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

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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, 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?

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?

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 suggest 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?

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 effects 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?

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?

Questions for the Record from Rep. Fitzgerald of Wisconsin for Assistant Attorney General Jonathan Kanter
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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?
    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?
    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?
    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?
    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?

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?

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?
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?
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?
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?

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?

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

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?

Questions for the Record from Rep. Johnson of Georgia for Assistant Attorney General Jonathan Kanter
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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?

Questions for the Record from Rep. Nadler of New York for Assistant Attorney General Jonathan Kanter
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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 cansheet, 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?

Questions for the Record from Rep. Correa of California for Assistant Attorney General Jonathan Kanter
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1. EU DMA 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?

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

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?"

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?"

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?

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?

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?

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

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?

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

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), that "[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.

USTR. Did you or anyone from DOJ speak to anyone at USTR about this decision? If so, what did you or anyone else at DOJ advise? What information did you or anyone else at DOJ convey to USTR?
How does the withdrawal of these proposals impact DOJ's antitrust work?
How do you respond to the criticism leveled against USTR's action?
Did you or anyone else at DOJ provide any advice or speak to anyone else in the Biden Administration about this decision?
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?

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 US 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.

1. 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.
. Please explain how the Antitrust Division evaluates and considers markets (for purposes of determining market concentration and market share) where market shares, costs, revenues vacillate over time when evaluating the merger's impact on the market and competition.
. 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.
. 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?

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?

1. 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?

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?

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?

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?

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?

1. Right to Repair.

I have always been concerned about "right to repair" laws that limit a consumers' 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.

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

1. 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.
What is the Antitrust Division doing to ensure that local newsrooms across the country can compete on a level playing field?
Real Estate Market. How does the DOJ intend to ensure consumers continue to have fair and complete online access to all real estate listings?
What kind of accountability exists to ensure these "pocket listings" are not discriminating against homebuyers, particularly minority homebuyers?

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.

1. Price fixing.

Your division successfully pursued a price fixing case in the pharmaceutical industry that raised the prices of generic cholesterol drugs.
How might collusion in this industry affect the cost of medicine for Americans?

1. 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.
What else is the Antitrust Division doing to pursue no-poach agreements?