Department of Justice

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JUSTICE DEPARTMENT AND FEDERAL TRADE COMMISSION ISSUE HORIZONTAL MERGER GUIDELINES

WASHINGTON, D.C. -- The Department of Justice and Federal Trade Commission (FTC) issued new 1992 Horizontal Merger Guidelines today, updating guidelines issued by the Department in 1984, and the Statement Concerning Horizontal Mergers issued by the FTC in 1982.

Today's action marked the first time that guidelines were issued jointly by the Department and the FTC, both of which share responsibility for federal antitrust merger enforcement.

Attorney General William P. Barr said, "As a principle of good government, joint guidelines are a major step forward. Where, as here, two agencies have concurrent enforcement responsibilities, the standards to be applied should not depend on which agency is analyzing a particular merger."

Assistant Attorney General James F. Rill in charge of the Antitrust Division said, "It is important to issue guidelines to provide businesses and consumers with a clear articulation of the analytical framework and specific standards the agencies employ in evaluating the competitive effects of transactions. The clear guidance that the 1992 guidelines give to the business community should minimize uncertainty in structuring merger transactions.

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"The 1992 guidelines represent the next logical step in the development of merger analysis. They incorporate the best legal and economic knowledge about the effects of mergers," said Rill. "The Department and Commission are committed to sound merger enforcement because that produces optimum benefits to the competitiveness of U.S. firms and the economy as a whole."

The new guidelines are designed to protect free-market competition by first preventing anticompetitive transactions so U.S. consumers will not be disadvantaged by anticompetitive mergers. At the same time, clarification reduces deterrents to efficiency-enhancing business conduct that will promote U.S. competitiveness.

The revisions reflect the agencies' eight years of experience working with the 1984 Guidelines. Specifically, the 1992 guidelines offer a comprehensive treatment of the potential adverse competitive effects of mergers, as well as an explication of the relevance of particular market factors to each of those effects.

The revisions articulate a five-step analytical process for determining whether to challenge a merger. The elements include: market definition, measurement and concentration; the potential adverse competitive effects of the merger; entry; efficiencies; and failure and exiting assets.

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The guidelines, for the first time, also articulate the circumstances under which a merger might lead to the unilateral exercise of market power. The agencies will consider the unilateral effects, in addition to whether a merger might lead to coordinated interaction among the firms remaining in the market.

The new guidelines use the term "coordinated interaction," rather than "collusion," as in the 1984 Merger Guidelines, to clarify that the agencies' concerns reach mergers whose effects might lead to tacit collusion.

Another area of significant improvement is the 1992 guidelines' treatment of entry. The new guidelines provide a framework for analyzing whether entry is timely, likely and sufficient to deter or counteract an anticompetitive merger.

The Department and the FTC have consulted with representatives of the National Association of Attorneys General (NAAG), which published its own merger guidelines in 1987. The Department and the FTC, acknowledge the useful input received from the NAAG representatives, and hope that this three-way consultation process represents a constructive step toward harmonization of federal and state merger standards.

"The 1992 guidelines reflect the current state of legal and economic thinking concerning the competitive effects of mergers, as well as our experience in reviewing mergers under the existing standards," said Barr. "The adoption of the new guidelines by the Department and the FTC should result in substantial benefits to U.S. consumers and U.S. businesses."

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