

November 19, 2021

Lee J. Lofthus
Assistant Attorney General for Administration
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

CC:

The Honorable Merrick B. Garland, Attorney General
Lisa O. Monaco, Deputy Attorney General
Vanita Gupta, Associate Attorney General
Bradley Weinsheimer, Associate Deputy Attorney General
Cynthia K. Shaw, Director, Departmental Ethics Office
Tracy Fisher, Ethics Officer, Antitrust Division

Re: The Role of Assistant Attorney General Jonathan Kanter in Investigations and Litigation
Against Google

Dear Mr. Lofthus,

We write to request that you examine whether Jonathan Kanter, the recently confirmed Assistant Attorney General of the Antitrust Division, should be recused from the Department's litigation and investigations against Google. Google has deep respect for the Justice Department's important role in enforcing our antitrust laws. It is of paramount importance that the Department's execution of this important duty be conducted fairly and impartially. In the words of former Solicitor General Frederick William Lehmann: "The United States wins its point whenever justice is done [for] its citizens in the courts."¹

As head of the Antitrust Division, AAG Kanter would typically be responsible for overseeing any litigation or investigations against Google. However, AAG Kanter's prior representations, actions, and statements raise concerns that having him supervise the Department's actions involving Google may not satisfy the requirement that those actions be fair and impartial. Because our access to information about AAG Kanter's prior representations and work is limited, we write to ask you to meet with us to discuss these concerns, investigate this matter, and reach an appropriate resolution.

¹ See Address by Seth P. Waxman, Solic. Gen. of the U.S., to the Sup. Ct. Hist. Soc'y, "*Presenting the Case of the United States As It Should Be*": *The Solicitor General in Historical Context* (June 1, 1998), available at <https://bit.ly/3DxaPB5> (alteration omitted).

Federal ethics guidelines prohibit federal employees from participating in any matter in which their impartiality could reasonably be questioned. It is a “[b]asic obligation of public service” that federal employees adhere to these principles. 5 C.F.R. § 2635.101(a). In particular, federal ethical regulations provide that “[e]mployees shall act impartially and not give preferential treatment to any private organization or individual.” *Id.* § 2635.101(b)(8). That rule is echoed in the Department’s own ethical standards.² Those ethical standards go on to provide that an employee should avoid even the appearance of impropriety.³ Moreover, by Executive Order, all appointees must also promise not to participate “in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients” for two years. E.O. on Ethics Commitments by Executive Branch Personnel § 1 (Jan. 20, 2021), <https://bit.ly/3lvTGBj>.

We question whether a reasonable person would find AAG Kanter impartial with respect to the Department’s investigations and litigation related to Google. As a private party, we do not have visibility into all of his prior representations. But the public record reveals that AAG Kanter has represented several private parties in connection with the specific matters involving Google that are pending before the Department. Not only are AAG Kanter’s former clients’ interests directly affected by these lawsuits, AAG Kanter himself appears to have already benefited financially from representing parties who have advocated for and helped develop pending and potential future cases brought by the Department against Google.

For example, AAG Kanter personally represented several third parties, including Yelp and ANGI Homeservices, in a pending lawsuit relating to Google Search that he would otherwise supervise.⁴ Yelp has been vociferously advocating for an antitrust case against Google for years and has been intimately involved in identifying and developing the material that underlies the Department’s allegations in the Search litigation.⁵ ANGI has allegedly been harmed by Google’s search algorithm. AAG Kanter also represented Yelp and ANGI, among others, in the companion Search lawsuit brought by Colorado.⁶ We understand that AAG Kanter also represented these parties, among others, in connection with the Department’s pre-complaint investigation before the complaint was filed. A confidential appendix is being submitted under separate cover by counsel of record in those matters, describing AAG Kanter’s representations of these parties in more detail.

² U.S. Dep’t of Just., Handbook for On and Off-Duty Conduct 2 (Jan. 2017), <https://bit.ly/3wTPwYb>.

³ *Id.* at 5 (“Appearance of Impropriety. An employee shall endeavor to avoid any actions creating the appearance that the employee is violating the law or the ethical standards set forth in this part.”); *accord* 5 C.F.R. § 2635.101(b)(14).

⁴ *See, e.g.*, Def.’s Reply in Support of Mot. to Compel Production of Documents of Yelp, Inc. Custodian Luther Lowe, Appx. E at 5, *United States v. Google LLC & Colorado v. Google LLC*, Nos. 1:20-cv-03010 & 1:20-cv-03715 (D.D.C. Oct. 14, 2021) (explaining that Google is seeking discovery of documents from Yelp because Mr. Lowe’s statements “influenced the drafting of the Complaints”).

⁵ *See, e.g., id.* at 1-2.

⁶ *See id.*, Appx. E at 5.

And AAG Kanter's involvement extends beyond the Department's Search investigation and litigation. For example, we understand that AAG Kanter represented ANGI, Ask Media, News Media Alliance, Magnite, and OpenX in an ad tech case led by the Attorney General of Texas. To the extent that the Department is investigating the same or similar issues, his involvement representing multiple third parties in the Texas case who might benefit from the filing of additional litigation raises serious concerns.

AAG Kanter's involvement in the Department's investigations and litigation prior to his confirmation aligns with his long record of litigation and advocacy adverse to Google on behalf of commercial rivals. He "has made a career out of representing rivals of American tech giants like Google."⁷ He "has been involved in antitrust fights with [Google] as far back as 2007," when he represented Microsoft in opposing Google's acquisition of DoubleClick.⁸ "During the Obama administration, Microsoft Corp. engaged him to push antitrust officials to take action against Google,"⁹ and he has represented Microsoft within the past two years.¹⁰ "And he has spent the years since collecting Google critics—the likes of Yelp, News Corp. and Mapbox, among others—as his clients."¹¹ In representing these companies, AAG "Kanter eagerly pushed government enforcers to file . . . competition lawsuits . . . against Google."¹² In addition, AAG Kanter has been intimately involved in several other attacks on Google and its business model. For instance, he represented the News Media Alliance in its effort to lobby for an antitrust exemption allowing publishers to stage a group boycott against Google, seeking to force it to pay to link to their websites.¹³ AAG Kanter represented companies like TradeComet and MyTriggers in litigation against Google for allegedly anticompetitive conduct.¹⁴ He was also the lead U.S. counsel for Unlockd, which has unsuccessfully sued Google in the United Kingdom

⁷ Lauren Hirsch & David McCabe, *Biden to Name a Critic of Big Tech as the Top Antitrust Cop*, N.Y. Times (updated Oct. 28, 2021), <https://nyti.ms/3DnL1Yi>.

⁸ See John Hendel, *Biden's Trustbuster Streak Continues with Kanter Pick*, POLITICO (July 21, 2021, 10:00 AM EDT), <https://politi.co/3jZDhnB>; U.S. Senate Comm. on the Judiciary Questionnaire for Non-Judicial Nominees: Jonathan Kanter 24, *available at* <https://bit.ly/3nkU7zt> (last visited Nov. 19, 2021) ("Kanter Judiciary Questionnaire").

⁹ Justin Sink & David McLaughlin, *Biden Names Tech Foe Jonathan Kanter as DOJ Antitrust Chief (2)*, Bloomberg Law (July 20, 2021, 6:20 PM), <https://bit.ly/3ADuwoT>; see also Hendel, *supra* n.8 (describing Kanter as "a key figure in the FTC's 2012 antitrust investigation against Google, in which he represented Microsoft").

¹⁰ See Jonathan Kanter OGE Form 278e, at 7 (May 10, 2021) (explaining that Kanter received compensation from Microsoft after September 2020).

¹¹ Hendel, *supra* n.8.

¹² Ben Brody & Source Code Team, *A Possible Recusal Can't Stop Jonathan Kanter*, Protocol (July 26, 2021), <https://bit.ly/3aAHXLr>; see Sink & McLaughlin, *supra* n.9 ("More recently, he represented clients, including Yelp Inc., who urged the Justice Department to sue Google last year.").

¹³ Jim Rutenberg, *News Outlets to Seek Bargaining Rights Against Google and Facebook*, N.Y. Times (July 9, 2017), <https://nyti.ms/3byVvrg>.

¹⁴ See Miguel Helft, *Google Accused of Antitrust Violation by Smaller Rival*, N.Y. Times (Nov. 8, 2009), <https://nyti.ms/3DAV2Rn>; see also Kanter Judiciary Questionnaire 20-21, *supra* n.8.

and Australia, and recently sued Google in the United States.¹⁵ And public reports have claimed that AAG Kanter was an “architect of the EU’s antitrust case against Google.”¹⁶

AAG Kanter has also repeatedly acknowledged having prejudged the question of whether Google has violated American antitrust laws, despite the fact that no U.S. court has ever reached that conclusion. AAG Kanter, described as a “[l]ongtime Google enemy,”¹⁷ has not minced words: He has accused Google of being a “monopol[y],”¹⁸ “closing off competition through discriminatory and exclusionary practices,” “harming content providers,”¹⁹ putting small companies “out of business,”²⁰ and “stifl[ing] innovation” and “economic growth.”²¹

While nominees for office will inevitably come to office with their own general opinions, AAG Kanter’s past conduct and statements suggest that he has already made up his mind about Google’s antitrust culpability. Indeed, many members of the public have drawn that precise conclusion, suggesting that allowing AAG Kanter to nevertheless remain in a supervisory role over the Department’s Google-related investigations and litigation would create, at a minimum, the appearance of partiality. AAG Kanter’s nomination was greeted with “immediate approval from policymakers and advocacy groups helping to lead the charge for more stringent antitrust enforcement.”²² These reports have noted that the nature and extent of AAG Kanter’s previous representations might well require his recusal from the Department’s cases and investigations involving Google,²³ citing his prior representation of “complainants that have accused Google of anticompetitive behavior,” including in connection with the very cases that he now might be overseeing.²⁴ Failure to recuse AAG Kanter might also add fuel to suggestions that the

¹⁵ See Cara Waters, ‘So Much For Don’t Be Evil’: Aussie Startup Unlockd Sues Google in the US, *The Sydney Morning Herald* (Sept. 20, 2021, 10:11 AM), <https://bit.ly/3mAJI7Q>.

¹⁶ Roger McNamee, *Biden Has to Play Hardball With Internet Platforms*, *WIRED* (July 24, 2021, 7:00 AM), <https://bit.ly/3l5FFdd>.

¹⁷ Ben Brody, *Longtime Google Enemy Kanter to Be Named as DOJ Antitrust Head*, *Protocol* (July 20, 2021), <https://bit.ly/30q1XPn>; see also Shirin Ghaffary, *Biden Stacks His Administration With Yet Another Tech Foe*, *Vox* (July 20, 2021, 5:05 PM EDT), <https://bit.ly/3DAfToa> (describing Kanter as “a known legal foe of Google”).

¹⁸ *Conference of Western Attorneys General: Competition and Innovation in Online Markets (Panel Session 6)*, at 13:36-13:51 (posted Aug. 21, 2017), <https://bit.ly/3kLIYXM>.

¹⁹ Jonathan Kanter, *Don’t Hand Our TVs Over to Google*, *N.Y. Times: Opinion* (May 30, 2016), <https://nyti.ms/3ly4aQM>.

²⁰ *US Briefing: The Google Slayers*, *Legal Week: Law.Com* (May 19, 2010), <https://bit.ly/2YICZcO> (internal quotation marks omitted).

²¹ *Conference of Western Attorneys General*, *supra* n.18, at 15:55-16:22.

²² Hirsch & McCabe, *supra* n.7.

²³ *Id.*; see also, e.g., Ben Brody, *What Can’t Jonathan Kanter Do?*, *Protocol* (July 23, 2021), <https://bit.ly/3v4vmtD> (“[H]is prior work as a corporate lawyer going after tech giants may require him to recuse himself from some of the DOJ’s marquee investigations and cases, including those involving Google and Apple.”).

²⁴ Lauren Feiner, *Biden to Nominate Google Critic and Progressive Favorite Jonathan Kanter to Lead DOJ Antitrust Division*, *CNBC* (updated July 20, 2021, 3:08 PM EDT), <https://cnb.cx/3atqoC>; see also, e.g., Brody, *supra* n.23.

Department's actions might be unduly influenced by Google's competitors—competitors that AAG Kanter himself represented.²⁵

In sum, AAG Kanter's statements disparaging Google and his extensive representation of parties who are suing Google and are deeply enmeshed in the Department's investigations of Google create at least an appearance of impropriety that warrants investigation. While the Department properly scrutinizes the business practices of American businesses, both the public and the businesses affected have a right to have such matters supervised by someone who is unconflicted and able to act impartially, as required by the Code of Federal Regulations and the Department's own ethical standards. Both the reality, and the appearance, of partiality are fairly called into question by AAG Kanter's prior statements and representations.

For the above reasons, we respectfully urge you to investigate this matter. We are available to meet whenever would be convenient for the appropriate Department officials to discuss the questions raised in this letter.

Sincerely,

Virginia Gibson
Hogan Lovells US LLP
1735 Market Street, Floor 23
Philadelphia, PA 19103
(267) 675-4600
virginia.gibson@hoganlovells.com

Attorney for Google LLC

²⁵ See, e.g., Paresh Dave, *United States vs Google Vindicates Old Antitrust Gripes From Microsoft*, Reuters (Oct. 21, 2020, 10:26 AM), <https://reut.rs/3Fx9Wt7>; Avery Hartmans, *Yelp Is Cheering the DOJ's Decision to File an Antitrust Lawsuit Against Google: 'Google Is Directly Harming Consumers'*, Insider (Oct. 20, 2020, 12:08 PM), <https://bit.ly/30DerDi>.