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Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines

2010 Guidelines More Accurately Represent Agencies Merger Review Process

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The Federal Trade Commission and Department of Justice issued today revised Horizontal Merger Guidelines that outline how the federal antitrust agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. These changes mark the first major revision of the merger guidelines in 18 years, and will give businesses a better understanding of how the agencies evaluate proposed mergers.

A primary goal of the 2010 guidelines is to help the agencies identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace. To accomplish this, the guidelines detail the techniques and main types of evidence the agencies typically use to predict whether horizontal mergers may substantially lessen competition.

The revised merger guidelines derive from the agencies' collective experience in assessing thousands of transactions focusing on the types of evidence the department and the FTC use to decide whether a merger of competitors may harm competition. Many of the proposed refinements and changes reflect issues previously identified in the "Commentary on the Horizontal Merger Guidelines," which the agencies jointly issued in 2006. In crafting the revisions, the agencies considered a wide range of opinions gathered through a series of joint public workshops, as well as hundreds of public comments

submitted by attorneys, academics, economists, consumer groups and businesses.

“Because of the hard work of all involved at both agencies, private parties and judges will be better equipped to understand how the agencies evaluate deals. That improvement in clarity and predictability will benefit everyone,” said FTC Chairman Jon Leibowitz. “We thank Christine Varney and her team at DOJ for their terrific work on this initiative, demonstrating once again how effectively and collegially the two agencies work together.”

“The revised guidelines better reflect the agencies’ actual practices,” said Christine Varney, Assistant Attorney General in charge of the Department of Justice’s Antitrust Division. “The guidelines provide more clarity and transparency, and will provide businesses with an even greater understanding of how we review transactions. This has been a successful process due to the commitment of the talented staff from both agencies and the excellent working relationship with the FTC led by Jon Leibowitz.”

The agencies jointly announced the project in September 2009, followed by a series of workshops over the course of the winter. The FTC issued proposed revisions for public comment on April 20, 2010. All of the written comments are posted on the FTC’s website at <http://www.ftc.gov/os/comments/hmgrevisedguides/index.shtm>.

The 2010 guidelines are different from the 1992 guidelines in several important ways. The guidelines:

- Clarify that merger analysis does not use a single methodology, but is a fact-specific process through which the agencies use a variety of tools to analyze the evidence to determine whether a merger may substantially lessen competition.
- Introduce a new section on “Evidence of Adverse Competitive Effects.” This section discusses several categories and sources of evidence that the agencies, in their experience, have found informative in predicting the likely competitive effects of mergers.
- Explain that market definition is not an end itself or a necessary starting point of merger analysis, and market concentration is a tool that is useful to the extent it illuminates the merger’s likely competitive effects.
- Provide an updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice.
- Update the concentration thresholds that determine whether a transaction warrants further scrutiny by the agencies.



- Provide an expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation.
- Provide an updated section on coordinated effects. The guidelines clarify that coordinated effects, like unilateral effects, include conduct not otherwise condemned by the antitrust laws.
- Provide a simplified discussion of how the agencies evaluate whether entry into the relevant market is so easy that a merger is not likely to enhance market power.
- Add new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

The 2010 guidelines are available on the FTC's website at <http://www.ftc.gov/os/2010/08/100819hmg.pdf> and the Department of Justice's website at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

The Horizontal Merger Guidelines, which were first adopted in 1968, and revised in 1992, serve as an outline of the main analytical techniques, practices and enforcement policies the FTC and the Department of Justice use to evaluate mergers and acquisitions involving actual or potential competitors under federal antitrust laws.

The guidelines issued today take into account the legal and economic developments since the 1992 guidelines were issued. They are not intended to represent a change in the direction of merger review policy, but to offer more clarity on the merger review process to better assist the business community and, in particular, parties to mergers and acquisitions.

The Bank Merger Competitive Review guidelines, which the federal banking agencies and the Department of Justice developed in 1995 to facilitate the competitive review of bank mergers, remain unchanged. The Bank Merger Competitive Review guidelines can be found at <http://www.justice.gov/atr/public/premerger.htm>.

The FTC vote approving the 2010 guidelines was 5-0. Chairman Leibowitz issued a separate written statement outlining some of the ways the guidelines have been improved. Commissioner J. Thomas Rosch issued a separate concurring statement praising the guidelines for considering "competitive effects first, and market definition second, thereby making clear that while . . . the market must be defined at some point in the process, ultimately merger analysis must rest on the competitive effect of a transaction." Commissioner Rosch, nevertheless, noted concerns that the guidelines place too

much emphasis on economic evidence including margins and prices, and insufficient attention to empirical evidence and non-price competitive effects.

The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Room 394, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave, N.W., Washington, DC 20580. To learn more about the Bureau of Competition, read "Competition Counts" at <http://www.ftc.gov/competitioncounts>.

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