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presents

Horizontal Merger Guidelines: Operating Within the New Antitrust Framework

Preparing for Increased FTC and DOJ Review and Data Requirements

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Clifford H Aronson, Partner, **Skadden Arps Slate Meagher & Flom**, New York

Joseph G. Krauss, Partner, **Hogan Lovells US LLP,** Washington, D.C.

Michael H. Knight, Partner, **Jones Day**, Washington, D.C.

Thursday, July 1, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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Strafford Webinar
July 1, 2010
1:00pm – 2:30 pm EDT

The “New” Horizontal Merger Guidelines

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The Proposed ("New") Horizontal Merger Guidelines

- First significant revision since 1992
  - Previous versions issued in 1982 and 1984
- Proposed Guidelines Released for Public Comment on April 21, 2010
  - Followed:
    - Comments solicited in September – 52 comments filed
    - 5 Separate Workshops
- 31 comments received to Proposed Guidelines
- Final version of Guidelines not yet issued

Key Changes

- Market definition
- Concentration thresholds
- Types and sources of evidence
- Unilateral effects
- Coordinated effects
- Price discrimination
- Entry conditions
- Efficiencies
- Partial acquisitions
- Monopsony
- Consummated mergers

Overview of Today

- Review key changes
- What are the implications of these changes
  - On merger analysis
  - On merger litigation
- Strategies for navigating in the new antitrust enforcement environment

Evidence of Adverse Competitive Effects

- New section [2] of the Guidelines: Upfront and Center
- "[A]ny reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."
- Categories include evidence of:
  - Actual competitive effects (consummated deals) (2.1.1)
  - Natural experiments (2.1.2)
  - Market shares and concentration (2.1.3)
  - Head-to-head competition (2.1.4)
  - Maverick status of merging party (2.1.5)
- Sources of evidence include: parties, customers, third parties.

But Wait . . . There's More

- Proposed revisions discuss additional types of evidence that agencies find useful, including:
  - Evidence of pre-merger margins, post-merger intent, efficiencies, and deal value (2.2.1)
  - Customer behavior/opinions (2.2.2)
  - Third-party behavior/opinions (2.2.3)

- Is there really anything new here? Yes and No
  - Agencies traditionally cast a wide evidentiary net
  - But revisions imply prominence given to evidence on specific issues - even where experience suggests limitations on value
  - Revisions do not address sufficiency or complexity issues

- Courts often skeptical about opinion testimony and other evidence
  - Guidelines may be attempt to bolster agency reliance

Margin Assumptions

- Two key statements regarding profit margins:
  - Section 2.2.1:
    - "For example, if a firm sets price well above marginal cost, that normally indicates either that the firm is coordinating with its rivals or that the firm believes its customers are not highly sensitive to price."
  - Section 4.1.3:
    - "Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price."
- Impact on analysis:
  - Reaction to overuse of critical loss analysis?
    - High margins translated into "free pass" for most mergers
  - But is this assumption going "too far"?
    - Contrary to industries with high fixed costs where high margins are typical, but market is still competitive

Revised Guidelines De-Emphasize Market Definition

- Market definition is just “one of the tools”
  - Not so subtle placement of “Market Definition” section after “Evidence of Adverse Competitive Effects” section
  - “Market definition is not an end in itself”
  - Some “analytical tools” used by Agencies “do not rely on market definition”
  - “Agencies rely much more on the value of diverted sales than the level of the HHI”
- But Section 7 of the Clayton Act requires the Agencies to prove market definition
  - Requires proof of “line of commerce”
  - Requires proof of a “section of the country”
- On May 11, 2010, in *City of New York v. Group Health Inc.* the court rejected the plaintiff’s use of UPP laid out in proposed guidelines because of the "clear requirement that a Plaintiff allege a particular product market in which competition will be impaired…”

A Picture is Worth . . .

Concentration Measures

- New concentration levels:

HHI Thresholds	1992	2010
Unconcentrated	< 1000	< 1500
Moderately Concentrated	1000-1800	1500-2500
Highly Concentrated	➢ 1800	>2500

- New change levels:

HHI Changes	1992	2010
Unconcentrated	--	< 100
Moderately Concentrated	> 100	> 100
Highly Concentrated	> 50 > 100 presumption	100-200 > 200 presumption

Concentration Measures

- Retained Presumption Language:
  - *"Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."*
- Is this presumption an accurate reflection of:
  - Actual staff practice?
  - US agency views expressed to the international community?

Unilateral Effects

- Section 6 describes different forms of unilateral effects:
  - Effects in differentiated products markets
  - Effects in auction markets
  - Effects in homogeneous product markets
  - Effects on innovation and . . . product variety

- Implied Guidelines approach:
  - First, determine whether there is any pre-merger competition/diversion between merging parties (static analysis)
  - Then, if preliminary screen shows possible effects (and often it will) factor in (perhaps with some skepticism) mitigating evidence of repositioning, entry, efficiencies

Unilateral Effects

- Agencies will rely on upward price pressure models, but how?
  - Approach often may lead to preliminary unilateral effects concerns
  - Unclear how much weight will be give to evidence of repositioning and efficiencies
  - Revisions offer little by way of predictive guidance
  - Tone of skepticism affords agencies latitude in weighing evidence
- New concept: loss of product variety as a distinct form of anticompetitive harm?

Coordinated Effects

- Section 7.1:
  - " . . .the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, *even without specific evidence* showing precisely how this will happen. The Agencies are likely to challenge a merger that would significantly increase concentration and lead to a moderately or highly concentrated market if that market shows signs of vulnerability to coordinated conduct and the Agencies have a theory they deem plausible of how the merger may cause adverse coordinated effects."
- Substantial lowering of hurdles Agencies must meet to bring a coordinated effects analysis
- Compare 1992 Guidelines
  - "Successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the coordinated interaction." (Emphasis added).
- To the Proposed Guidelines:
  - "The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative."

Entry Treated with Greater Skepticism

- Entry defenses have become more amorphous
  - Under new Guidelines, entry must be “rapid enough” to counteract anticompetitive results of merger
    - Under 1992 Guidelines, entry was considered timely if it could be accomplished within two years
  - Under new Guidelines entry must be “sufficient to replicate at least the scale and strength of one of the merging firms”
    - Entry was “sufficient” under 1992 Guidelines if the assets required for entry were adequately available for entrants to respond fully to sales opportunities
- Vagueness provides flexibility to the government to decide on a case-by-case basis how quickly entry must occur in order to be considered

Efficiencies

- Same basic approach as before:
  - Must be merger specific
  - Must be cognizable – continued skepticism over longer-term efficiencies (i.e., fixed cost savings)
  - Onus remains on merging parties to prove up
  - Must reverse anticompetitive effects to be sufficient
  - Revisions contain express recognition that consumer protection principle trumps wealth maximization
- Overall tone of skepticism – efficiencies unlikely to overcome serious concerns

Consummated Transactions

- Evidence of observed post-merger price increases or other adverse competitive effects is given substantial weight
  - Could be dispositive to Agencies
  - But what about evidence of a competitive marketplace
- Even if anticompetitive effects have not yet been observed, agencies will still consider same types of evidence they consider in proposed mergers

Other Changes

- Price Discrimination
- Power Buyers
- Failing Firm
- Monopsony Power
- Partial Acquisitions

Questions??