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Changes in U.S. Antitrust Enforcement

A number of important changes are expected to take place in U.S. antitrust enforcement in the near future, including revisions to the Horizontal Merger Guidelines, more aggressive Federal Trade Commission (“FTC”) procedures, tougher unilateral conduct enforcement, and the expected appointment of two new Democratic Commissioners at the FTC. In this alert, we provide an overview of these forthcoming developments.

Revisions to the Horizontal Merger Guidelines

The FTC and the Antitrust Division of the Department of Justice (“DOJ”) have announced that they will hold a series of five public workshops in the coming months to explore the possibility of updating the Horizontal Merger Guidelines (“Guidelines”) for the first time since 1997. The DOJ and FTC conducted similar workshops under the Bush administration, but concluded in 2006 “that a revamping of the Guidelines [was] neither needed nor widely desired”¹ Although the basic analytical framework of the Guidelines will likely be preserved, we expect that there will be important changes.

The FTC and DOJ highlighted twenty topics that they plan to discuss in the upcoming workshops (although no issue will be out of bounds).² Among the most noteworthy topics were HHI (market concentration) thresholds, unilateral effects analysis, non-price effects, minority interests, and use of “direct effects” evidence, which are described in more detail below.

- The Guidelines may be revised to adjust the HHI thresholds upwards in order to make them consistent with current practice.³ The current Guidelines provide that mergers in industries with HHIs of 1,000–1,800 “potentially raise significant competitive concerns,” but data published by the agencies indicates that such mergers are rarely challenged.
- The agencies are likely to incorporate into the Guidelines new ways to analyze potential price increases due to unilateral effects in differentiated product markets.

¹ DOJ and FTC Commentary on the Horizontal Merger Guidelines, *available at* <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

² See Horizontal Merger Guidelines: Questions for Public Comment, Sept. 22, 2009, *available at* <http://ftc.gov/bc/workshops/hmg/hmg-questions.pdf>.

³ HHIs are used as an aid in evaluating market concentration in horizontal mergers. HHIs are calculated by summing the squares of the individual market shares of all the participants.

- DOJ Assistant Attorney General Christine Varney and FTC Commissioner Thomas Rosch have placed a greater focus on theories of harm based on non-price effects of mergers, especially innovation. The Guidelines may be revised to address in more detail such theories.
- The Guidelines may be revised to address acquisitions of minority interests, which are not discussed in the current version of the Guidelines.
- The agencies may incorporate more explicitly the use of “direct effects” evidence into the Guidelines, such as customer views, the firms' post-merger plans, and historical actual or attempted coordination in the industry. Although the antitrust agencies already consider direct effects in their reviews of mergers, increased emphasis on direct effects may result in more data-intensive merger reviews.

More Aggressive FTC Procedures

In recent weeks, top officials at the FTC have indicated that the agency may implement more aggressive procedures in antitrust investigations in the future. For instance, FTC Commissioner Thomas Rosch has proposed that the FTC should make compulsory process mandatory at the beginning of every formal investigation.⁴ He believes that voluntary requests for information are used too frequently, and that “parties are far more likely to generate prompt and complete responses to Commission requests for information . . . if there are sanctions attached to not doing so.” According to Rosch, FTC staff should refuse to grant extensions of time and should enforce compliance with compulsory process if parties are stalling or not cooperating.

Richard Feinstein, Director of the FTC’s Bureau of Competition, has made similar statements.⁵ Feinstein stated that the FTC will expect parties to abide by timing arrangements, and the FTC will be quicker to compel process and seek subpoena assistance from the courts. Feinstein has also raised concerns about excessive redactions to documents made by parties, which slow the process of conducting antitrust investigations. Further, according to Feinstein, the FTC is considering a policy of going to court or invoking Rule 4.1(e)⁶ sanctions where parties or counsel have acted unethically.

In short, we expect the FTC to take a tougher position with respect to conducting investigations.

Tougher Unilateral Conduct Enforcement

In two recent speeches, Christine Varney called for greater international convergence on key antitrust issues, including single firm conduct.⁷ Varney stated that “an openness to others’ ideas and new approaches is critical to our efforts towards greater convergence.” In addition, one of

⁴ See J. Thomas Rosch, Remarks Before the Berlin Forum for EU-US Legal-Economic Affairs, Sept. 19, 2009, *available at* <http://www.ftc.gov/speeches/rosch/090919roschberlinspeech.pdf>.

⁵ See Richard Feinstein, Remarks at American Bar Association Brown Bag, Oct. 8, 2009, *available at* <http://www.abanet.org/antitrust/mo/premium-at/at-bb/09/AT91008.mp3>.

⁶ 16 CFR 4.1(e) requires attorneys practicing before the FTC to conform to standards of ethical conduct, and allows the FTC to reprimand, suspend, or disbar counsel from practicing before the FTC if counsel act unethically.

⁷ See Christine Varney, Remarks at the Counsel on Foreign Relations, Oct. 8, 2009, *available at* <http://www.usdoj.gov/atr/public/speeches/250814.htm>, and Christine Varney, Remarks at the 36th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy, Sept. 24, 2009, *available at* <http://www.usdoj.gov/atr/public/speeches/250264.htm>.

Varney's first acts at the DOJ was to withdraw the Bush administration's Section 2 Report,⁸ a report that the FTC opposed for placing "firms' interests ahead of the interests of consumers."⁹ These statements are signs that the DOJ and FTC plan more aggressive antitrust enforcement with respect to unilateral conduct. In fact, the DOJ and FTC have already begun inquiries into anticompetitive practices by Monsanto, IBM, and Intel.¹⁰ It remains to be seen whether there will be more cases filed and whether the agencies will be successful in persuading the courts, which have been skeptical of such claims in recent years.

New FTC Commissioners

President Obama is expected to nominate two new Commissioners to fill vacancies at the FTC left by the resignation of former Chairman Deborah Platt Majoras in March 2008 and the expiration of Commissioner Pamela Jones Harbour's term at the end of September 2009. Nominees for FTC Commissioner must be confirmed by the Senate. Both new Commissioners are expected to be Democrats since the President may nominate up to three Commissioners from the same party, and Chairman Leibowitz is currently the only Democratic Commissioner. Given the current composition of the FTC, we would not expect the addition of two new Democratic Commissioners to substantially change the current enforcement minded trend at the FTC.

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⁸ See Justice Department Withdraws Report on Antitrust Monopoly Law, *available at* <http://www.usdoj.gov/opa/pr/2009/May/09-at-459.html>.

⁹ See Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice, *available at* <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

¹⁰ The DOJ has initiated investigations into whether Monsanto has monopolized certain modified seed markets and whether IBM has monopolized mainframe markets. The FTC is investigating allegations that Intel has monopolized the microprocessor market.

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