

# Client Alert

A report  
for clients  
and friends  
of the firm

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## Timothy J. Muris as Chairman of the FTC: *The More Things Stay the Same, The More They Change*

On June 1, 2001, Timothy J. Muris succeeded Robert Pitofsky as Chairman of the Federal Trade Commission. During his six-year tenure as Chairman, Mr. Pitofsky had supervised one of the more aggressive antitrust enforcement periods in the FTC's history. At one of his first speeches as Chairman, Mr. Muris assured the Antitrust Section of the American Bar Association: "There has been considerable speculation about possible changes at the Commission . . . Continuity will be the norm, with changes at the margins."

In his first four months, Mr. Muris has committed the FTC to classic antitrust enforcement efforts focusing on conduct among competitors. However, the FTC already has changed "at the margins" in significant ways that will affect your business strategies. Companies considering mergers or acquisitions should be aware that their transactions now will be reviewed by an FTC:

- that still will actively analyze and challenge horizontal mergers that may be anticompetitive.
- that will be more flexible in assessing mergers of competitors, even in concentrated industries.
- that will give greater weight to efficiencies produced by a merger.

### ***The FTC Will Actively Review Horizontal Mergers***

When Mr. Muris was nominated, many questioned whether merger enforcement efforts would wane. Mr. Muris has sought to end that line of thought. As Chairman Muris explained in his ABA speech, "I can tell you unequivocally that if you come in with transactions that would not fly in the past, you are likely to 'crash' unless you have compelling, stubborn facts on your side."

For example, Mr. Muris emphasized that the FTC will scrutinize mergers that are not subject to reporting

requirements. Just last year, Congress increased the dollar threshold under the Hart-Scott-Rodino Act ("HSR") for reporting mergers to \$50 million from \$15 million. Nevertheless, Mr. Muris has announced that the FTC will carefully examine mergers under the \$50 million threshold. In fact, the FTC has just challenged two acquisitions by MSC Software Corp.—one for \$8.4 million and the other for \$10 million—neither of which would have been reportable under the old HSR dollar standards. Therefore, if your business is considering a merger or acquisition, it should carefully assess the antitrust implications of the transaction even if it is not subject to the HSR reporting requirements.

### ***The FTC May Be More Flexible in Assessing Mergers***

The Muris FTC also is clearly willing to consider "compelling, stubborn facts" that might justify a merger that otherwise raises traditional antitrust concerns. For example, developments suggest that the FTC now may allow mergers of smaller businesses if the combined company can compete better with larger, dominant competitors. That this constitutes a subtle shift "at the margin" is confirmed by a comparison of an FTC lawsuit filed last spring under Mr. Pitofsky to stop the merger of Heinz and Beech-Nut, and the Commission's decision under Mr. Muris not to challenge the merger of AmeriSource Health Corporation and Bergen-Brunswig.

Heinz and Beech-Nut were the second and third largest companies in the baby food industry, competing with Gerber which had a 65 percent market share. Although the combined companies would have a market share of only 35 percent, the potential increase in overall market concentration clearly contravened the antitrust Merger Guidelines because of the dominant market share already enjoyed by Gerber. Heinz/Beech-Nut contended that, despite traditional market concentration concerns, the merger would permit the combined company to compete better with Gerber. However, the Pitofsky FTC successfully contested this argument, both on legal and factual grounds, and persuaded the court to enjoin the merger.

Significantly, before his nomination Mr. Muris had supported the Heinz/Beech-Nut merger. Three months after he took office, he had the chance to revisit the FTC's analysis. In August, the Muris FTC chose not to challenge the merger of AmeriSource and Bergen-Brunswig, the third and fourth largest companies in the drug wholesaling industry. The FTC expressly endorsed the merger in part

because "this transaction will combine the third- and fourth-ranked firms in the drug wholesaling business into a presumably stronger number three . . . ."

The comparison of these two decisions suggests that the Muris FTC will not regard as dispositive the merger's impact on market concentration, as measured under the Merger Guidelines. Instead, under Mr. Muris, the FTC may be more receptive to a merger, even in a concentrated market, if it will enhance competition by strengthening the merging parties' ability to compete with the dominant companies. In fact, when probative evidence can be developed demonstrating pro-competitive effects of a merger, the FTC may now be more likely to defer to mergers that are traditionally condemned under the Merger Guidelines. Therefore, companies should carefully document how the merger will actually strengthen their combined ability to compete and, in turn, how competition in the market as a whole will increase.

### **The FTC Will Give Greater Weight to Efficiencies**

In the past, antitrust commentators and, to a lesser extent, the courts, have endorsed suspect mergers if the combined operations could operate more efficiently than the two companies could on their own. Until now, however, the FTC itself has been less enthusiastic about efficiency arguments. In its first four months, the Muris FTC has shown an increased willingness to give greater weight to evidence of efficiencies that can be realized through a merger. Once again, a comparison of the Heinz/Beech-Nut case and the AmeriSource/Bergen-Brunswick transaction highlights this shift.

In the Heinz/Beech-Nut case, the parties argued that the merger would yield significant efficiencies. However, the court approved the FTC's demand for a stringent standard of proof, reasoning that "the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies." Based on this burdensome but ill-defined legal standard and factual findings against the merging parties, the court agreed with the FTC and rejected the parties' efficiencies claims.

In contrast, the Muris FTC endorsed the AmeriSource/Bergen-Brunswick argument that the merger would yield efficiencies that outweighed any competitive concerns. Absent litigation, the parties' efficiency projections are not public. Nevertheless, the FTC did not demand a showing of "extraordinary" efficiencies that the FTC demanded in the Heinz/Beech-Nut case. Instead, the Muris FTC was satisfied that "the proposed transaction likely will give the merged firms sufficient scale . . . [to become] . . . cost-competitive . . . and [to] invest in value-added services desired by customers."

In fact, the Muris FTC apparently did not require AmeriSource and Bergen-Brunswick to demonstrate that the efficiencies could be achieved only through their merger. Instead, it was persuaded that "[T]hese changes could be implemented [by the merged entity] more rapidly than either [company] could do individually." In sum, the Muris FTC recognized this timing advantage

itself as a "cognizable merger-specific efficiency" that allayed antitrust concerns about the merger.

Thus, the Muris FTC apparently now is ready to give greater weight to a wider range of cost savings that parties can realize through a merger. In this light, companies considering a consolidation should carefully estimate any efficiencies that they can achieve combined and how quickly these efficiencies can be realized. Importantly, however, the companies should document these efficiencies when they are considering the transaction because any efficiency projections are more plausible if they are part of the merger strategies of the companies and are considered by the buyer in its negotiation of the agreement.

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Obviously, the actions of the Muris FTC in its first four months are not a conclusive indication of the direction the FTC will take under his stewardship. Still, Mr. Muris' speeches and the Commission's recent actions strongly suggest that the FTC will continue aggressive scrutiny of competitive conduct. At the same time, the Muris FTC will give greater consideration to business justifications for suspect conduct. In short, with Mr. Muris at the helm, both continuity and change will prevail.

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