

Mergers & Acquisitions/Antitrust ADVISORY

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Antitrust Agencies Propose Revisions to Horizontal Merger Guidelines

For the first time in more than a decade, the federal antitrust enforcement agencies have proposed modifications to their guidelines for determining when and how mergers among competitors should be challenged as being anticompetitive. The agencies explained the revisions as codifications of the “flexible” and fact-specific approach to merger analysis they have used in recent years rather than a major analytical shift,¹ but it remains to be seen whether the changes are also the foundation for more aggressive merger enforcement.

The Current Guidelines

The Horizontal Merger Guidelines (“Guidelines”) have remained largely unchanged since 1992 and were last revised by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) in 1997.² While they do not have the force of law, the Guidelines provide a valuable reference point for companies and courts analyzing whether a proposed transaction violates Section 7 of the Clayton Act, which bars mergers likely to have anticompetitive consequences. With very few merger investigations leading to actual litigation rather than settlement, the agencies’ application of the Guidelines to both Hart-Scott-Rodino Act pre-merger reviews, as well as consummated mergers, often defines the battleground for merger analysis. Also, the Guidelines’ principles are reference points for other types of antitrust analysis, like market definition in monopolization cases.

The existing Guidelines provide a generally linear approach to analyzing a proposed merger to determine any potential reduction in competition, including the analysis of the definition of the relevant economic market, the competitive dynamics of the market, the potential anticompetitive consequences in that market and any overriding justifications, such as demonstrated efficiencies. As the federal antitrust agencies described in a recent study, the application of the Guidelines often utilized a case-by-case, rather than purely formulaic, approach.³

¹ See DOJ and FTC, Horizontal Merger Guidelines at 1 (Apr. 20, 2010), *available at* <http://www.ftc.gov/os/2010/04/100420hmg.pdf> (“Revised Guidelines”).

² See DOJ and FTC, Horizontal Merger Guidelines (Apr. 8, 1997), *available at* <http://www.justice.gov/atr/public/guidelines/hmg.htm>.

³ See FTC and DOJ, Commentary on the Horizontal Merger Guidelines (Mar. 27, 2006), *available at* <http://www.ftc.gov/opa/2006/03/mergercom.shtml>.

The Proposed Revisions

After holding a series of joint workshops over the past six months, the DOJ and FTC announced their proposed revisions on April 20, 2010.⁴ Among the key elements of the proposed changes are:

1. *Rejection of “One Size Fits All” Merger Analysis*

The Revised Guidelines move away from a rigid and formulaic evaluation of mergers focused primarily on an initial definition of the relevant market and calculations of market concentration. Instead, they are more broadly stated to involve a variety of factors designed to evaluate whether the actual or likely effect of a merger is to limit competition, including observation of past pricing trends in the relevant or related industries.⁵ In this way, the Revised Guidelines are said to be a more accurate reflection of the actual, transaction-specific practices of the antitrust agencies in evaluating the competitive effects of both proposed and consummated mergers in recent years.⁶

Of note is the agencies' statement that while defining a relevant market is still viewed as a useful tool in determining whether a planned or actual merger violates antitrust law, it is not a necessary starting point in the analysis of a merger, nor is it dispositive of this question.⁷ This may strike some observers (or courts) as a radical departure, but, in truth, the simple use of market definition and shares often does not begin or end an agency's concerns. Sometimes, the Revised Guidelines note, identifying potential anticompetitive effects may be an appropriate first step even before defining a market.⁸ As an example, the proposed revisions state that evidence that a reduction in the number of rivals offering a group of products caused an increase in prices for those products may be used to establish that those products form a relevant market.⁹ The Revised Guidelines further note that a price increase for a group of products following a consummated merger may speak for itself regarding the anticompetitive effects of the merger, reducing the need to infer from evidence regarding market shares and definitions.¹⁰ However, the Revised Guidelines also note that when the antitrust agencies define a market, they will continue to seek to define the smallest market possible for assessing anticompetitive effects and may not include all conceivable substitutes.¹¹

Among other new aspects of the Guidelines' substantive principles are:

- Additional emphasis on the increasingly utilized theory of unilateral effects, or harm to competition due to the size of the merged entity, stemming from a transaction. For example, the Revised Guidelines discuss the importance of past head-to-head competition between the merging parties as a key factor and

⁴ See FTC, Federal Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines (Apr. 20, 2010), available at <http://www.ftc.gov/opa/2010/04/hmg.shtm>.

⁵ Revised Guidelines, at 1.

⁶ See *id.*

⁷ See *id.* at 7.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* at 3.

¹¹ See *id.* at 7-8.

suggest inquiry into anticompetitive “upward pricing pressure” based on the diversion ratio between similar products made by the parties (or the calculation of sales likely to be lost to the other party’s products if prices were increased) is advisable if such information is available.¹² The revisions note that reductions in non-price variables such as product variety may raise concern, and they remove a presumed 35 percent market share safe harbor present in the existing Guidelines’ discussion of unilateral effects theories.¹³

- Clarification of coordinated effects theories, or harm (whether accomplished directly or indirectly) due to increased concentration among competitors, including identification of risk factors such as past collusion, transparency of business dealings, product similarity, contract dynamics and other characteristics of demand and the relevant buyers in a product segment.¹⁴
- Removal of the condition that timely entry to offset the anticompetitive impact of a deal must be able to occur within two years. Rather, entry must simply be “rapid.”¹⁵ Study of past entry, or lack of entry, may be another source of relevant information.¹⁶
- The addition of preventing the “entrench[ment]” of market power as a goal of the Guidelines (in addition to creation or enhancement of market power).¹⁷ Along with comments about high margins evidencing collusion or a lack of price sensitivity among customers,¹⁸ these revisions signal increased attention on the activities of substantial market participants.

The agencies described these changes in the Revised Guidelines as giving companies considering a merger more insight into how the government considers whether to allege a transaction has led to or is likely to lead to a substantial lessening of competition.¹⁹ Some commentators have observed, however, that these new approaches may in fact make merger challenges less predictable, since the formal principles applicable to the evaluation now will involve many amorphous “factors” rather than focusing on defined calculations. The Revised Guidelines also go to great lengths to stress that the factors listed are not exhaustive and that the agencies will challenge a merger any time it is determined that there has been, or may be, harm to competition.²⁰

2. Acknowledgement That Evidence of Effects Can Be Found in Many Places

The Revised Guidelines also broaden the types of evidence the FTC and DOJ say they have found to be useful in predicting the competitive effects of a merger. In addition to the traditional market share and concentration analysis, the Revised Guidelines acknowledge that customer comments, evidence of “natural experiments”

¹² See *id.* at 21.

¹³ See *id.* at 20.

¹⁴ See *id.* at 24.

¹⁵ See *id.* at 28.

¹⁶ See *id.* at 27.

¹⁷ See *id.* at 2.

¹⁸ See *id.* at 27.

¹⁹ See *id.* at 1.

²⁰ See *id.* at 1 (“... certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal ...”).

in analogous contexts, an examination of head-to-head competition between the merging parties and whether one of the parties plays the role of a “maverick” competitor may be important to gaining a full picture of likely anticompetitive effects.²¹ The Revised Guidelines also note that ordinary business documents will be more probative than later-prepared merger advocacy materials.²² Explicit recognition of these sources of evidence is consistent with the agencies’ practices and comports with the expansion of merger enforcement theories in the proposed revisions.

One noteworthy amendment to the Guidelines is a revision of the statistical framework for evaluating the presumptive risk level of a transaction based on market concentration, called the Herfindahl-Hirschman Index (HHI). The HHI thresholds in the current Guidelines have been criticized as producing too many false positives, and, in fact, the agencies have themselves released studies in recent years showing this to be true.²³ Thus, the HHI thresholds in the Revised Guidelines have been adjusted upward to better reflect how the agencies view market concentration as an indication of competitive concern.²⁴ The agencies stressed that these thresholds are not meant as a litmus test for merger acceptability, but rather are used only as one of many factors in evaluating a merger.²⁵

The Revised Guidelines also note that when looking at consummated mergers—which have become increasingly common targets for both DOJ and FTC lawsuits—evidence of actual effects such as post-merger price increases and decreases in product variety and innovation will be considered.²⁶ Finally, the agencies acknowledge that they may, as in the Whole Foods-Wild Oats merger, consider the competitive effects on separate customer groups.²⁷

3. Recognition of New Concepts

The Revised Guidelines also provide new sections on some increasingly common merger analysis issues:

- The concept of power buyers as a check on market concentration is recognized, but there is a caution that it does not constitute an automatic or complete defense to an otherwise improper transaction.²⁸
- The Revised Guidelines also note that when competing buyers merge, that also can have anticompetitive effects.²⁹
- It is recognized that partial acquisitions also can be anticompetitive due to reduced competitive zeal, fears of coordination or excessive information sharing.³⁰

²¹ See *id.* at 3-4.

²² See *id.* at 4.

²³ See, for example, FTC, Horizontal Merger Investigation Data, Fiscal Years 1996-2007 (Dec. 1, 2008), available at <http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf>.

²⁴ See Revised Guidelines, at 19.

²⁵ See *id.*

²⁶ See *id.* at 2.

²⁷ See *id.* at 17.

²⁸ See *id.* at 26-27.

²⁹ See *id.* at 32-33.

³⁰ See *id.* at 33-34.

Conclusion

The Revised Guidelines retain and augment commentary on many familiar concepts such as protection of innovation markets and consideration of demonstrable efficiencies. However, in recognizing many of the realities of current agency practice, they provide more authority for an enhanced spectrum of merger challenges in an era when the new leadership of the federal antitrust agencies have called for vigorous merger enforcement. These revisions thus increase the need for, and ability of, parties and counsel to incorporate a variety of approaches into their merger planning, analysis and advocacy. It remains to be seen if the agencies utilize their expanded spectrum and, more importantly, if courts, which have both insisted on and been hostile to a pure Guidelines-based approach to merger enforcement, embrace its principles as a matter of law. The period for submitting comments on the proposed revisions was recently extended from May 20, 2010, to June 4, 2010.³¹

³¹ See FTC, FTC Extends Public Comment Period on Proposed Revised Horizontal Merger Guidelines Through June 4 (May 6, 2010), available at <http://www.ftc.gov/opa/2010/05/hmg.shtm>.

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