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FTC and DOJ Issue Revised Horizontal Merger Guidelines

Late last week, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) announced the issuance of revised Horizontal Merger Guidelines (Guidelines). The Guidelines set forth the analytic framework that directs the agencies' assessment of whether a horizontal merger or acquisition is likely to violate the antitrust laws. The revisions represent the first significant alterations to the Guidelines since 1992.¹ According to the agencies, and as described in our April 21 mailing, these changes are designed to clarify the merger review process by incorporating legal and economic developments over the last 18 years into the Guidelines.

The final Guidelines are not significantly different from the April draft. As we noted at the time, the proposed revisions diverged from the 1992 Guidelines in several important respects, as they:

- eschewed a rigid, formulaic approach that required the agencies to define product and geographic markets as a starting point for their analyses, in favor of a flexible methodology focusing on the likely competitive effects of a transaction;
- provided an expanded discussion of the analytical tools employed to assess whether the elimination of competition between the merging parties by itself (*i.e.*, unilateral effects) would reduce competition;
- increased the thresholds of market share concentration, calculated according to the Herfindahl-Hirschman Index (HHI), used to determine whether a transaction warrants further scrutiny; and
- characterized firms that are not current producers in the relevant market as market participants or potential entrants based on their abilities to impact the market with a "rapid" supply response in the event of a price increase.

The final Guidelines reflect a few notable changes apparently responsive to comments the agencies received on the April draft during the public comment period. For example, the agencies have revised Section 4 (Market Definition) acknowledging that antitrust law requires the agencies to define a relevant market, even if the agencies no longer treat market definition as the "starting point" for their merger analyses.

The final Guidelines also clarify the April draft's discussion of margins, noting (albeit in a footnote) that "high margins are not in themselves of antitrust concern." Nonetheless, the Guidelines continue to suggest that the agencies are more likely to scrutinize mergers involving competition in high margin relevant product markets.

In addition, Section 7.1 of the Guidelines (Impact of Merger on Coordinated Interaction) stresses that the agencies need a "credible basis" to conclude that a transaction may render a market more vulnerable to coordination. This change appropriately substitutes a higher burden than suggested by the April draft (*i.e.*, a "theory" of adverse competitive effects will result in a merger challenge if "deem[ed] plausible"). Section 7.1 also adds language stating that an acquisition eliminating a "maverick" (*i.e.*, "a firm that plays a disruptive

¹ The agencies amended the Guidelines' treatment of efficiencies in 1997.

role in the market to the benefit of customers”) in a market vulnerable to coordination is likely to result in adverse coordinated effects.

While the five FTC commissioners voted to approve the Guidelines unanimously, Commissioner J. Thomas Rosch issued a **concurring statement** criticizing the Guidelines. Rosch argued that the Guidelines overemphasize economic models based on price effects and fail to offer a clear framework for non-price considerations (e.g., reduction in quality, variety or innovation). He expressed concern that many of the economic theories set forth in the Guidelines are based on margins and that attempts to temper this focus in the Guidelines’ footnotes are not sufficient to curb the “sinister inference” suggested in the text. Noting that courts have typically relied on empirical evidence rather than economic theories, Rosch explained that “economic theories based on prices and margins are considered to be just that — theories. Although they may be considered in order to corroborate the inferences drawn from the empirical evidence, they are not substitutes for that evidence.” In conclusion, Rosch criticized the Guidelines for failing to deliver on their “promise at the outset — namely, that they will be a complete and accurate description of what our enforcement staff considers in merger investigations and that they will be a helpful guide to courts. These Guidelines are neither.”

In summary, the new Guidelines reflect the ongoing shift in the merger review process from the linear methodology of the 1992 Guidelines to a flexible, case-by-case inquiry through which the agencies will employ a variety of analytic tools to evaluate a proposed transaction’s effects on competition depending on the facts at hand. Skadden antitrust attorneys are available to answer any questions regarding the practical implications of the revisions to the Guidelines.

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