absent modern precedent diminish its value to the courts?

RESPONSE:

The 2023 Merger Guidelines faithfully reflect the controlling law. Structural presumptions remain good law pursuant to Supreme Court precedent and as confirmed by dozens of courts throughout the country. Further, the 2023 Merger Guidelines cite key circuit court precedent including both *Baker Hughes* and *Heinz.* The 2023 Merger Guidelines explicitly incorporate the burden-shifting framework reflected in *Baker Hughes*.

a. **Follow-up:** Under these draft guidelines, many nonhorizontal deals that enable the acquiring firm to become more efficient, and thus gain market share or compete more effectively in adjacent markets, would be considered illegal even if they benefit consumers and workers. Why do you seek to discount efficiencies even if they benefit consumers and workers?

RESPONSE:

The 2023 Merger Guidelines faithfully reflect the state of the law, including binding Supreme Court precedent.

b. **Follow-up:** Why do the draft merger guidelines overly focus on the level of concentration instead of market power, especially market power measured by the ability to raise prices or lower output, quality, innovation, variety or service?

RESPONSE:

The 2023 Merger Guidelines outline the legal framework as set forth by Congress and interpreted by the courts.

c. **Follow-up:** Given the antitrust agencies' recent poor record at trial, including in mergers, why do you want to abandon the 2010 horizontal merger guidelines that the court relied upon in a rare victory for your agency, blocking Penguin Random House's proposed acquisition of Simon & Schuster?

RESPONSE:

The Division has achieved historic success both in our record at trial and in our mission to deter problematic mergers. We have won three historic trials, including two that will lower airfare for cost-conscious travelers throughout the country. Additionally, parties have abandoned a

substantial number of transactions prior to litigation, including two deals totaling several billion dollars that threatened competition in the ocean shipping supply chain industry.

Since 1968, the Agencies have regularly updated the merger guidelines to reflect changes in the state of industry and the law. This includes revisions in 1982, 1984, 1992, 1997, 2010, and 2020.

d. **Follow-up:** You have criticized antitrust enforcers for not bringing tough cases in the past and being afraid to lose. What losing percentage will signal to the public that the DOJ is not afraid to lose?

RESPONSE:

The Antitrust Division has sought to bring the right cases for the right reasons, applying the law as written by Congress and interpreted by the courts. The Division is proud of our efforts, which have secured historic litigation victories for consumers, workers, businesses, and competition. We determine whether to initiate law enforcement matters based on a thorough assessment of the facts and the law relating to each individual transaction under review.

3. On June 5, 2019, the DOJ announced that it was again opening a review of the consent decrees governing the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI). On January 15, 2021, the DOJ closed its review, but stated "[t]he ASCAP and BMI consent decrees should be reviewed every five years, to assess whether the decrees continue to achieve their objective to protect competition and whether modifications to the decrees are appropriate in light of changes in technology and the music industry." Rather than reopening the ASCAP and BMI consent decrees which have twice been closed without change, has DOJ instead considered assessing possible anticompetitive behavior from the two for-profit Performing Rights Organizations (PROs) not currently subject to consent decrees?

RESPONSE:

I cannot provide any comment on this subject because I am recused from participating in matters related to the ASCAP consent decree.

4. There is no question that tech start-ups have been an enormous driver of innovation in our economy in recent decades. The business model of many high-tech startups is to seek out acquisitions by incumbents after several years in business. Many startups would not go into business—and would not receive venture capital financing—if they could not ultimately be acquired after several years in business. Yet overly aggressive antitrust enforcement may make this business model impossible, and therefore deter the formation of start-ups or cause venture capital firms to be unwilling to invest in these start-up ventures. Do you share this concern, and do you agree that overzealous merger enforcement carries the risk of these negative consequences for the start-up economy?

a. **Follow-up:** Do you consider this issue when you decide whether to challenge a merger or acquisition in the high-tech economy?

RESPONSE:

In all enforcement decisions, the Justice Department is guided by the facts and the law. Where mergers do threaten competition, the Antitrust Division will conduct an in-depth investigation and either challenge the deal outright or permit it to close subject to a remedy that adequately resolves violations of the law. Sound antitrust enforcement preserves innovation by enabling new and disruptive competitors to compete and thrive.

5. You mentioned multiple times in your testimony before this subcommittee that if you ask five people what the consumer welfare standard is, you'll get six answers. The antitrust statutes as passed by Congress are broad and vague. What is your proposed alternative to the consumer welfare standard, and how can you assure that your preferred standard can be applied in a way that doesn't devolve into a "I know it when I see it" standard?

RESPONSE:

In enacting the Clayton Act, Congress directed that merger enforcement prevent mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[2] The statute focuses on competition. It does not mention welfare effects—including consumer welfare. The Division applies the standard reflected in the statutory text, as interpreted by binding judicial precedent, when enforcing the antitrust laws. Of course, the welfare of consumers is a key consideration and significant benefit of the competitive process. But the benefits of competition are not limited to consumers. Antitrust enforcement benefits workers, the free flow of information, entrepreneurs, and Americans more broadly.

[2] 15 U.S.C. § 18.

Questions for the Record from Rep. Johnson of Georgia for Assistant Attorney General Jonathan Kanter
"Oversight of the Department of Justice Antitrust Division"
November 14, 2023

1. Last year, you expressed your strong support for new legislation to rein in app store monopolists like the Open App Markets Act to help address some of the most egregious issues and abuses in digital markets. While that legislation did not get over the finish line last year, do you still support this kind of legislation to add to your toolbox for addressing market abuses?

RESPONSE:

The Open App Markets Act is important legislation that would help ensure that independent app developers are able to compete on fair and equal terms and would prohibit the worst types of anticompetitive conduct by the gatekeeper firms that own and operate the largest app stores and mobile platforms. This is a critical issue, and I look forward to working with the Committee to improve enforcement in this area.

Questions for the Record from Rep. Nadler of New York for Assistant Attorney General Jonathan Kanter
"Oversight of the Department of Justice Antitrust Division"
November 14, 2023

1. New numbers from the beverage industry show that from March 23, 2018, to September 30, 2023, that industry paid almost $2.2 billion in Section 232 tariffs on purchased aluminum can sheet, but only $135 million (or about 6 percent) of that amount went to the U.S. government. Very little aluminum used for beverage cans is subject to tariff. The beverage industry argues it is paying tariff surcharges on non-tariffed metal because one company holds a monopoly on setting a critical element of the price of aluminum—the Midwest Premium. The ability to force consumers to pay a tariff surcharge on non-tariffed metal seems to indicate a market distortion. It also appears to undermine the fundamental purpose of the Section 232 tariffs—to make imported metal less attractive than domestic metal for purchasers. If this practice of charging a tariff surcharge on non-tariffed metal is affecting the beverage industry, it must also be affecting other industries and the government itself. And many consumers may be overpaying for many products because of this price-setting monopoly. Is the Department investigating these complaints about monopoly power in this sector of the market?

RESPONSE:

While longstanding Department policies and practice generally prevent us from commenting on or confirming or denying the existence of any investigation, the Division remains committed to seriously examining complaints of anticompetitive conduct. The Antitrust Division will take all appropriate action when our investigations point to conduct that harms competition or the competitive process in aluminum and other markets.

Questions for the Record from Rep. Correa of California for Assistant Attorney General Jonathan Kanter
"Oversight of the Department of Justice Antitrust Division"
November 14, 2023

1. EU DMA

In 2022, the Biden Administration issued a white paper raising concerns that the EU would unfairly target U.S. companies as part of its implementation of the DMA. Clearly, those concerns were warranted as the EU designated multiple American companies, only one Chinese company, and no companies from any European countries as "gatekeepers." Do you know why the Administration is no longer expressing concern with the EU's implementation of the DMA?

a. Did you or anyone at DOJ weigh in on the Administration's position on the implementation of the DMA or the Administration's decision to stop raising concerns? If so, what did you or others advise?

b. Did you or anyone at DOJ encourage the Administration to hold back on criticism of the EU's implementation of the DMA or the designating of "gatekeepers" or "core platform services?

c. How does the implementation of the DMA impact or influence DOJ's approach to antitrust law and enforcement?

d. Do you believe the EU's approach to antitrust enforcement and its digital agenda has merit? Should the EU approach be implemented in the United States? If so, what aspects of the EU approach do you believe DOJ or Congress should support?

e. What is your opinion on the EU's designation of five American companies as "gatekeepers"?

RESPONSE:

The Division's highest priority in any international engagement is to ensure our ability to enforce U.S. law in U.S. courts in a manner consistent with the U.S. Constitution. In keeping with the standard practices of U.S. antitrust agencies going back decades and across all Administrations, the Division works with agencies abroad to understand the potential impact in the U.S. of foreign enforcement and regulation.

QUESTION: During the hearing you mentioned that DOJ sent an observer for a short period of time to the EU. In your written testimony, you stated that concerning the Digital Markets Act (DMA), "[t]he Division sent a liaison to the European Commission to better understand

the impact of the Act on our domestic interests and to enable us to advocate for U.S. interests in its [DMA's] implementation." I wanted to follow up on our discussion.

a. The liaison you mentioned was partially sent "to advocate for U.S. interest." Can you please share in detail how the liaison advocated for U.S. interests?

b. How does DOJ define "U.S. interests?" How does the definition impact U.S. companies, specifically the companies ultimately designated "gatekeepers?"

c. Did the DOJ liaison or anyone else at DOJ provide advice to or take part in any discussions with anyone in or affiliated with the European Union on the designation of "gatekeepers?"

d. How does the DOJ Antitrust Division view the policies underlying the DMA and the implementation of the DMA? Does DOJ agree that the EU correctly implemented the DMA? Does DOJ agree with the EU's selection of the companies designated "gatekeepers?"

RESPONSE:

In keeping with the standard practices of U.S. antitrust agencies going back decades and across all Administrations, the Division works with agencies abroad to understand the potential impact in the U.S. of foreign enforcement and regulation. The Division sent a liaison for a few weeks to understand how the Digital Markets Act may impact U.S. law enforcement. These types of liaisons are commonplace and have occurred across Administrations.

2. USTR.

The Office of the U.S. Trade Representative (USTR) unexpectedly withdrew its digital trade proposals at the World Trade Organization in the middle of negotiations on the proposed Indo-Pacific Economic Framework. These principles would have protected against forced transfer of U.S. technologies, enabled information to flow freely across borders, and promoted free markets for digital goods.

I am concerned that USTR's actions will harm American companies, especially ones located in California, and the flow of information while forcing the transfer of American technologies. Many members of Congress and industry leaders, including the Motion Picture Association, which is a large employer in my district and brings over $14 billion to the U.S. economy annually from abroad, have raised serious concerns with USTR's actions.

a. Did you or anyone from DOJ speak to anyone at USTR about this decision?

i. If so, what did you or anyone else at DOJ advise?

ii. What information did you or anyone else at DOJ convey to USTR?

b. How does the withdrawal of these proposals impact DOJ's antitrust work?

c. How do you respond to the criticism leveled against USTR's action?

d. Did you or anyone else at DOJ provide any advice or speak to anyone else in the Biden Administration about this decision?

e. Did you or anyone else at DOJ advise anyone else in the Biden Administration on how this decision would impact efforts at the Antitrust Division?

RESPONSE:

The Division is a member of a statutorily authorized interagency committee that consults and assists in the trade policy process coordinated by USTR. In general, the Antitrust Division provides its expertise on competition law enforcement to other components of government when relevant and statutorily authorized.

The Division seeks always to ensure effective enforcement of U.S. antitrust laws. We support efforts by the Administration to promote competition. As the Executive Order on Promoting Competition in the American Economy noted, "robust competition is critical to preserving America's role as the world's leading economy."

3. Market Dynamics.

From the time a case is filed until the time it is tried, market dynamics and the fortunes of the parties may change significantly. This is especially true in the cases of mergers and acquisitions.

a. Please explain how the Antitrust Division evaluates and considers markets (for purposes of determining market concentration and market share) where market shares, costs, and revenues vacillate over time when evaluating the merger's impact on the market and competition.

RESPONSE:

The 2023 Merger Guidelines acknowledge "that the Agencies measure each firm's market share using metrics that are informative about the market realities of competition in the particular market and firms' *future competitive significance*."[3] (emphasis added). Therefore, when

[3] Dep't. of Justice & Fed. Trade Comm'n., *2023 Merger Guidelines* at 50 (Dec. 18, 2023), *available at* https://www.justice.gov/atr/2023-merger-guidelines.

analyzing markets, the Antitrust Division also considers "reasonably foreseeable changes to market conditions," which may include changes to shares, costs, and revenues.

b. Please explain how the Antitrust Division evaluates and considers markets (for purposes of determining market concentration and market share) in an industry where unanticipated hurdles (such as supply chain issues that impact the growth of one of the merging entities) may arise.

RESPONSE:

Where changes to market conditions are not "reasonably foreseeable," such as unanticipated supply chain issues, the Antitrust Division will update our analysis as more information about the market realities of competition become available. Should unanticipated market events occur that change the dynamics of competition within a market, the Antitrust Division will take those events into account when analyzing markets and market concentration.

c. In the case where one of the parties to the merger may face new financial difficulties after the DOJ files its initial complaint, how does the DOJ Antitrust Division evaluate or consider the financial health of such a firm? Does the Antitrust Division modify its approach if circumstances change after the initial complaint was filed?

RESPONSE:

The Antitrust Division evaluates evidence of a failing firm consistent with the three requirements under prevailing law. Under this approach, merging parties must show that 1) the failing firm faces a "grave probability of business failure;" 2) the prospects of reorganization are "dim or nonexistent;" and 3) the acquiring company is the "only available purchaser."[4] Parties may present evidence consistent with the "failing firm" defense at any time, including after a complaint is filed.

d. Does the Antitrust Division re-evaluate the market share and market concentration if the financial circumstances of one of the merging parties change after the complaint is filed?

RESPONSE:

The Antitrust Division may consider revising evidence of market shares and concentration where the market dynamics have shifted such that the market realities of competition have significantly changed. Should the parties' financial circumstances evolve to support a "failing firm" defense, the parties may present such evidence at any time, including after a complaint is filed.

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[4] Id at 30

4. Hart-Scott-Rodino (HSR) Act Pre-Merger Notification Rules.

As I mentioned during the hearing, I have heard from groups raising concerns about the new filing requirements for the HSR Form under the proposed HSR pre-merger notification rules. One criticism is the significantly increased volume of materials required and associated costs for all filers at the initial phase.

a. In the past, what percentage of filings raised concrete anticompetitive concerns?

RESPONSE:

During FY 2022, 3,152 transactions were reported under the HSR Act, which is the second highest number of reported transactions over the past ten years. The Antitrust Division's enforcement efforts directly impacted 26 merger transactions.[5] The number of challenges brought is not an exact proxy for the number of transactions that raised concrete anticompetitive concerns given Agency discretion and prioritization due to resource constraints.

b. In the past, the volume of documents now required under the proposed HSR form was only required when an application was subject to a "second request" review. What percentage of mergers required to file the HSR form were subject to a second level of review?

RESPONSE:

For FY 2022, the Agencies issued Second Requests for 47 of the 3,029 eligible reported transactions. The number of Second Requests issued is not an exact proxy for the percentage of potentially problematic transactions that the Agencies review each year due to constraints on resources that limit the ability fully investigate all potentially illegal mergers.

c. A new element of the filing process requires the submission of all draft materials and narrative responses justifying the deal, as well as final documents. This appears to go beyond the Congressional mandate to restrict requests to information that is necessary or appropriate for DOJ to conduct an initial evaluation. Can you provide specific reference to Congressional intent supporting that Congress intended for DOJ to have the authority to request any and all documents independent of costs incurred on filers?

RESPONSE:

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[5] DEP'T. OF JUSTICE AND FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT 3 (2022), https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2022.

As authorized under Section 7A(d)(1) of the Clayton Act, the Agencies are updating and revising the HSR Form so that the information and documentary material required is in fact necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws.

The information currently collected on the HSR Form is insufficient for the Agencies to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers. The revisions to the HSR form seek to address these deficiencies.

d. How will DOJ guarantee that the new HSR prenotification rules will not negatively impact innovation, job creation, or growth? Can you provide assurances that smaller businesses that may need an infusion of capital will not be harmed by the proposed new rules?

RESPONSE:

The Division is a law enforcement agency. When we engage in a regulatory process, it is to provide our relevant expertise from an enforcement perspective not a regulatory perspective. The FTC is the relevant rulemaking agency.

e. Does DOJ plan to use any of the documentation collected through the new HSR form to pursue antitrust cases outside the purview of the specifically proposed merger for which the documents are collected?

RESPONSE:

The purpose of the HSR Act is to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws, including Section 7 of the Clayton Act, if consummated and, when appropriate, to seek an injunction in federal court in order to enjoin anticompetitive acquisitions prior to consummation. The Antitrust Division has and will continue to exercise our authority and mandate in accordance with the facts and law.

5. Right to Repair.

I have always been concerned about "right to repair" laws that limit a consumer's ability to repair goods or go to third parties for repairs. California is one of the few states that has a "right to repair" law for some goods.

a. Can you please tell us more about DOJ's efforts to support consumers' right to repair goods at the national level?

RESPONSE:

The Antitrust Division recently filed a Statement of Interest in a private multidistrict antitrust litigation involving John Deere tractors.[6] In this case, farmers who own and use John Deere equipment have alleged that Deere violated Sections 1 and 2 of the Sherman Act by preventing them from performing repairs on Deere equipment through the use of proprietary software and "Dealership-only" resources. The district court recently and denied Deere's motion for a judgment on the pleadings, so now the case can proceed to trial.

6. Online Platforms and News Publishers.

   In California, news publishers employ around 76,000 reporters and staff. I am concerned with emerging news deserts because high-quality journalism is a cornerstone of our democracy. In President Biden's Executive Order on Promoting Competition in the American Economy, the President highlighted the impact of online platforms on advertising markets, including the closure of newspapers across the country.

   a. What is the Antitrust Division doing to ensure that local newsrooms across the country can compete on a level playing field?

RESPONSE:

Healthy and vibrant news media markets are essential to democracy. Modern journalism depends on digital platforms to distribute and monetize news. These digital platforms control a major pathway through which news providers reach their audiences and monetize their original journalism. The Antitrust Division is committed to promoting competition in journalism, advertising, and all digital markets. The Antitrust Division has ongoing matters in litigation regarding competition in these markets.

7. Real Estate Market.

   Some real estate brokerages now engage in "pocket listings," where brokers and agents withhold listings from consumers and share them only with selective or private audiences. "Private listing networks," where real estate agents share listings only within their own brokerages and with their own clients, deprive consumers of access to these private real estate listings, are also becoming more common.

   a. What kind of accountability exists to ensure these "pocket listings" are not discriminating against homebuyers, particularly minority homebuyers?

   b. How does the DOJ intend to ensure consumers continue to have fair and complete online access to all real estate listings?

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[6] Statement of Interest of the United States, *In re: Deere & Company Repair Services Litigation*, No. 3:22-cv-50188 (N.D. Ill. Feb. 14, 2023), *available at* https://www.justice.gov/media/1274486/dl?inline.

RESPONSE:

Protecting competition in the real estate industry is among the highest priorities for the Antitrust Division. For American families, home ownership is an important vehicle for wealth and equity accumulation. The purchase and sale of a home is often the largest financial transaction a typical American family will ever undertake. Promoting competition for the fees that sellers and buyers face can result in billions of dollars of savings for U.S. homebuyers. Pursuant to our mission, and consistent with the facts and the law, the Antitrust Division will use its enforcement and advocacy tools to address anticompetitive policies, practices, and rules in the residential real-estate industry. By way of example, since 2021, the Antitrust Division has filed five statements of interest and amicus briefs in antitrust cases involving competition and real estate.

8. Price fixing.

Your division successfully pursued a price fixing case in the pharmaceutical industry that raised the prices of generic cholesterol drugs.

a. How might collusion in this industry affect the cost of medicine for Americans?

RESPONSE:

During a multi-year investigation, the Antitrust Division and our law enforcement partners uncovered price-fixing, bid-rigging and market-allocation schemes affecting many generic medicines. The Division charged seven generic pharmaceutical companies for their participation in the schemes and alleged that the conduct resulted in higher prices for many generic medicines.[7] Collectively, the seven companies have agreed to pay criminal penalties totaling more than $681 million to resolve the charges. In addition, two agreements required the companies to divest their drug lines for pravastatin, a widely used cholesterol medicine that was central to the companies' price-fixing conspiracy. To the best of my knowledge, this is the first time in modern history that the Division successfully obtained a divestiture as remedial relief to resolve a criminal conspiracy. Additionally, one resolution included a first-of-its-kind requirement that the generic drug company donate $50 million in generic drugs to humanitarian organizations.

9. No-poach agreements.

When employers enter illegal no-poach agreements to not hire each other's workers this potentially reduces workers' pay and limits their employment opportunities. Often employees don't even know that a no-poach agreement exists.

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[7] U.S. Dep't Justice, Press Release, *Major Generic Drug Companies to Pay Over Quarter of a Billion Dollars to Resolve Price-Fixing Charges and Divest Key Drug at the Center of Their Conspiracy* (Aug. 21, 2023) (indicating "Teva conspired with Glenmark, Apotex Corp. and others to increase prices for pravastatin and other generic drugs.")

a. What else is the Antitrust Division doing to pursue no-poach agreements?

RESPONSE:

No-poach agreements harm workers and, as courts across the country have acknowledged, violate the antitrust laws. Last year, the Antitrust Division obtained the first criminal conviction for an agreement between employers not to hire each other's workers. The Division is as committed as ever to using our statutory authority to prosecute these violations of the Sherman Act in labor markets as appropriate. We continue to investigate labor-market collusion, including agreements among companies not to hire each other's workers, in many industries.