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*Antitrust,  
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## DOJ Antitrust Division Updates Policy Guide to Merger Remedies: Subtle but Significant Changes Clients Should Understand

The U.S. Department of Justice Antitrust Division released its revised Policy Guide to Merger Remedies on June 17 – the first revision of this publication since 2004. The revised document reflects a far more tolerant attitude by the DOJ towards conduct-based remedies and could affect how companies evaluate their own potential mergers and how they react to competitors' mergers. Citing "globalization" and more "complex international and vertical transactions," the updated guide augurs more flexibility by the DOJ in fashioning unique remedies for approving proposed mergers, as well as the possibility of more DOJ involvement in challenging vertical mergers (i.e., mergers between suppliers and customers).

The most apparent change in policy is a willingness to pursue conduct-based remedies that the older version of the guide criticized or preemptively rejected. Conduct-based remedies restrict or govern certain post-consummation business conduct by the merged entity and are an alternative to the typical merger remedy of divestiture. The 2004 guidelines discouraged conduct-based remedies "because they tend to entangle the Antitrust Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies [i.e., divestitures] can avoid." The updated guidelines, however, recognize that conduct-based remedies can reserve a merger's potential efficiencies, while still addressing the potential competitive harm caused by the transaction, particularly in the context of vertical mergers.

Conduct-based remedies that were criticized in the 2004 version are presented in the 2011 version in a considerably more positive light. New remedies include mandatory licensing provisions, prohibitions on certain contracting provisions (i.e., restrictive or exclusive terms), and notice of otherwise non-reportable mergers. Some of these remedies provide non-merging companies and customers with protection against retaliation or discrimination by the merged entity. For instance, mandatory licensing provisions can require a merged entity to license certain technology or other assets to competitors.

The revisions to the Policy Guide may hold important clues to the direction of DOJ antitrust enforcement. While both the FTC and the DOJ have permitted some conduct-based remedies in recent years (i.e. *Evanston Hospital*, *PepsiCo* and *Scott & White* for the FTC and *Ticketmaster* and *Comcast/NBC* for the DOJ), this is the first time the DOJ has issued official guidelines that encourage conduct-based remedies. Also, as conduct-based remedies tend to be more relevant to vertical than to horizontal mergers, the Antitrust Division's increased focus on conduct-based remedies may suggest that the DOJ will be more active in investigating and challenging vertical mergers.

The updated guide's attitude towards the cost and difficulty of enforcement also confirms that a priority of the Antitrust Division is to increase the number of merger settlements. Whereas the 2004

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remedies policy guide voiced an aversion to conduct-based remedies due to the cost of monitoring and enforcing them, the 2011 guide appears more open to these types of remedies, despite the potential costs involved. The updated guide also highlights the role of the department's newly created General Counsel's Office in ensuring that entities are complying with consent decrees in merger cases. Apparently, the DOJ's experience over the past seven years has made it more willing to become involved in the ongoing business of the companies that it monitors.

Although the revised guide contains many of the same policies outlined in the previous version, the increased emphasis on conduct-based remedies and the change in attitude towards enforcement costs provide important indications of the DOJ's antitrust enforcement objectives that clients should understand. This is particularly true for those clients either contemplating vertical mergers or affected by competitors' vertical mergers. Clients should expect more challenges to vertical mergers.

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