FTC AND DOJ ISSUE PROPOSED MERGER GUIDELINES

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Last week, the Federal Trade Commission and Antitrust Division of the Department of Justice (collectively the "Agencies") issued proposed revisions to the Horizontal Merger Guidelines ("Guidelines"), which outline the Agencies' methodology for assessing the probable effects of proposed mergers and acquisitions among competitors and ultimately for determining whether enforcement actions are necessary. The proposed Guidelines, containing the first reissue of and complete revisions to the Guidelines since 1992, have been released for a public comment period that expires on June 4, 2010.

The Agencies have indicated that, over the past 18 years, their practices have diverged from the Guidelines. The proposed Guidelines reflect the expansive and flexible approach that the Agencies have utilized in recent years, with the most significant changes to the Guidelines relating to overall methodology, as well as market definition and concentration. In addition, the revised Guidelines specify the types and sources of evidence the Agencies might consider in assessing the probable competitive effects of mergers and acquisitions.

The Agencies' flexible enforcement approach is most strongly reflected in the Guidelines' abandonment of the prior step-by-step analysis. The proposed Guidelines expressly reject a uniform methodology to determine the probable competitive effects of mergers. Rather, they now provide that the Agencies will engage in a transaction-by-transaction analysis, drawing upon their experience with merger enforcement and applying those analytical tools that are most appropriate for a specific transaction.

Nowhere is this flexible analysis more apparent than in the changes to the Guidelines' provisions concerning market definition and concentration. Market definition and measurement of market concentration are no longer the required starting point in the analysis. Although identification of substitutes for any overlapping products of the merging firms is still a necessary part of the analysis, it has been relegated to only one method for assessing probable competitive effects of mergers. The Guidelines also provide that "[e]vidence of competitive effects can inform market definition." To illustrate that principle with an example, the Guidelines provide that evidence that a reduction in the number of suppliers of a group of products sold by both parties to a merger caused those products' prices to increase can establish that the group of products constitutes a relevant market.

The proposed Guidelines also raise the thresholds for market concentration that will trigger a presumption of anticompetitive effects, finding that the presumptions will arise only in more heavily concentrated markets. Any presumptions arising from the concentration analysis, however, are not rigid thresholds and merely shape the analysis.

Perhaps the most significant change to the Guidelines is the addition of provisions specifying the types and sources of evidence that the Agencies are likely to consider in their assessment of the probable effects of merger. These provisions largely mirror the agencies' existing enforcement practices. The types of evidence include market definition and concentration, the extent of head-to-head competition between the parties, whether one party may be considered a price maverick (meaning a market participant who has competed aggressively on price or otherwise acted to the benefit of consumers), and the effects of recent mergers in the relevant or related markets. The sources of evidence include the merging parties, their customers and other market participants.

Also consistent with current practices are the revisions to the effects analysis. The proposed Guidelines emphasize unilateral effects (i.e. effects on competition caused only by the combined entity), which has been the theory of the overwhelming majority of enforcement actions. Consistent with the revisions discussed in the proceeding paragraph, the unilateral effects section specifies that evidence of such effects will be far more significant in the assessment of mergers than the concentration analysis. In addition, for the first time, the Guidelines now specify that these unilateral effects might include a reduction of incentives for new product innovation, a type of unilateral effect often applied to mergers in the pharmaceutical industry. The revised Guidelines, like their predecessor, also recognize that mergers may harm competition by fostering coordinated interaction among remaining market participants.

The Guidelines for the first time recognize that buyers of the overlapping products may have sufficient market power to negate any post-merger price increase. The presence of powerful customers in a market alone, however, will not rebut the possibility of anticompetitive effects, and the Agencies will engage in a transaction specific inquiry as to whether all customers actually have sufficient power to defeat any anticompetitive post-merger activity. Last, although the Guidelines continue consideration of whether any anticompetitive effects would be offset by timely, likely and sufficient entry into the market, the Guidelines now specify that historical entry attempts will provide the most significant evidence in an entry analysis.

In sum, the revisions to the Guidelines were intended to conform them to the Agencies' existing practices. It, therefore, remains to be seen whether the proposed Guidelines' more fluid, less definitive analysis will have a discernable effect on merger enforcement activity. Also to be seen is how courts will react to the Agencies' articulation of a more fluid approach, as courts have, in both actions involving the Agencies and otherwise, referred to and adopted the prior Guidelines' methodologies.