

Antitrust Division and Federal Trade Commission Propose New Merger Guidelines, Request Public Comment

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Revised horizontal merger guidelines outlining how the Federal Trade Commission and the Antitrust Division evaluate the likely competitive impact of mergers were released for public comment by the agencies this week. The proposed guidelines, announced April 20, 2010, are the result of a series of hearings and public workshops convened to update the guidelines used by the agencies to reflect their current enforcement approach and analytical methodology. The guidelines currently in effect were issued in 1992, were last updated in 1997, and were viewed by some not to be reflective of current enforcement policy.

The revised guidelines are not yet effective, pending closing of the public comment period in May, and were released to coincide with the timing of the ABA Antitrust Section Spring Meetings taking place in Washington.

The proposed 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 proposed guidelines set out the types of evidence the agencies will consider to address the question of whether a merger may substantially lessen competition. Broadly, these 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,’ or firm that plays a disruptive role in the market to the benefit of customers.

The proposed 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 proposed 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 proposed 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.”*

In what is being viewed as an unambiguous departure from prior guidance, the proposed guidelines make clear that market definition and market concentration are analytic tools that may aid in the analysis of a merger, but are not necessary steps in analyzing the competitive effects of a merger.

At a panel discussion on the proposed guidelines held in Washington following the announcement, Molly Boast, Deputy Assistant Attorney General for Civil Matters at the Antitrust Division said the proposed guidelines are designed to be more transparent, and to move away from a “step-by-step” or “checklist” approach to merger analysis. Boast also said that 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.[\[1\]](#) 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 has become an increasingly significant part of merger review in the last 15 years. The proposed 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, Boast recognized 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.

Significant differences between the current and proposed guidelines were highlighted in the FTC press release accompanying the announcement. The proposed 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.
- introduce a new section on “Evidence of Adverse Competitive Effects.”
- 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.
- provide an updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice.
- update the concentration levels that are likely to warrant either further scrutiny or challenge from the agencies.

- provide an expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation.
- clarify that coordinated effects, like unilateral effects, include conduct not otherwise condemned by the antitrust laws.
- 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.
- add new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

The consensus view at this stage is that the new guidelines largely document the agencies' current practice with respect to merger enforcement, but that they may permit the bringing of more cases at the margins that do not fit the more rigid approach of the current guidelines. At a minimum, the government's flexibility in bringing merger challenges will be enhanced in an enforcement environment where the antitrust enforcement 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.

[1] The HHI is calculated by summing the squares of the individual firms' market shares, 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 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). Proposed Guidelines Footnote 7 at: <http://www.ftc.gov>.

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