

Antitrust Agencies Propose New Merger Guidelines

On April 20, 2010, the Federal Trade Commission released proposed revisions of the Horizontal Merger Guidelines (“the Proposed Guidelines”). Last updated in 1997, the Proposed Guidelines provide the business community with an overview of how the antitrust agencies analyze proposed mergers between competitors. They help businesses evaluate the likelihood of a federal challenge to a proposed transaction, explaining all the factors the agencies consider. Overall the Proposed Guidelines would have a mixed effect, making some anticompetitive behaviors easier to demonstrate and showing more skepticism about the potential mitigating effects of entry - but at the same time expressing a tolerance for higher concentration levels before a merger challenge will be brought.

Some significant changes in the Proposed Guidelines include the following:

- A de-emphasis of the role of market definition and market share in the review process - market definition will no longer be the starting point for all merger analysis; instead, merger analysis will be a fact-specific inquiry, for which the agencies will employ a variety of analytical tools.
- An increase in the threshold levels of market concentration that presumptively raise antitrust concerns.
- An update on how the agencies will evaluate the ease of entry into a market. Though the Proposed Guidelines retain modified timeliness, likelihood, and sufficiency tests for entry, they indicate that where there is a lack of actual history of entry into the relevant market, the agencies will consider this an indication that successful entry will be difficult or slow to occur.
- The addition of specific sections on the topics of powerful buyers, mergers between competing buyers, and partial acquisitions.
- Updated explanations of several analytical tools including
 - “Hypothetical monopolist” test - under which the agencies determine the smallest relevant market.
 - The use of “critical loss analysis” to determine whether a price increase would lead to increased profits.

- “Unilateral competitive effects analysis,” including pricing of differentiated products, bargaining and auctions, capacity and output for homogenous products, and innovation.
- “Coordinated effects analysis,” clarifying that the agencies will examine certain types of conduct, including coordinated interaction, that is not otherwise condemned by antitrust laws.

The Federal Trade Commission is accepting comments on the Proposed Guidelines through May 20, 2010. A copy of the Proposed Guidelines is available at <http://www.ftc.gov/os/2010/04/100420hmg.pdf>. For additional information about the Proposed Guidelines, or for a hard copy of them, please contact a member of the [Antitrust, Franchise, and Consumer Law Client Service Group](#).

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