

Antitrust Alert: Federal Antitrust Agencies Release Proposed Horizontal Merger Guidelines

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The Obama Administration has indicated an intention to more vigorously enforce the antitrust laws, including the prohibition against anticompetitive mergers. One of the Administration's first initiatives was to undertake a review of the Horizontal Merger Guidelines, issued in 1992 ("Guidelines"). On April 20, 2010, the Department of Justice Antitrust Division and the Federal Trade Commission published for public comment a comprehensive revision of the Guidelines ("Proposed Guidelines"). **The purpose of this Alert is not to provide a comprehensive analysis of the 34-page draft Proposed Guidelines, but to inform our clients and friends about this important development and to briefly highlight the direction of the Proposed Guidelines.**

The Guidelines do not have the force of substantive law. Numerous courts have cited to the Guidelines, and have, on occasion, used the Guidelines to reject antitrust agency challenges to mergers. In their proposed revision, the antitrust agencies seek to avoid that "box" going forward:

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time.

Having lost some cases because of failures of proof regarding relevant product and geographic markets, the agencies in the Proposed Guidelines assert that market definition is not an end in itself, and that direct evidence of anticompetitive effects might obviate the need, or obligation, to define markets:

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

The Proposed Guidelines "tweak" the familiar HHI market concentration screen (sums of the squares of participants' market shares), raising the ceiling of the "unconcentrated" range from 1000 to 1500, and shifting the definition of "moderately concentrated markets" to HHIs between 1500 and 2500. The Proposed Guidelines confirm the conventional wisdom that mergers in the moderate and highly concentrated ranges that trigger significant changes in the HHIs warrant further scrutiny, not automatic challenge.

The Proposed Guidelines make clear and expand on the two major types of anticompetitive effects that the agencies analyze in horizontal mergers:

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise [known as “enhancing market power”]. . . .

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as ‘unilateral effects.’ A merger also can enhance market power by increasing the risk of coordinated, accommodating or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as ‘coordinated effects.’ In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

One important, controversial issue in merger enforcement and the previous Guidelines has been the role of efficiencies. The Proposed Guidelines contain an expanded three-page section on efficiencies. The enforcement agencies acknowledge that efficiencies, often used to justify horizontal mergers, are a relevant consideration. But the enforcement agencies will only consider efficiencies that are merger-specific, *i.e.*, are unlikely to be accomplished in the absence of the merger. The enforcement agencies will balance any such substantiated, cognizable efficiencies against anticompetitive effects:

The Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm customers in the relevant market, *e.g.* by preventing price increases in that market. In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primary in protecting customers.

Much more will be written and said about the new Proposed Guidelines in the coming weeks and months. We would be happy to answer any specific questions that you have. It is probably a safe assumption that, while not officially final, the Proposed Guidelines are being used by the enforcement agencies now in analyzing the horizontal mergers that pass before them.

Please feel free to contact us for a complete copy of the Proposed Guidelines, or to discuss how the Proposed Guidelines (or any other antitrust issue) could affect your future business decisions.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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