

## **Summary of Antitrust Modernization Commission Hearing on Assessment of U.S. Merger Enforcement Policy**

**November 17, 2005**

The Antitrust Modernization Commission (“AMC” or “Commission”) held a hearing on November 17, 2005 to obtain testimony accessing U.S. Merger Enforcement Policy. Specifically, the AMC asked the panel of assembled experts “whether current merger enforcement policy in the U.S. ensures competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets.” In fact, the hearing focused on the impact of the Merger Guidelines, especially Guidelines from 1992 forward.

The panel unanimously agreed that merger enforcement had become more consistent and predictable as a result of the Merger Guidelines, particularly from 1992 forward. In general, there was consensus that Merger Guidelines accomplished what they had set out to do, and were not in need of major revision. The panel pointed to the acceptance of the guidelines by the Courts and in the international community as evidence of the guidelines success. However, there were two areas where the panel was in relative agreement that improvements could be made, though the panel provided little information as to how to proceed. First was a general agreement that there needed to be increased transparency of the agency decision process. Second, the panel agreed that there needed to be significant improvement to the inter-agency clearance process.

### **I. Summary of Written Testimony:**

A. William J. Baer. Partner and Chair of the Antitrust Practice, Arnold & Porter LLP, Washington D.C.

William Baer testified that the current approach to merger analysis, dating from the adoption of the 1982 Merger Guidelines, and particularly since the 1992 revisions, marks a significant improvement over earlier enforcement practice. Baer states that while earlier enforcement was often characterized as being unpredictable and overly aggressive, current practice is characterized as being focused and constructive. Baer asserts that this improvement is largely due to the Merger Guidelines, which provide a framework and a common vocabulary for merger analysis and focus attention on specific key issues: market definition, concentration, competitive effects, likelihood of entry, and efficiencies.

Baer also pointed to developments in merger practice which he identifies as indicators of the positive impact of the Merger Guidelines. Among these is the general consensus as to the proper scope of merger analysis in the political arena today as compared to the contentious debates of the 1970’s and early 1980’s. Baer notes that this reduction in the volume of the political debate is also reflected in the scholarly arena. He also points out the positive trend in the courts, noting that over time they have become

more accepting of the guidelines and more consistently apply guideline principals when adjudicating a challenge. Finally, Baer points to the growing acceptance of the “substantially lessening competition” standard by foreign jurisdictions.

Baer concludes that only minor tweaking of current enforcement practice is called for. He recognizes the debate as to the relationship between market concentration and market performance, yet rejects the argument that the presumption of anticompetitive effects embodied in the Merger Guidelines should be jettisoned. Baer argues that, while critics might have a point if analysis stopped with a finding of market concentration, that is not how the analysis works today. Rather, Baer argues that market concentration functions as a screening mechanism to identify mergers which may be deserving of closer inspection. Turning to other matters, Baer argues that the decision making process at the FTC should be more transparent, that clearance between the agencies is a continuing issue which should be resolved, and that second requests are often unreasonably burdensome and the process is in need of reform. Nevertheless, Baer concludes that merger enforcement today is “more predictable, transparent and analytically sound than ever before.”

B. James F. Rill. Partner in Howery LLP’s antitrust practice group in Washington, D.C. and former Assistant Attorney General in charge of the U.S. Department of Justice’s Antitrust Division. During his tenure as Assistant Attorney General, Mr. Rill oversaw the issuance of the Joint DOJ-FTC 1992 Merger Guidelines.

James Rill argues that the Merger Guidelines provide adequate and effective guidance for the merger enforcement program and that there is adequate transparency in federal enforcement policy. Mr. Rill also states that revision of the Merger Guidelines is not called for, and legislation is neither called for or desirable. Mr. Rill points to the widespread adoption of the Merger Guidelines by the courts as an indicator of their success in providing an analytical basis for case analysis. Similarly, he points to the acceptance of the analytical structure of the guidelines by foreign jurisdictions as a further indicator of the guidelines success.

Mr. Rill acknowledges that the Merger Guidelines have been the subject of criticism on several grounds, including: 1) that they preserve the “fiction” of relevant market definition; 2) the competitive effects section is an unstructured, unweighted checklist; 3) the unilateral effects section is similar to the historic submarket concept and is susceptible to loose analysis; and 4) the efficiency section is unduly narrow and incomplete. Mr. Rill dismisses these criticisms as being “marginal criticisms that misjudge the flexibility of the Merger Guidelines to adapt to changes in industry dynamics and evolving economic and institutional learning.”

Mr. Rill specifically acknowledges that some economists have urged substituting direct measurement of competitive effects by econometric techniques for the current guidelines approach to market definition. While Mr. Rill feels that economic simulation can be effective to test the conclusions reached by empirical evidence, he does not feel

that the methodology or the likely underlying data are sufficiently reliable to justify the implementation of this approach at this time.

C. Robert D. Willig. Competition Policy Associates (COMPASS), Princeton, New Jersey.

Mr. Willig testified that the Merger Guidelines organize current enforcement policy well in today's environment and remain an appropriate platform for dealing with continuing changes in the economy and our understanding of it. Mr. Willig states that despite significant changes in the economy and in governmental regulatory mechanisms, the fundamental conceptual framework for antitrust merger policy remains sound.

Mr. Willig specifically addressed the ongoing debate regarding the role played by relevant markets and concentration in antitrust merger analysis, noting that some view the construct of relevant market to be obsolete. Mr. Willig rejects this view, noting that data sets, analytical tools and analyses are imperfect, and that important discipline in merger analysis is fostered by the insistence that intervention be founded on the identification of relevant markets in which competition is predicted to be significantly weakened by the merger. He further notes that, under the proper application of the guidelines, market definition does not compel over-reliance on concentration measurements for the rationale for enforcement action.

Mr. Willig does, however, identify one significant problem with the current enforcement regime. "The problem is the lack of transparency accorded to the economic analysis performed by the agencies that sometimes are quite influential in agency decisions." Mr. Willig argues that this lack of transparency can lead to agency analyses and conclusions which are not subjected to dialogue with the parties that often corrects errors, broadens perspectives and helps to make the process more reliable. However, while noting the increasing need for transparency, Mr. Willig acknowledges that he has no solution for dealing with the fact that often the data utilized by the agency is provided under confidentiality arrangements.

D. David T. Scheffman, LECG LLC, Washington, D.C. [Written Testimony Not Yet Available]

## **II. Highlights from Questions and Answers (Paraphrased):**

Q: What do you believe to be the error rate, when the agency should enforce and when it should not?

Mr. Scheffman: I believe that the error rate is low, but that is my opinion based on what I view a reasonable person would conclude based on the facts. Errors are most likely to occur where you do not have credible consumer complaints, which is less likely in the B-to-B situation where customers are more informed. Errors also can occur where there is an absence of strong empirical evidence, or an absence of "hot documents."

Mr. Baer: It is difficult to say from year to year whether credible cases are more or less common. What can be said is that under the guidelines, the analysis is articulated and more rigorous. To a certain extent, the question has to do with the perceptions of the general public, and the antitrust community needs to do a better job in communicating to the general public.

Mr. Rill: The process is a learning one and is evolving, but the error rate is low.

Mr. Willig: The error rate is low. Most errors can be traced to the personal or political viewpoint of individual investigators. This would less likely be the case where there is more transparency to the process.

Q: We are troubled by continued commentary in the press critical of a perceived “lack of enforcement.” Is the test wrong, or is there a disconnect between the antitrust community and the general public?

Mr. Scheffman: Neither political party is running on the argument that antitrust enforcement policy is wrong. Media commentary is reflective of a populist bias in the general public.

Mr. Rill: There is a populist bias against “bigness.” In my view, if the far right and the far left are both angry, you probably have it about right.

Mr. Baer: The problem is one of communication between the antitrust community and the general public. It is a serious problem deserving of attention.

Q: Do the Merger Guidelines provide a sufficient roadmap for judges?

Mr. Baer: The analytical consistency of court opinions has greatly improved as a result of the guidelines.

Mr. Rill: The guidelines have played a very important role in informing the courts.

Mr. Scheffman: The guidelines provide sufficient guidance to judges.