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DOJ/FTC Merger Guidelines and Review Process

Practice Pointers and Lessons Learned From Antitrust Enforcement Trends

THURSDAY, JULY 25, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10**.

FTC Releases Revised Horizontal Merger Guidelines for Public Comment

April 23, 2010

This week, the Federal Trade Commission (FTC) released for public comment the FTC's and Department of Justice's (DoJ's) proposed revision of the Horizontal Merger Guidelines. The Guidelines serve as a template for the U.S. agencies' reviews of proposed horizontal mergers, and last underwent a major revision in 1992. The revisions are the product of an FTC and DoJ joint effort after soliciting feedback through five public workshops.[1]

The proposed revisions are largely designed to describe more accurately the reality of the agencies' current practice. FTC Chairman Jon Leibowitz announced that "Eighteen years have passed since the Horizontal Merger Guidelines were revised. During that time the agencies' approach has evolved significantly, and the Guidelines should reflect that."[2] In addition, the revisions incorporate concepts previously discussed in the agencies' "Commentary on the Horizontal Merger Guidelines" document, circulated in March 2006.[3]

A major theme of the revisions is that the agencies have moved away from a rigid, structured market analysis in favor of a more fluid approach, tailored to each transaction. The revised Guidelines stress that merger analysis "is a fact-specific process through which the agencies ... apply a range of analytical tools."[4] Accordingly, they emphasize that merger analysis need not begin with, nor focus on, market definition or concentration in the relevant market.

To underscore this new, more flexible analytical framework, the agencies incorporated a new section addressing "Evidence of Adverse Competitive Effects." This portion of the proposed revised Guidelines outlines the wide variety of types and sources of evidence that an agency might gather to build its case. In addition to assessing market shares and concentration, the agencies typically search for historical "natural experiments" to compare market behavior before and after changed conditions; evidence of direct competition between the parties; the potential for the loss of a "maverick" party through the merger; and, if the merger has already been consummated, any evidence of actual adverse effects on competition. Typical sources of this evidence include the merging parties, their customers, and any other industry participants, such as competitors, industry associations, or firms that sell complementary goods.[5]

The proposed revisions include several other notable changes, including:

- A streamlined discussion of how the agencies evaluate market entry, although the analysis continues to focus on timeliness, likelihood, and sufficiency of entry. Notably, the draft removed the 1992 Horizontal Merger Guidelines' explicit presumption that entry will be considered timely only if it can be achieved within two years.[6]

- An expanded section on unilateral effects, including a discussion regarding the evaluation of industries in which sales are conducted through formal or informal auction processes. Among other things, the agencies will examine the frequency with which one of the parties to the merger had been the runner-up when the other party won the business. This has been the agencies' practice, but was not explained in the Guidelines.[7]

- A recognition that one of the potential consequences of a merger is a loss of variety because the merger may result in cessation of one of the party's offerings. The agencies will examine whether this will lead to a "demonstrable loss of significant value to customers over and above any price effects," and consider whether a merged entity would spur or impair product innovation. The Guidelines also note that not all variety reductions should be considered anticompetitive because some simply may reflect efficient consolidation.[8]

- Loosening the market categories as measured by the Herfindahl-Hirschman Index (HHI): "unconcentrated" markets are now those with an HHI below 1,500 (formerly 1,000); "moderately concentrated" markets extend to an HHI of 2,500 (formerly 1,800); and concentrated markets are where the HHI measures above 2,500.[9]

- A new section that elaborates on the approach the agencies will take to considering whether powerful buyers would prevent the merging parties from raising prices. Although the Guidelines observe that the existence of powerful buyers, standing alone, will not dispel concerns about anticompetitive effects, the agencies will consider whether large purchasers could serve as a bulwark against anticompetitive behavior. The section also notes that "even if some powerful buyers could protect themselves, the Agencies also [will] consider whether market power can be exercised against other buyers."[10]

The updated changes do not appear to signify any revolutionary departure from current merger analysis. Rather, the changes generally seem to memorialize the methodologies already implemented at the agencies. The revised Guidelines, once finalized, should serve as a more useful guide to parties seeking to understand how the agencies are likely to evaluate a proposed merger.

The FTC is accepting comments on the draft until May 20. To review the proposed revisions of the Horizontal Merger Guidelines, click here. The FTC also has a page on the entire Guidelines revision process (found here), including transcripts from the workshops and submissions to the workshops.

Please contact any member of the WilmerHale Antitrust and Competition Practice if you have any questions about the proposed Guidelines or would like assistance in preparing comments.

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[1] *See* Christine Varney, "Merger Guidelines Workshops," September 22, 2009 (available here).

[2] *See* "Federal Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines," April 20, 2010 (available here).

[3] *See* "Commentary on the Horizontal Merger Guidelines," March 2006 (available here).

[4] Revised Guidelines at 1.

[5] Revised Guidelines at 3–6.

[6] Revised Guidelines at 27–29.

[7] Revised Guidelines at 20–24.

[8] Revised Guidelines at 18–19.

[9] Revised Guidelines at 23–24.

[10] Revised Guidelines at 26–27.