

U.S. Antitrust Agencies Propose Updates to Horizontal Merger Guidelines

April 26, 2010

On April 20, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) issued proposed revisions to the Horizontal Merger Guidelines (the Guidelines), the agencies' statement of their enforcement policies. The proposed Guidelines reflect the agencies' current philosophy, which has evolved since the Guidelines were last updated significantly in 1992.

The proposed Guidelines align the agencies' stated enforcement policies with current practice, emphasize that the agencies will use a variety of analytical tools and evidence in their analysis, and consequently illustrate the agencies' current flexible approach. The expanded treatment of the agencies' competitive-effects theories and greater flexibility in merger analysis are indicia of stricter merger enforcement under the Obama administration than under the prior administration.

Highlights of the Guidelines include:

- **Merger Analysis Does Not Rely on a Single Methodology.** The 1992 Guidelines set out a sequential process to analyze mergers. The agencies moved away from that approach some time ago and the proposed Guidelines make explicit that merger analysis involves a "fact-specific process through which the Agencies . . . apply a range of analytical tools."
- **Types and Sources of Evidence Used in Merger Analysis.** The proposed Guidelines identify (1) the types of evidence the agencies often find informative, including post-closing price increases, historical analogues in similar or adjacent markets, and market shares and concentration levels and (2) the sources of helpful information, including documents, testimony, and data from the merging parties, customers, and competitors. The proposed Guidelines emphasize that the agencies will use a range of analytical tools and evidence in merger reviews.
- **Greater Focus on Price Discrimination.** The proposed Guidelines elaborate on how the agencies analyze price discrimination, which occurs when suppliers charge higher prices to certain customers, and explain that such discrimination is feasible where (1) suppliers can identify different classes of customers to charge different prices, and (2) customers cannot protect themselves from price discrimination by, for example, buying the product from other customers rather than from the supplier.

- **Importance of Market Definition Minimized.** The 1992 Guidelines and court precedent generally begin merger analysis with defining the relevant product and geographic market. The proposed Guidelines minimize the importance of market definition, stating that it is simply a “useful” exercise but “is not an end of itself” and the agencies’ analysis need not start with market definition. The FTC made similar arguments in *Federal Trade Commission v. Whole Foods Market, Inc., and Wild Oats Markets, Inc.* (U.S. District Court for the District of Columbia) Civ. No. 07-cv-01021-PLF, which the D.C. Circuit found unpersuasive.
- **Account for Location of Customers in Geographic Market Definition.** The 1992 Guidelines primarily base geographic market definition on the location of suppliers. The proposed Guidelines say that geographic markets may also be defined by reference to customer location, such as where price discrimination based on customer location is feasible, which the proposed Guidelines say is often the case when suppliers quote delivered prices.
- **Upward Adjustment of Market Concentration Thresholds.** The agencies evaluate market shares and concentration by using the “HHI”¹ and considering the post-merger HHI and the HHI increase caused by a merger. Currently the agencies rarely, if ever, challenge mergers deemed problematic under the thresholds in the 1992 Guidelines. To address this reality, the proposed Guidelines raise these thresholds.

Market Characterization	1992 Guidelines		Proposed Guidelines	
	Post-merger HHI	HHI Increase	Post-merger HHI	HHI Increase
Unconcentrated	<1,000	Anticompetitive Effects Unlikely	<1,500	Anticompetitive Effects Unlikely
Moderately Concentrated	1,000-1,800	<100: Anticompetitive Effects Unlikely >100: Potentially Raise Significant Concerns	1,500-2,500	<100: Anticompetitive Effects Unlikely >100: Potentially Raise Significant Concerns
Highly Concentrated	>1,800	<50: Anticompetitive Effects Unlikely >50: Potentially Raise Significant Concerns > 100: Market Power Presumed Likely	>2,500	<100: Anticompetitive Effects Unlikely 100-200: Potentially Raise Significant Concerns >200: Market Power Presumed Likely

- **Elaborate on Unilateral Effects Analysis.** The proposed Guidelines elaborate on the agencies’ view of unilateral effects—the theory that post-merger, a single firm may have the ability to raise prices, lower output, or reduce innovation. Significantly, the proposed Guidelines eliminate the presumption that a post-merger market share of 35% indicates unilateral effects are likely.

¹ The Herfindahl-Hirschman Index (HHI) is a measure of concentration calculated by squaring each market participant’s market share and then summing those figures. Calculating the increase in concentration resulting from a merger can either be done by comparing the pre-merger and post-merger HHIs or by simply multiplying the market share of the parties and multiplying the product by two (i.e., 2 x a x b).

- **Elaborate on Coordinated Effects Analysis.** Similarly, the proposed Guidelines elaborate on coordinated effects—the theory that a post-merger market with few remaining firms is ripe for collusion to raise price or reduce output. Factors suggesting that coordinated effects are more likely include evidence of past collusion attempts, transparency of market pricing, and market structures that enable firms to punish competitors for lowering prices or raising output.
- **Leave Entry Analysis Relatively Unchanged.** The proposed Guidelines retain the requirement that market entry must be “timely, likely, and sufficient” to counteract potential harm resulting from a merger, but delete the notion that such entry must occur within two years.
- **Efficiencies Analysis Unchanged.** The proposed Guidelines retain the requirement that efficiencies be “merger-specific” (i.e., unlikely to be accomplished by other means, raising fewer competitive problems), substantiated or verifiable, and sufficient to counteract competitive harm. The proposed Guidelines suggest that one way to substantiate such claims is to show efficiency gains in prior deals.
- **Failing Firm Analysis Largely Unchanged.** The proposed Guidelines retain the high hurdles for merging parties to make successful failing firm or failing division defenses. The proposed Guidelines drop the fourth prong of the defense—the requirement that, absent the acquisition, the assets of the failing firm would exit the market—although that may be less of a change in substance than in text.
- **Addresses Monopsony Power.** The proposed Guidelines cover mergers that may create or enhance monopsony power—market power by competing *buyers* of products—and treat them the same as mergers among competing suppliers, but also acknowledge that mergers among buyers may lead to efficiencies like volume-based discounts.
- **New Section on Partial Acquisitions.** For the first time, the proposed Guidelines address the agencies’ analysis of partial (i.e., minority) acquisitions of competitors, explaining that the agencies are concerned about three things: (1) acquirers having the ability to influence the target’s competitive conduct through voting interests, governance rights, or board seats; (2) acquirers having diminished incentive to compete with the target because, for example, the acquirer shares in any sales gains and losses by the target; and (3) acquirers gaining access to nonpublic competitively sensitive information about the target and vice versa.

The agencies are accepting public comments on the proposed Guidelines until May 20, 2010.

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