

Antitrust Agencies Release Proposed Revisions to Merger Guidelines

On April 20, 2010, the Department of Justice and Federal Trade Commission (the “agencies”) released for public comment much anticipated proposed revisions to the [Horizontal Merger Guidelines](#). The Guidelines, last revised in 1997, set forth the methodologies antitrust enforcement agencies employ to determine whether to challenge mergers between rivals. The proposed Guidelines follow five public workshops held in December 2009 and January 2010 in several cities that generated a significant number of comments from attorneys, academics, economists, consumer groups, and businesses. During the next 30 days, the agencies will accept written comments on the proposed revisions.

The proposed Guidelines, although not yet final, contain a number of noteworthy changes to those now in force:

- **De-emphasis of market definition and market shares in favor of other ways of predicting competitive consequences.** The agencies propose that merger analysis need not start with market definition. Although market definition is a “tool that is useful to the extent it illuminates the merger’s likely competitive effects,” the proposed Guidelines contemplate potentially relying solely on other evidence probative of a transaction’s competitive effects.
- **Preference for narrower markets.** The proposed Guidelines state that narrowly-defined markets are more likely to be useful than broadly defined markets, and—limiting the smallest market principle—the agencies will find a market whenever a hypothetical monopolist over one or more products can exercise market power. The agencies will also be more willing to infer narrow markets from high margins.
- **HHI thresholds raised.** While de-emphasizing market definition, the agencies increased the nominal levels of concentration (as measured by the Herfindahl-Hirschman Index) that raise antitrust concern.
- **Narrower definition of market participants.** The proposed Guidelines appear to allow the inclusion of fewer potential entrants as market participants because they would only include in the market firms that would enter “rapidly” if prices increase, whereas the current Guidelines include firms that would likely enter within one year.
- **Mergers involving differentiated products may be more susceptible to challenge.** The proposed Guidelines endorse the “Upward Pricing Pressure” analysis favored by DOJ and FTC economists “when the evidence is available.” This is likely to lead to more mergers involving non-commodities being found *prima facie* anticompetitive than under the existing Guidelines.

- **Innovation competition and partial ownership sections added.** Under the proposed Guidelines, the agencies may examine a merger's effect on innovation competition, rather than just price competition, including how a merger may result in a firm's having a "reduced incentive to continue with an existing product development effort or reduced incentive to initiate development of new products." The proposed Guidelines also contain a discrete section specifying how the agencies intend to analyze the acquisition of partial ownership interests.

As with the current Horizontal Merger Guidelines, the proposed revisions reflect methodologies for analysis to be used by the agencies that will not, necessarily, be adopted by the courts in particular cases.

For more information, please contact the above-listed attorneys from Ropes & Gray's Antitrust Group or your existing Ropes & Gray attorney.