

## CLIENT ALERT

### FTC, DOJ Issue Revised Merger Guidelines

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Today, the FTC and DOJ jointly issued their proposed revision of the Horizontal Merger Guidelines. The Guidelines, which have not been updated in more than a decade, outline how the agencies evaluate the likely competitive impact of proposed mergers and acquisitions and assess whether to challenge individual transactions. This proposed revision is intended to more accurately reflect the agencies' current policies and practices, and further reflects the Obama administration's more aggressive approach to antitrust enforcement.

As expected, the agencies' proposal includes several material changes to the existing Guidelines. In particular, the proposed revisions provide for a flexible fact-specific inquiry into the merits of the transaction, eliminating the current, structured methodology. The Guidelines focus extensively on methods for directly determining competitive effects, and significantly decreases the role and importance of market definition. As examples, the Guidelines indicate that the agencies will look at actual effects arising from consummated mergers (but the absence of such effects will not, of itself, be determinative that there is no competitive issue), natural experiments, the existence of direct head-to-head competition, and whether one of the merging parties is a market disrupter, or maverick. Not all of these are new, but the change in emphasis is clear. Further, the proposed revisions make far more clear that the agencies will consider harm to a subset of customers sufficient, even if larger groups of customers would be unharmed by a transaction.

In addition, the revised Guidelines also:

- Provide an updated discussion of unilateral and coordinated effects;
- Update the concentration (HHI) levels likely to warrant scrutiny and/or challenge;
- Incorporate new sections on monopsony power, power buyers, and partial acquisitions; and
- Provide an expanded discussion of the categories of evidence used by the agencies to assess the likelihood of competitive effects. Here, again, the proposed Guidelines emphasize that some economic modeling of merger effects can be done without first, or possibly ever, defining a relevant market.

While the proposed revisions largely reflect current agency practices, the reduced emphasis on market definition represents a significant departure from the prior Guidelines, as well as more than two decades of case law, including such notable cases as *Oracle* and *Whole Foods*. While this change will have little or no impact on the vast majority of transactions, it will likely impact those transactions that raise the most serious antitrust issues and will ease future merger challenges. Ironically, the revisions also may create considerable uncertainty within the business community, at least until some of the newer concepts have been applied in enough transactions to develop a baseline of enforcement practices.

The FTC and DOJ are accepting public comments regarding their proposed revision until May 20, 2010.

[Click here for a complete copy of the proposed revised guidelines \[PDF\].](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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