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Antitrust Division and Federal Trade Commission Announce Revised Horizontal Merger Guidelines

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On August 19, 2010, the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice released revised horizontal merger guidelines outlining how the agencies evaluate the likely competitive impact of mergers.[1] The release comes four months after the FTC, following a series of hearings and workshops, issued the agencies' joint proposed revisions for public comment.[2] The new guidelines are intended to reflect the agencies' current enforcement approach and analytical methodology, which remains focused on identifying and challenging anticompetitive mergers while avoiding unnecessary interference with neutral or pro-competitive mergers. The previous guidelines, which were issued in 1992 and last updated in 1997, were viewed by some as not to be reflective of current enforcement policy and practice.

The guidelines identify as one of their aims to "assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the agencies' enforcement decisions," and to "assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context." Whether the courts will take the agencies' cue remains to be seen, though lower courts have historically been somewhat deferential to the agencies in this area.

In a new section, the guidelines set out the types of evidence the agencies will consider when analyzing a merger, as well as the sources of that evidence. The categories of relevant evidence identified by the agencies include: actual effects observed in consummated mergers; direct comparisons based on experience; market shares and concentration in a relevant market; substantial head-to-head competition; and disruptive role of a merging party, *i.e*. eliminating a "maverick," a firm that plays a disruptive role in the market to the benefit of customers.

The guidelines place a new spotlight on powerful buyers that are able to negotiate favorable supply terms, reflecting the thinking that they may be able to effect price discrimination in their favor. Similarly, the guidelines also reflect the concern of the agencies that mergers of competing buyers have the potential to enhance market power on the "buying side" of the market, sometimes referred to as monopsony power, just as mergers between sellers can enhance market power on the "selling side."

Notably, the guidelines also reflect the notion that the acquisition of a non-controlling or minority interest in a competitor has the ability to lessen competition between the parties to the transaction as a result of influence or shifting incentives. The guidelines counsel that the agencies will review acquisitions of minority positions in competing firms, *even where "the minority positions do not necessarily or completely eliminate competition between the parties*."

The guidelines make clear that market definition and market concentration are analytic tools that may aid in the analysis of a merger, but the measurement of market shares and market concentration that market definition allows are not ends in themselves. The real goal remains the assessment of a merger's competitive effects.

For cases where market concentration measurements do matter, the Herfindahl-Hirschman Index, or HHI, thresholds have been adjusted upward to be more consistent with agency practice, designating 2500 with a delta or change as a result of the transaction of 200, as the new threshold for highly concentrated markets that will be presumed to be likely to enhance market power.[3] Under the existing guidelines, transactions are presumed to be likely to create or enhance market power or facilitate its exercise where the post-merger HHI exceeds 1800, with an increase of more than 100 points – a standard that the agencies have not observed for some time.

Economic analysis and modeling have become increasingly significant parts of merger review over the last 15 years. The guidelines thus give more focus to economic analysis in order to more accurately reflect its importance today – a sentiment voiced by Assistant Attorney General for Antitrust Christine Varney early on in her tenure. Still, the guidelines reflect that economic analysis, while providing an analytical framework and starting point, must be used in conjunction with other types of evidence and remains only one element of the overall picture, which will continue to include real-world evidence of business conditions in the marketplace.

According to the FTC and DOJ press releases announcing the new guidelines, the most significant changes effected by the new guidelines include:

- The guidelines clarify that merger analysis does not use a single methodology, but is a fact-specific process through which the agencies use a variety of tools to analyze the evidence to determine whether a merger may substantially lessen competition.

- The guidelines introduce a new section on "Evidence of Adverse Competitive Effects."

- The guidelines explain that market definition is not an end itself or a necessary starting point of merger analysis, but instead a tool that is useful to the extent it illuminates the merger's likely competitive effects.

- The guidelines provide an updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice.

- The concentration levels that are likely to warrant either further scrutiny or challenge from the agencies are updated in the guidelines.

- The guidelines provide an expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation.

- The guidelines clarify that coordinated effects, like unilateral effects, include conduct not otherwise condemned by the antitrust laws.

- The guidelines provide a simplified discussion of how the agencies evaluate whether entry into the relevant market is so easy that a merger is not likely to enhance market power.

- The guidelines add new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

Concurrently with the release of the revised guidelines, FTC Chairman Jon Leibowitz issued a written statement outlining some of what he perceives to be improvements over the previous guidelines. These include, inter alia, the new emphasis on competitive effects over the more formulaic approach of the previous guidelines.[4] Commissioner J. Thomas Rosch also issued a separate written statement highlighting, among other things, the "competitive effects first" approach; but he also cautioned that the new guidelines do not place, in his view, sufficient emphasis on empirical evidence and non-price-competitive effects.[5]

The agencies both noted in their press releases that the Bank Merger Competitive Review guidelines, which the federal banking agencies and the DOJ developed in 1995 to facilitate the competitive review of bank mergers, remain unchanged.[6]

The new guidelines largely document the agencies' current practice with respect to merger enforcement, but they may permit more cases to be brought that do not fit the more rigid approach of the previous guidelines. At a minimum, the government's flexibility in bringing merger challenges will be enhanced in an enforcement environment where the antitrust agencies have demonstrated a desire to be more active. Thus, parties to transactions involving competing products or services are cautioned to consider the agencies' likely response in light of this new pronouncement, and to seek guidance from antitrust counsel where appropriate.

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[1] The 2010 guidelines are available on the FTC's Website at http://www.ftc.gov/os/2010/08/100819hmg.pdf and the Department of Justice's Website at http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[2] During that period, the agencies received thirty-two comments. They are available on the FTC's Website at http://www.ftc.gov/os/comments/hmgrevisedguides/index.shtm.

[3] The HHI is calculated by summing the squares of the individual firms' market shares, thus giving proportionately greater weight to larger market shares. For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). Guidelines Footnote 9.

[4] Chairman Leibowitz's statement is available on the FTC Website at http://www.ftc.gov/os/2010/08/100819hmgleibowitz.pdf.

[5] Commissioner Rosch's statement is available on the FTC Website at http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf.

[6] The Bank Merger Competitive Review guidelines can be found at www.justice.gov/atr/public/premerger.htm.