DEPARTMENT OF JUSTICE

Welcome to the Workshops

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Welcome Remarks as Prepared for the
Horizontal Merger Guidelines Review Project's
First Workshop

Washington, D.C.

December 3, 2009

In September, the Department of Justice and the Federal Trade Commission announced that we would be holding workshops to explore whether and how the Agencies should update the Horizontal Merger Guidelines in light of changes in economic learning, the case law, and practice at the Antitrust Division and the FTC since the last significant Guidelines revision in 1992. We then issued a detailed set of questions for public comment. In response, we received 44 comments from lawyers, economists, and other interested parties. Those comments, which are available on the FTC's Web site, reflect a great amount of thought and consideration, for which we are very grateful.

Today, we are holding the first of five workshops at which we will hear more from leading experts. Two more panels will be held later this month in New York and Chicago. The other two will be held January: one in California and one back here in Washington. Details about the upcoming workshops are available on the FTC's web site, and I encourage all those interested in the proceedings to attend or follow them online.

Today's workshop will have four panels. After our introductory panel, which I will address shortly, we will have three panels later today concerning three topics: (1) the relevance and use of direct evidence of competitive effects, (2) market definition, and (3) unilateral effects.

As I noted in my remarks announcing this review project, the current Guidelines only sparely address the use of direct evidence that is not based on inferences from increases in market concentration. Nevertheless, that direct evidence is something that the Antitrust Division and the FTC routinely rely on in our analyses in both unilateral- and coordinated-effects cases. It is also evidence that courts find compelling. For instance, the

FTC's showing in the *Staples* matter that prices were generally lower when more office superstores competed within a geographic market constituted a key element of the court's views on the likely competitive effects of that proposed combination.[1] Whether and how the Guidelines should be modified to address direct evidence more explicitly than they currently do will be the subject of today's second panel. Included in that discussion will be views on what kinds of direct evidence are most relevant to determining a merger's likely effects on consumers and competition—the core concern of our merger laws and, hence, the Guidelines.

This issue touches upon something that was raised in a number of the public comments and is, I suspect, something that many of our panelists today will have views on: namely, the degree of specificity that is generally appropriate in the Guidelines. A number of commentators made quite specific recommendations on different aspects of the Guidelines, and, indeed, the questions we issued to guide those public comments were themselves quite specific in some circumstances. In some contrast, other commentators stressed the appropriateness of a high degree of generality in the Guidelines. Balancing those concerns is something that I am interested in hearing further views on.

Our third panel today will address market definition. Several commentators offered that, despite any perceived flaws associated with delineating product and geographic markets, defining markets should remain a cornerstone of the Guidelines

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[1] FTC v. Staples, Inc., 970 F. Supp. 1066, 1082 (D.D.C. 1997).

framework. Those comments are in keeping with my own, preliminary view that drastic revision of the Guidelines does not at this time appear to be appropriate because the core elements of the Guidelines—like their use of market definition to build a structural case—remain fundamentally sound.

Nonetheless, the comments we have received reflect the reality that the role of market definition in the process of assessing competitive effects has diminished over time. Within the Agencies, for instance, we often back into a market definition after assessing likely competitive effects through other means. In this regard, the 2006 Commentary on the Horizontal Merger Guidelines quite accurately notes that the Agencies do not apply the Guidelines as mechanistically as the Guidelines might suggest. Courts, however, remain quite focused on market definition. We are thus extremely interested in the views of our experts, who have real-life experience grappling with the complexities of the practice of defining markets, to help illustrate ways that the Guidelines should, or should not, be updated.

On a more technical level, some of our commentators have pointed out circumstances where the hypothetical-monopolist paradigm for defining markets is difficult to apply or where a mechanical application of the paradigm may be unhelpful or misleading. Those circumstances include dynamic, high-tech markets where competitive interactions may be particularly difficult to assess. Whether and how these perceived ambiguities can or should be clarified, and whether the Guidelines should indicate some of the pitfalls that arise from a rigid application of the hypothetical-monopolist algorithm, is something we also look forward to hearing about during our third panel.

Our fourth panel of the day will address unilateral effects, a subject that many of our commentators addressed. The concept of potentially adverse unilateral effects from a merger was expressly introduced in the 1992 revision to the Guidelines. That discussion is, however, brief, and we are interested in hearing whether advances in learning since 1992 could be usefully incorporated into the Guidelines, particularly in view of some judicial dissatisfaction with the Guidelines' articulation of the theory of adverse unilateral effects.[2] What the comments do make clear, however, is that significant advances in our understanding of unilateral effects have indeed occurred since 1992: practice and learning have clearly evolved substantially. Whether any of those developments should be incorporated into the Guidelines is something we look forward to hearing our panelists' views on.

Our first panel kicking off the workshops will offer historical perspectives on the role of the Guidelines. Placing the Guidelines within their historical context is an excellent way to launch the workshops because each version of the Guidelines builds upon its predecessors. For instance, in announcing the 1992 Guidelines, the Department noted that they reflected "the agencies' eight years of experience working with the 1984 Guidelines" and represented "the next logical step in the development of merger analysis."[3] Similarly,

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2 *See, e.g.*, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1117 (N.D. Cal. 2004).

3 Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Justice Department and Federal Trade Commission Issue Horizontal Merger Guidelines (Apr. 2, 1992), *available at* http://www.justice.gov/atr/public/press_releases/1992/0270.htm.

the Department explained that the 1997 update was designed in part to articulate "existing practices at the agencies" as they had evolved under the 1992 Guidelines.[4]

In our first panel, we have been able to gather a distinguished panel whose members bring a wealth of experience and expertise that will help us frame our workshops within their appropriate historical context. All five have significant enforcement experience, and all five have experience representing clients before the Agencies, as well. Several were involved in producing prior iterations of the Guidelines, and I'm particularly interested in views about what went well and what didn't go well during those experiences.

The first of our panelists is Deb Garza, who is currently Co-Chair of Covington & Burling's Antitrust and Consumer Law Practice Group. She previously served as Deputy Assistant Attorney General and then Acting Assistant Attorney General in charge of the Antitrust Division between May 2007 and January 2009. She was also Chair of the Antitrust Modernization Commission, which spent three years surveying antitrust enforcement in the United States. In its April 2007 Report and Recommendations, the AMC told the President and the Congress that there was no need for "wholesale changes to merger policy" but did offer that the Horizontal Merger Guidelines should be updated with regard to "the potential impact of a merger on innovation."[5] We're grateful to her for

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4 Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Justice Department and Federal Trade Commission Announce Revisions to Merger Guidelines (Apr. 8, 1997), *available at* http://www.justice.gov/atr/public/press_releases/1997/1088.pdf.

5 ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 55, 67 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

agreeing to share with us the perspectives she's gained from her service at the Antitrust Division, as Chair of the AMC, and from private practice.

Doug Melamed is currently a Senior Vice President and General Counsel of Intel. Before that, he worked at WilmerHale and its predecessor for 25 years. Like Deb, he also served as Deputy Assistant Attorney General and then Acting Assistant Attorney General in charge of the Antitrust Division between October 1996 and January 2001, during which time the Guidelines were last revised. Doug, we're grateful to you for making time to share your experiences with us so early in your tenure at Intel.

Our third panelist is Tim Muris, who is a Professor at George Mason University School of Law and is also Co-Chair of O'Melveny & Myers's Antitrust and Competition Practice. Tim served as Chairman of the FTC between 2001 and 2004 and, in addition, previously served as Director of both the FTC's Bureau of Consumer Protection and Bureau of Competition. Tim, we're grateful to you for being here.

Our fourth panelist is Bob Pitofsky, who is a Professor at the Georgetown University Law Center and also Counsel at Arnold & Porter. Bob was a Commissioner of the FTC between 1978 and 1981 and then the Chairman of the FTC between 1995 and 2001, during which time I served as a Commissioner at the FTC. He was instrumental in the promulgation of the 1997 update to the Guidelines section dealing with efficiencies. It's a special pleasure for me to be inviting a dean of the antitrust bar, as well as a great friend and mentor, to this program.

The same can be said of Jim Rill. Jim was Assistant Attorney General in charge of the Antitrust Division between June 1989 and May 1992. As AAG, and of particular

relevance today, he was an architect of the 1992 Guidelines, which were the first to be jointly adopted by the Justice Department and the FTC. Between 1997 and 2000, he served as Co-Chair of the Department of Justice's International Competition Policy Advisory Committee, whose report discussed the influence of the Guidelines abroad. He currently works at Howrey. Jim, welcome.

Finally, I again would like to emphasize as we begin these workshops that we have no preconceived decisions about whether and how the Guidelines should be updated. Like the public comments, these workshops are meant to inform our decision-making. We're here today to learn. In that vein, to all the panelists who have offered or will offer their time and expertise, I extend the thanks of the Department of Justice for your insights and your valuable public service.