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# DOJ Releases New Merger Remedy Guide

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The DOJ has released an updated merger remedies guide that provides an overview on how the DOJ Antitrust Division staff will analyze proposed remedies in merger matters. The revised guide places an increased emphasis on behavioral or conduct remedies to address issues raised by vertical transactions.

On Friday, June 17, the Department of Justice (DOJ) released an updated merger remedies guide that provides an overview on how the DOJ Antitrust Division (Division) staff will analyze proposed remedies in merger matters. This is the first update the Division has issued since the issuance of the original guide in 2004. The primary difference between the 2004 and updated merger remedies guide is the Division's position that conduct or behavioral remedies are often appropriate to address concerns raised in vertical transactions. Although this is a change in policy, it reflects the types of remedies the Division has implemented over the last two years. For example, the Division has required behavioral remedies in several large transactions over the last two years, including Comcast/NBCU, Ticketmaster/Live Nation and GrafTech/Seadrift. The other major changes include the requirement of an up-front buyer for particular divestitures, the potential inclusion of "crown jewel" remedies, and the consolidation of all Division oversight of remedies with the Division's Office of General Counsel.

The biggest change from the 2004 guide is that the updated guide focuses on how behavioral or conduct remedies are often necessary and appropriate to address both horizontal and vertical transactions. Due to questions about the effectiveness and ability to monitor conduct remedies, the 2004 guide stated that conduct relief was appropriate in only limited circumstances. In contrast, the updated guide states that effective merger remedies include both structural or conduct provisions. Structural remedies typically involve the sale of physical assets by the merging firms or the sale or licensing of intellectual property rights. A conduct remedy typically involves certain limitations or restrictions on how the merged entity can conduct business once the merger is complete.

The updated guide says that conduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies, but absent a remedy, the merger would harm competition. The updated guide acknowledges that these conduct remedies will most often be used as an effective method to address competition concerns raised by vertical mergers. Nonetheless, the updated guide states that these remedies can also be used, usually in conjunction with structural remedies, to address concerns raised by horizontal mergers as well. The revised guide discusses the importance of creating clear remedies that can be enforced. Furthermore, the revised guide discuses the most common type of conduct relief, including firewall, non-discrimination, mandatory licensing, transparency and anti-retaliation provisions, as well as prohibitions on certain contracting practices.

Although the discussion of these behavioral remedies in the revised guide are a big change from the 2004 guide, we have seen the Obama Administration Division utilize these remedies over the last two years.

In what is a major departure from the 2004 Guide, when the divestiture involves less than an existing business, the Division may require either an upfront buyer or a crown jewel provision. In contrast to the Federal Trade Commission (FTC), the Division traditionally has not required an upfront buyer and has disfavored crown jewel provisions. Historically, when a remedy was likely, merging parties preferred having the Division review the transaction because the Division did not require an upfront buyer. This meant that the parties could typically close the transaction more quickly since they did not have to find and negotiate a purchase agreement with an upfront buyer. It appears that the Division's merger remedies policy is now more aligned with the FTC policy. Both agencies may now require an upfront buyer in divestitures when the merging parties are not divesting a stand-alone business. Similarly, in contrast to the 2004 guide, the revised guide adopts the FTC policy of sometimes requiring a crown jewel provision if there is any doubt over whether an acceptable buyer can be found for the divestiture package. Like the 2004 Guide, the updated guide states that a fix-it-first remedy may be acceptable. However, it states that the Division will not accept a fix-it-first remedy if the remedy needs to be monitored or involves post-closing entanglements between the buyer and seller.

Another change involves the Division's discussion of how mergers in regulated industries may impact the type of remedy. For example, the Division may not need to include certain provisions in a consent decree if the regulatory agency's order contains these provisions or if the regulatory agency already monitors particular conduct. This situation occurs quite frequently in transactions in the communications industry, where the Federal Communications Commission (FCC) and Division cooperate in reviewing transactions.

With respect to structural remedies, the updated guide is generally consistent with the 2004 guide. Both guides emphasize the importance of the divestiture including all assets necessary for the buyer to be an effective, long-term competitor. Additionally, in accordance with the 2004 guide, the revised guide discusses how the divestiture of an existing business entity, or ongoing business, rather than a divestiture of selected assets, is preferable. Nevertheless, the guide also states that the Division is willing to consider the divestiture of less than an existing business.

Similar to the 2004 guide, the updated guide provides that the Division may require that additional assets be divested when it finds that the divestiture of an existing business entity is insufficient to resolve the competitive issues of the merger. For example, the updated guide states that the Division may require a "full line" of products to be offered in the divestiture package, even when its antitrust concern relates to only a subset of those products. In addition, even if the merger creates a problem in the U.S., the Division could require the divestiture of a worldwide business, if necessary, to restore competition.

With respect to an intellectual property divestiture or license, the updated guide is generally consistent with the 2004 guide. The Division states that permitting the merged firm to retain access to intangible assets, such as a patent, may create significant competition issues. As a result, the Division may require the merged firm to relinquish all rights to the intangible assets. However, the revised guide goes on to say that in certain circumstances, where efficiencies are significant, the Division may allow the buyer to retain a non-exclusive license for those intangible assets.

The updated and 2004 guides are similar on the factors the Division will analyze in determining whether to approve a specific buyer of the divested assets. The updated guide lists three key factors:

1. The divestiture of the assets to the proposed buyer must not itself cause competitive harm.
2. The purchaser must have the incentive to use the divestiture assets to compete in the relevant market.
3. The buyer must have sufficient knowledge, experience and financial capability to compete over the long-term.

Moreover, both the 2004 and updated guides state that the Division may consider the price of the divestiture assets in evaluating a buyer. For example, the revised guide states that the Division will not approve a purchaser if the purchase price is too low, suggesting that the "purchaser does not intend to keep the assets in the market." Similarly, the Division may have concerns about the buyer paying too high a price for the assets because it could indicate that the buyer is paying a premium for the acquisition of market power or that the buyer could be handicapped by debt or lack of adequate working capital. In addition, the revised guide states that the Division is unlikely to allow the seller to finance the sale of the divestiture assets. Lastly, like the 2004 guide, the updated guide provides that the Division typically allows parties sixty to ninety days to find a purchaser on their own. If the parties are unable to do so, the Division has the right to appoint a selling trustee to complete the sale.

Finally, in what is a major organizational change, the Division has placed responsibility for the evaluation and oversight of merger remedies with the Office of the General Counsel. Prior to the revised guide, the staff attorney who reviewed the transaction also had responsibility for the drafting and oversight of remedies. It appears that the Division is creating a separate section to handle all merger remedies, similar to the FTC's separate Compliance shop.