

## ALERTS AND UPDATES

### Antitrust Enforcement Agencies Propose Revised Horizontal Merger Guidelines

April 23, 2010

On April 20, 2010, the Federal Trade Commission (FTC) released for public comment a [proposed updated version](#) of the *Horizontal Merger Guidelines* (“*Guidelines*”), which explain how the FTC and the Antitrust Division of the U.S. Department of Justice (collectively, the “Agencies”) evaluate the impact on competition of a proposed merger when determining whether to challenge the merger under U.S. antitrust law. The *Guidelines* “are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies’ enforcement decisions” and “may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.” The current version of the *Guidelines* was issued in 1992, with minor revisions in 1997.

The Agencies principally review mergers for violations of section 7 of the Clayton Act, which prohibits acquisitions of assets or voting securities that are likely to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country. The proposed revisions to the *Guidelines* would deemphasize the focus on step-by-step analysis that requires definition of relevant product and geographic markets, in favor of a more flexible analysis, while retaining and modifying most of the basic analytical tools referenced in the current *Guidelines*. These revisions come in the wake of merger cases like Whole Foods Market–Wild Oats, in which the Agencies relied on evidence of competitive effects in sampling price effects of entry or exit of particular closest competitors, but then encountered substantial evidence of a broader market definition under the principles outlined in the existing *Guidelines*, which appeared to contradict conclusions of adverse competitive effects in the relevant market.

Among the significant additions, the revised *Guidelines* include a new section with a nonexhaustive list and discussion of “several categories and sources of evidence that the Agencies, in their experience, have found most informative in predicting the likely competitive effects of mergers.” The types of evidence listed include:

1. Actual anticompetitive effects already observed or likely to arise in the future for mergers that have already been consummated;
2. Direct comparisons based on experience and historical events, such as the impact of recent mergers, as well as entry, expansion or exit in the relevant market;
3. Market shares in a relevant market, the level of concentration in that market and the change in concentration caused by the merger;
4. “[W]hether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors”; and
5. Whether the merger would eliminate what the *Guidelines* characterize as a “maverick” firm; for example, a firm that threatens the strong position of another firm with a new business model or new technology or a firm that has the incentive or ability to take the lead in price cutting or resisting industry price increases.

The revised *Guidelines* explain that the sources of this evidence would most commonly come from the merging parties, customers, other industry participants and industry observers.

The Agencies typically define relevant product and geographic markets when analyzing the effect of a merger on competition. The revised *Guidelines* explain that “[m]arket definition is not an end in itself: it is one of the tools the Agencies use to assess whether a merger is likely to lessen competition.” They further clarify that “[t]he Agencies’ analysis need not start with market definition.” This is a substantial change from the current *Guidelines*.

A tool the Agencies have used in defining the boundaries of the geographic and product markets in which they analyze the effects of the transaction on competition is a test that examines the extent to which a hypothetical monopolist in a postulated market could implement a small price increase without losing so many sales to substitute products as to make the price increase unprofitable. The revised *Guidelines* amend and further illustrate how the Agencies implement this test in practice, explaining that, in many instances, the Agencies may utilize a price increase of up to 10 percent in performing this analysis.

The revised *Guidelines* modify the Agencies’ standards for evaluating potentially problematic transactions by measures of market concentration. The current *Guidelines* explain that the Agencies consider market concentration and increases in concentration, and, as an aid in this analysis, they typically employ the Herfindahl-Hirschman Index (HHI). This concentration index is calculated by summing the squares of the individual market shares of the market participants. The revised *Guidelines* retain this methodology, but update the concentration levels that are likely to prompt further scrutiny from the Agencies:

- Under the revised *Guidelines*, markets involving a post-transaction HHI of 1,500 are considered “unconcentrated.” This is an increase from the current *Guidelines*, pursuant to which a market was considered unconcentrated if the post-transaction HHI was below 1,000. This change is significant because, as the revised *Guidelines* explain, mergers involving an HHI increase of less than 100 points and mergers in an unconcentrated market are considered unlikely to have anticompetitive effects and ordinarily would require no further analysis.
- The revised *Guidelines* also modify the definition of a “highly concentrated” market. Under the current *Guidelines*, a market with a post-transaction HHI of 1,800 was considered highly concentrated, whereas this has been increased to 2,500 under the revised *Guidelines*. According to the revised *Guidelines*, mergers in a highly concentrated market that involve an HHI increase between 100 and 200 points may potentially raise significant competitive concerns requiring further analysis, while mergers resulting in an HHI increase of more than 200 points in a highly concentrated market presumptively enhance market power. This presumption may be refuted by persuasive evidence that the merger is unlikely to enhance market power.

The revised *Guidelines* also provide new and expanded discussions of several other considerations by the Agencies in evaluating mergers, including:

- An expanded discussion of the Agencies’ evaluation of the unilateral competitive effects (the ability of the post-merger firm to cause anticompetitive effects after the removal of competitive constraints as a result of the merger), including the effect of the merger on innovation;
- An update of the Agencies’ evaluation of coordinated effects—considering whether the merger creates an environment in which firms are encouraged or enabled to engage in coordinated interaction that adversely affects consumers—which explains that while concern over coordinated effects can include illegal conduct such as express price-fixing agreements, it also “includes conduct not otherwise condemned by the antitrust laws”;
- A modified discussion of how the Agencies consider whether the prospect of easy entry by new firms into a market alleviates concerns about adverse competitive effects; and

- New sections on powerful buyers, mergers of competing buyers and the Agencies' consideration of one firm's *partial* acquisition of a competing firm.

In general, these revisions may better describe actual evaluation within the Agencies than the current *Guidelines*. The revisions may present more of a moving target to firms that seek to employ the *Guidelines* as a framework to convince the Agencies or the courts that a merger is unlikely to have a substantially adverse effect on competition in any line of commerce in any section of the United States. The Agencies are soliciting written comments on the revised *Guidelines*, which must be received on or before May 20, 2010.

### **For Further Information**

If you would like more information on the impact of this development or regarding other antitrust matters, please contact Antitrust and Competition Practice Group co-chairs [Edward G. Biester III](#) or [Wayne A. Mack](#), a [member](#) of the [Antitrust and Competition Practice Group](#) or the attorney in the firm with whom you are regularly in contact.