

November 16, 2022

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

The Honorable Jonathan S. Kanter
Assistant Attorney General for the Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Garland and Assistant Attorney General Kanter,

As advocates of reining in monopolistic behavior to benefit consumers, small business owners, and communities, we write to express our support for the Department of Justice's (DOJ) efforts to hold anticompetitive behavior accountable.

In the year since Kanter was confirmed as Assistant Attorney General for the DOJ Antitrust Division, the DOJ has made impressive strides towards reinvigorating federal antitrust enforcement. After decades of under-enforcement — and, at times, hostility to enforcement — on the part of federal antitrust regulators, we are delighted to see the extent to which the Antitrust Division has been taking seriously its responsibility to the American people during Kanter's first year. From what we can see, the change seems to be a structural one that is likely to endure.

Accordingly, we wish to highlight some of the strongest aspects of the DOJ Antitrust Division's record over the past year.

I. Despite being under-resourced, the DOJ is enforcing antitrust law — which has especially benefitted small businesses — at a record pace

More than a third of the American workforce — 60 million individuals — support their families by working in the small business economy, including at small retailers, at independent grocers, as pharmacists, as farmers, and as ranchers. These businesses underpin America's local economies and contribute massively to our regional productivity. But they cannot survive in the absence of a fair market, and they count on the Department of Justice to enforce the regulations that keep that market fair.

Despite being understaffed and under-resourced, the Antitrust Division is set to litigate more merger trials in FY 2022 than in any other fiscal year. The Antitrust Division currently has seven pending civil antitrust cases, the most in several decades, and under Kanter the division has indicted defendants in twenty criminal antitrust cases, a figure higher than at any time since the 1980s. The division ended FY 2021 with 46 pending grand jury investigations, the most in 30 years. As Kanter noted, this has all been accomplished in the “backdrop of nearly 3,000 notified [merger] transactions in FY 2022”, the highest since 2000.¹

As noted previously, Kanter’s historic tenure is especially impressive given the paucity of resources at the division. The Antitrust Division employed some 650 staffers in 2021, a 35% decrease from the approximately 1,000 staffers employed in 1979. During the same period, the U.S. population increased by around 51% from approximately 220 million² to 332 million.³ This means that despite a significant increase in both population and corporate concentration,⁴ the Antitrust Division has significantly less capacity than it did 42 years ago.

II. Under Kanter, the Antitrust Division has bolstered interagency cooperation to protect consumers from predatory and anti-competitive behavior

In line with the Biden Administration’s all-of-government approach to competition policy,⁵ the Antitrust Division has entrenched its working relationships with a number of federal agencies, including the Federal Trade Commission (FTC). As part of a collaboration to bolster federal merger guidelines,⁶ the agencies held a series of listening forums assessing the impact of mergers in the agriculture, healthcare, media, and technology sectors.

Under Kanter, the Antitrust Division and the Department of Agriculture have reaffirmed their commitment to combating monopolistic practices in the agriculture sector and providing tools to report anticompetitive misconduct.⁷⁸ In the past year, the DOJ Antitrust Division and the Federal Bureau of Investigation have worked to identify and scrutinize bad actors who have used the

¹ <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary>

² <https://www2.census.gov/library/publications/1979/demographics/P25-806.pdf>

³ <https://www.census.gov/quickfacts/fact/table/US/PST045221>

⁴ <https://www.promarket.org/2022/04/21/new-data-shows-the-rise-of-corporate-concentration-in-the-us-in-the-past-100-years/>

⁵ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

⁶ <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>

⁷ <https://www.justice.gov/opa/pr/justice-department-and-agriculture-department-issue-shared-principles-and-commitments-protect>

⁸ <https://www.usda.gov/media/press-releases/2022/02/03/usda-doj-launch-online-tool-allowing-farmers-ranchers-report>

supply chain crisis as an opportunity for illegal price-fixing schemes.⁹ As part of the division’s effort to promote labor market competition, the division entered into a memorandum of understanding with the National Labor Relations Board in July 2022.¹⁰

III. Amid the global supply chain crisis, the DOJ Antitrust Division has prevented mergers that would have exacerbated economic malaise

Over the past year, the Antitrust Division has scrutinized and successfully prevented deals that would have harmed consumers and small firms amid the supply chain crisis. Given that shipping industry consolidation has played a major role in supply chain chaos since 2021,¹¹ Kanter’s leadership should be applauded for thwarting a deal that would’ve put 90% of reefer container production under the control of a Chinese-state owned company.¹²

DOJ scrutiny also led to the abandoning of a proposed merger of equals between shipping giants Cargotec and Konecranes, which Attorney General Garland said “threatened the global supply chain and the free and fair markets upon which the integrity of our economy depends.”¹³ Given that material supply shortages have proven a hindrance to housing construction,¹⁴ the division should be applauded for stopping a little-noticed effort to monopolize the pebbled fiberglass reinforced plastic (FRP) wall panel market.¹⁵

IV. Under Kanter, the Antitrust Division has shown it will break from decades of “hands-off” enforcement

In April 2022, Kanter declared “that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun.”¹⁶ And indeed, one year into his tenure, the Antitrust Division is clearly moving away from the failed “hands-off” approach to antitrust that contributed to the current consolidation crisis.¹⁷ Under Kanter, the Antitrust Division notably scored its first-ever victory in criminal enforcement of violations of labor antitrust law.¹⁸

⁹ <https://www.reuters.com/business/us-antitrust-enforcer-fbi-announce-effort-deter-identify-collusion-2022-02-17/>

¹⁰ <https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers>

¹¹ <https://www.freightwaves.com/news/shippings-extreme-consolidation-could-prolong-supply-chain-pain>

¹² <https://maritime-executive.com/article/u-s-regulators-block-cimc-s-purchase-of-maersk-container-industry>

¹³ <https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department>

¹⁴ <https://www.wsj.com/articles/builders-hunt-for-alternatives-to-materials-in-short-supply-11633512601>

¹⁵ <https://www.justice.gov/opa/pr/justice-department-sues-block-verzatec-s-proposed-acquisition-crane>

¹⁶ <https://www.promarket.org/2022/04/28/kanter-interview-antitrust-consumer-welfare-criminal-individuals/>

¹⁷ <https://www.vox.com/the-goods/2020/2/18/21126347/antitrust-monopolies-internet-telecommunications-cheerleading>

¹⁸ <https://news.bloomberglaw.com/antitrust/doj-notches-first-no-poach-win-with-guilty-plea-sentencing>

Despite being historically unenforced, the Antitrust Division has made clear that it will not tolerate anti-competitive interlocking directorate agreements.¹⁹ In October 2022, scrutiny by the DOJ led to the resignation of seven directors serving on corporate boards of competing companies, an explicit violation of Section 8 of the Clayton Antitrust Act that has gone unpunished for too long.

Like elsewhere in the federal government, the Antitrust Division's efforts have been hindered in the past by the "revolving door" between government and private industry.²⁰ Under Kanter, major positions in the division have been filled by qualified experts with strong anti-monopoly *bona fides*, such as Sally Hubbard (formerly of the Open Markets Institute) and Eric Posner (professor at University of Chicago Law School).²¹

V. During Kanter's tenure, the Antitrust Division has shown it will not back down in the face of powerful interests

Since taking office, Kanter's leadership has affirmed that scrutiny of anticompetitive behavior would not yield in the face of opposition from powerful monopolists. Early on in his tenure, Kanter indicated that he would eschew accepting harmful mergers just to get symbolic concessions and instead has favored using litigation to hold monopolists accountable by blocking harmful mergers outright.²²

Even when it has not resulted in a victory for the government, Kanter's approach has successfully extracted meaningful concessions: For example, the DOJ was able to force Booz Allen Hamilton in the government's suit against the EverWatch acquisition to drop a "merger agreement clause to seize veto power over EverWatch's bids" prior to the finalization of the deal.²³

From the DOJ's ongoing landmark antitrust suit against Google²⁴ to the department's reportedly-pending case against Apple,²⁵ the Antitrust Division will continue to play a leading role in efforts to rein in monopolistic behavior. We reiterate that the direction of the division under Kanter's leadership has been a refreshing one, and we look forward to working with your leadership to help foster fair competition.

¹⁹

²⁰ <https://prospect.org/economy/closing-the-revolving-door-in-antitrust/>

²¹ <https://www.justice.gov/atr/chief-staff-and-senior-advisors>

²² <https://news.bloomberglaw.com/antitrust/doj-antitrust-chief-prefers-merger-lawsuits-over-settlements>

²³ <https://news.bloomberglaw.com/antitrust/doj-sees-gains-in-long-shot-antitrust-challenges-amid-defeats>

²⁴ <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc>

²⁵ <https://www.politico.com/news/2022/08/26/justice-department-antitrust-apple-00053939>

Sincerely,

American Economic Liberties Project

Blue Future

Center for Digital Democracy

Common Future

Demand Progress Education Fund

Farm Action

Fight Corporate Monopolies

Fight for the Future

Future of Music Coalition

Institute for Local Self-Reliance

Main Street Action

Media Alliance

Oregonizers

Other98

People's Parity Project

Public Citizen

Revolving Door Project

RootsAction.org

United We Dream