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Update on Developments in Competition Law/Policy

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UPDATE ON DEVELOPMENTS IN COMPETITION LAW/POLICY

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Thank you. I'm happy to have the opportunity this morning to update you on some of the recent activity of the Justice Department's Antitrust Division.¹ I'd like to talk about a merger challenge the Department recently concluded, as well as some competition advocacy and related initiatives in which the Department is engaged.

Ticketmaster Entertainment Inc./Live Nation Inc.

The merger I'd like to discuss is Ticketmaster's merger with Live Nation, which, if allowed to proceed unchallenged, would have significantly reduced competition in the market for the provision of primary ticketing services to major concert venues in the United States. (Venues are the physical locations where the concerts occur.) After an investigation that lasted a little less than a year, the Department, in January, reached a proposed consent agreement with the parties that allowed the transaction to close, but imposed significant restructuring requirements and safeguards that would prevent potential harm to competition.

According to the complaint filed by the Department, Ticketmaster has been the dominant primary ticketing service provider in the United States for the past two decades. The primary customers for such primary ticketing services are venues, and the analysis of the merger focused on major concert venues in particular. Ticketing companies such as Ticketmaster arrange with venues to provide primary ticketing services. The ticketing

¹ Before starting my remarks, I need to add the required disclaimer that the views expressed are my own, and do not purport to reflect those of the United States Department of Justice.

company is responsible for distributing primary ticket inventory, through channels such as the Internet, call centers, and retail outlets. In essence, the ticketing company provides the technology infrastructure for distribution. The overall price a consumer pays for a ticket generally includes the face value of the ticket and a variety of service fees above the face value of the ticket. These fees are usually charged by the provider of primary ticketing services and set in conjunction with the venue itself. Ticket distribution has been a highly profitable business for Ticketmaster, and, as I've indicated, Ticketmaster dominated the industry. In 2008, its market share among major concert venues exceeded eighty percent. Ticketmaster's contract renewal rate typically exceeded eighty-five percent. Ticketmaster also owns a majority interest in Front Line Management Group, Inc., the largest artist management group in the country. (Artist management groups represent artists in business and commercial dealings.)

Live Nation is the largest concert promoter in the United States. Concert promoters contract with artists to perform at particular concerts, and make the arrangements for and market the concerts. Promoters often also assume the financial risks involved in staging the concerts. Live Nation promoted shows representing 33% of the concert revenues at major concert venues in 2008. Live Nation also controls more than 75 concert venues in the United States.

For many years, Live Nation had used Ticketmaster as its primary ticketing provider for its venues and was Ticketmaster's largest customer. In late 2006, Live Nation decided not to renew its contract with Ticketmaster, and began exploring other options, including taking over the ticketing function itself. In late 2007, Live Nation entered into an agreement with the leading German primary ticketing provider. In

December 2008, it began selling tickets for its own and third party venues, becoming almost overnight the second largest provider of primary ticketing services in the United States. In February 2009, it entered into a merger agreement with Ticketmaster – and we began our investigation.

After a lengthy investigation, the Department concluded that the transaction posed a significant competitive problem in the market for the provision of primary ticketing services to major concert venues. The parties were informed of this determination, and were told that the Department was prepared to sue to block the transaction. Rather, however, than heading to court, the Department and the parties began to discuss ways to allow the transaction to go forward, while obviating the competitive harm.

After lengthy discussions and further investigation, the Department did allow the transaction to proceed, but only because required divestiture of certain of Ticketmaster's assets would bring new competitors into the market place to replace the competition that would have been lost by the merger. The Department also imposed certain obligations upon the new Ticketmaster/Live Nation entity prohibiting specific anticompetitive conduct, all of which is to ensure that the newly created competitors have the opportunity to compete effectively.

The provisions of the decree are rather detailed, and I only have a limited amount of time, so I will just summarize. For anyone interested in additional information, there are a number of documents, in particular the Complaint and the Competitive Impact Statement, available on the Division's website at www.justice.gov/atr/cases/ticket.htm.

Under the proposed settlement, Ticketmaster must license a copy of its primary ticketing software to AEG, the second-largest concert promoter in the United States and

operator of some of the United States' most important concert venues. As a promoter and venue operator, AEG will have incentives to provide better ticketing service at lower prices. With a copy of the Ticketmaster software, AEG should be able to market a viable, attractive new ticketing system. AEG is also given additional options with regard to the software that it can decide to exercise over the next five years.

Ticketmaster must also divest Paciolan Inc., a ticketing company that it currently owns, to Comcast-Spectacor (which has signed a letter of intent to purchase Paciolan) or some other suitable purchaser. Comcast-Spectacor is a sports and entertainment company that has management relationships with a number of concert venues and has ticketing experience with its own small ticketing company.

Under the terms of the settlement, the merged firm will also be forbidden from retaliating against any venue owner that chooses to use another company's ticketing services or another company's promotional services. The settlement also sets up firewalls that protect confidential competitor data by preventing the merged firm from using information gleaned from its ticketing business in its day-to-day operations of its promotions or artist management business. Finally, the merged firm must provide the Department with advance notice of any future acquisitions of a ticketing company so the Department may investigate the competitive effect of any such an acquisition.

At the end of this process, the merger – with the efficiencies the parties claim for it – was allowed to proceed, and the market is as competitive as it would have been had the acquisition been blocked.

Advocacy and Outreach Efforts

In the little bit of time I have remaining, I would like to just briefly mention some recent advocacy and outreach efforts in which the Division has been engaged.

Last February, President Obama signed into law the American Recovery and Reinvestment Act of 2009, which provides a significant amount of stimulus money to help pull the American economy out of recession by saving or creating new jobs. Everyone involved with the stimulus package wanted – and continues to want – that money to be used effectively and wisely. The Division’s experience, however, has taught us that whenever lucrative government contracts must be disbursed quickly, the potential risk of collusion and fraud with regard to the disbursement of these funds increases dramatically. Our experience has also taught us, however, that these risks can be dramatically minimized when an early and strong emphasis is placed on prevention and detection. Therefore, the Justice Department has mounted a substantial effort, in which the Antitrust Division is playing a substantial role, in training federal and state government procurement officials to help prevent fraud and abuse before it occurs and training law enforcement officials to variously recognize, report and/or prosecute such conduct if it does occur.

A key component of this initiative involves training agency procurement and grant officials, auditors and investigators at the national, regional and local levels on techniques for identifying “red flags of collusion” before the award of Recovery Act funds. This involves a four-step analytical process in which:

- trainees are taught to look for indicators of collusion as they determine how many vendors one would expect to compete for the award, and which vendors they would expect to see in this competition;

- they are taught to closely examine the proposals submitted by the competing vendors to look for suspicious similarities;
- to review the outcome of prior awards to identify suspicious bidding and award patterns over time; and
- to be alert for suspicious behavior that indicates vendors may have colluded rather than competed.

The Department believes that this initiative is having a significant effect on the disbursement of stimulus funds. More information on this initiative can be found on our website at www.justice.gov/atr/public/criminal/economic_recovery.htm.

In another important competition advocacy initiative, the Division is also undertaking a series of joint public workshops in 2010 to explore competition and regulatory issues in the agriculture sector. The goal of the workshops is to promote a dialogue among industry participants and to allow the Department to hear and to learn from parties with real world experience in the agriculture industry. Issues the workshops are scheduled at this point to address include:

- evaluation of the state and nature of competition in a range of agricultural markets;
- the impact of vertical integration in agricultural markets;
- concerns about monopsony or “buyer” power;
- relevant regulatory regimes; and
- questions about the nature of transparency in the agricultural marketplace.

In addition to the workshops, the Department, as part of this initiative, has invited public comment on issues related to competition in the agriculture industry. Over 15,000

comments have been received by the Division in response to this invitation. We hope to have all of these comments posted on our website by the end of February.

Additional information on this initiative can be found at www.justice.gov/atr/public/workshops/ag2010/index.htm.

Finally, late last year, the Division and the Federal Trade Commission (FTC) undertook an initiative to review the agencies' Horizontal Merger Guidelines. Public comment was solicited last fall on a range of relevant issues, and a number of workshops were held in several cities around the United States in December and January in which experts explored various aspects of current merger enforcement.

As many of you know, the Horizontal Merger Guidelines outline the merger enforcement policy of the Department and the FTC. These Guidelines describe the analytical framework and specific standards normally used by the agencies in analyzing mergers. The Guidelines were initially adopted in 1968, and have been revised several times since. The last major review and revision was in 1992, although the section on efficiencies was updated in 1997. This initiative is intended to explore whether the Horizontal Merger Guidelines accurately reflect the current practice of merger review at the Department and the FTC as well as to take into account legal and economic developments that have occurred since 1992.

Issues covered in the workshops included: market definition; market shares and market concentration; use of more direct forms of evidence of competitive effects; unilateral effects; the distinction between uncommitted and committed entry; and the non-price effects of mergers, especially the effects of mergers on innovation; and remedies.

Staffs of both agencies are now reviewing the public comments produced by the workshops, to determine what modifications, if any, to the Guidelines are warranted. Additional information on the Horizontal Merger Guidelines review can be found at www.ftc.gov/opa/2009/09/mgr.shtm and www.justice.gov/atr/public/press_releases/2009/index09.htm.