

# Antitrust and Unfair Competition Alert

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## Federal Trade Commission and Department of Justice Issue Proposed Revised Horizontal Merger Guidelines to Reflect Current Agency Enforcement Practice

The FTC and DOJ recently issued proposed revisions to the Horizontal Merger Guidelines outlining how they (1) evaluate the likely competitive impact of mergers and acquisitions, and (2) assess whether to challenge individual transactions. The guidelines currently in effect were issued in 1992 and updated in 1997. These proposed revisions are intended to more accurately reflect the agencies' current policies and practices, as well as the Obama administration's more aggressive approach to antitrust enforcement.

The proposed revised guidelines should be of interest to any entity that is: (1) contemplating a merger or acquisition, or (2) concerned that two or more of its suppliers may merge, replace their rivalry with unilateral behavior, and increase the prices charged by the combined entity. The guidelines take effect June 4 and until that time, the public is invited to comment.

The issuance follows a series of hearings and public workshops convened to update the guidelines. While the guidelines do not have the force of law, they are a valuable resource because they reveal the agencies' methodology and are given great deference by many courts in ruling on legal challenges to a merger or acquisition.

Substantively, as expected, the proposed revisions include a number of material changes:

1. The proposed new guidelines reflect a reduced focus on market definition and provide for a flexible, fact-specific inquiry regarding the likely impact on post-merger prices and competition.
2. The proposed revisions make quite 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.
3. The new guidelines continue the widely accepted use of econometrics to assess competition in a post-merger environment, but raise the threshold used to identify highly concentrated markets that will be presumed to be likely to enhance market power. This increase in the threshold, and de-emphasis of it, is a policy judgment that the antitrust agencies were expending scarce government resources investigating mergers in unconcentrated industries that did not substantially lessen competition. The new guidelines focus on trying more directly to determine whether or not a post-merger price increase will be defeated.
4. The proposed guidelines identify types of evidence the agencies will consider in determining whether a merger may substantially lessen competition, including actual effects observed in consummated mergers, direct comparisons based on experience, market shares and concentration in a relevant market, substantial head-to-head competition, and the disruptive role of a merging party, i.e., eliminating a "maverick," or firm that plays a disruptive role in the market to the benefit of customers.

Christine Varney, Assistant Attorney General for the Antitrust Division of the Department of Justice, and Jon Leibowitz, the Chairman of the Federal Trade Commission, recently participated in a panel discussion at the American Bar Association Antitrust Section's Spring Meeting in Washington, D.C., and commented on the proposed revisions. Ms. Varney said that they reflect the actual practice employed by the antitrust agencies and sought to achieve greater transparency to businesses and their lawyers. Mr. Leibowitz agreed but pointed out that the new guidelines may actually reduce certainty in some ways, as they advocate a less formulaic (and less predictable) "check the box" approach. He criticized some courts for applying the current guidelines in "too mechanistic" a way, rather than focusing on whether the transaction results in a substantial lessening of competition. These comments and the proposed guidelines reflect the greater discretion the agencies are seeking to utilize to challenge proposed mergers they believe to be anticompetitive, and, when compared to the Bush administration's enforcement policy and practice, the heightened scrutiny that can be expected for proposed mergers and acquisitions.

If you wish to comment or discuss this development or any antitrust issue, contact Joseph Wolfson at [jwo@stevenslee.com](mailto:jwo@stevenslee.com) or (610) 205-6019, Neil C. Schur at [ncsc@stevenslee.com](mailto:ncsc@stevenslee.com) or (215) 751-1944, or your Stevens & Lee lawyer.

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