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DOJ reiterates distaste for merger settlements

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Deputy assistant attorney general Andrew Forman

Merging parties face a “very high bar” when presenting settlements to the Department of Justice, a member of the Antitrust Division’s front office has said.

Speaking at an event at George Washington University Law School on Monday, deputy assistant attorney general Andrew Forman said the DOJ will continue to be deeply sceptical of any proposed merger resolutions that cannot fully replicate the competitive intensity of the market prior to the deal’s closing.

“The best way to remedy an anticompetitive merger is to block it,” said Forman, who joined the division in May from [Paul Weiss Rifkind Wharton & Garrison](#).

Forman’s message as he spoke on a panel about merger control during the William Kovacic-hosted event on Monday expands upon the [remarks](#) that assistant attorney general Jonathan Kanter delivered before the New York Bar Association in January.

At the time, Kanter said merger remedies – both divestitures and behavioural remedies – have shown to be less effective in preserving competition than outright blocking the transaction. Settlements also prevent the DOJ from being able to advance the law, he said.

On Monday, Forman said the Antitrust Division’s main mission is law enforcement, signalling a disinterest in lengthy consent decrees that require constant reviewing.

“That’s what we’re good at,” Forman said. “We’re not necessarily so good at being a regulator and monitoring overly-regulatory things.”

Bernard Nigro, who served as the Antitrust Division’s number-two during the Trump Administration, also spoke at the event. He said he felt the Biden Administration would sometimes face challenges when trying to convince a court that a merger settlement is ineffective.

The Fried Frank Harris Shriver & Jacobson partner cited the sharp questions that the US District Court for the District of Columbia had for the DOJ during the government's trial to block *UnitedHealth/Change Healthcare*. During closing arguments on Friday, Judge Carl Nichols [appeared sceptical](#) of the division's argument that UnitedHealth's proposed divestiture and firewall would not resolve potential anticompetitive harm.

Nigro said he appreciated Forman's argument that resolving these transactions can be complex and there is a serious question of whether consumers or the merging parties should bear the risks. But structural remedies can be very effective in preserving competition, he insisted.

Fellow speaker Bill Baer, who led the Antitrust Division during the Obama Administration, said Kanter's stance on merger remedies sent an important message to companies and their advisors.

"Be careful," he said to the mergers and acquisitions community. "You need to do a better job of self-regulating what deal you are going to put forward."

Baer said some companies are seemingly willing to put the US antitrust enforcers through the enormous expense of investigating a transaction in hopes of getting the deal waved through.

Yet the agencies have shown during the Biden Administration that they are willing to take more risk in trying to block these deals because it is the right thing to do, he noted.

Forman said deterrence is not the basis of the DOJ's decision to block a specific deal, but the agency hopes that the broader business community is hearing the message that enforcers are more willing, cumulatively, to go to court.

Forman also discussed the progress of the FTC and DOJ in rewriting the [merger guidelines](#), on which the US enforcers have received more than 5,000 public comments. He said the two agencies will continue to work very collaboratively on the document throughout the autumn.

The new guidelines will seek to better reflect the market realities of the modern economy, Forman added.

"There are a lot of ways in which firms compete that are broader than just the horizontal and the vertical bucket," he said.

Forman claimed [economics](#) will play an important role in the new guidelines, but added that the upcoming document will put a greater emphasis on maintaining the rivalry between two merging companies rather than modelling and predictions.

The Antitrust Division does not need to prove outcomes to the third or fourth decimal point at trial, Forman said.

The deputy assistant attorney general added that the FTC and DOJ are thinking hard about how the new guidelines will be able to survive through multiple administrations.

The event concluded on Monday.

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