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Guideline 2: The Importance of Direct Indicators of Competition in Merger Review

Remarks of Henry Liu
Crowell and Bates White 13th Annual Luncheon
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Thank you for the warm introduction. I appreciate the invitation to speak here today, and a special thanks to my team—in particular, Albert Teng—for assisting with these remarks. Before I begin, I'll offer the standard disclaimer that I am here speaking solely for myself; I do not speak for the Commission or staff at the FTC.

A lot has been said about the new 2023 Merger Guidelines and I won't take your entire lunch hour rehashing those discussions. But I will say that—now that we're four months into the new Guidelines—one thing is clear: they are working. The new Guidelines better reflect the reality of how competition occurs, and they provide real transparency into how the agencies are thinking about whether mergers present sufficient competitive risk to warrant an enforcement action.

Today, I wanted to focus on one particular part of the new Guidelines—Guideline 2—which states that "Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms."[1] This is a simple and obvious sentence and captures the concept of unilateral effects in the 2010 Horizontal Merger Guidelines. But the intent of Guideline 2 is broader—it reflects the fact that we are prioritizing direct indicators of competition between the merging parties over potentially superfluous and unnecessary fights about market definition. In other words, where there is direct evidence that a merger may substa

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indicate that there are over 100,000 new computer and information science graduates in the United States each year,[2] and it would not be a stretch to argue that the overall market for recent college graduates is “unconcentrated”—with hundreds, if not thousands, of companies hiring.

Under a merger analysis approach centered on market definition, we might struggle to define a relevant market that is concentrated. The merging parties’ market shares in any market for computer science graduates in Silicon Valley would undoubtedly be small. And intuitively, without more information, it would be challenging to convince a court that the merger would be presumptively unlawful in a labor market—college graduates probably have any number of options in California and elsewhere.

But what if the evidence tells a different story? Imagine that ordinary course emails

focus of merger litigation—not because it is the only tool for evaluating the merger's effects on competition, but because it has become a make-or-break issue for courts.

The focus on market definition has frustrated enforcement efforts and can be, at least in some cases, analytically backwa