

**NEW MERGER GUIDELINES COULD INCREASE AGENCY  
ENFORCEMENT DISCRETION**

The FTC and DOJ recently published draft horizontal merger guidelines (“Draft Guidelines”) that update the existing guidelines, which were last revised in 1997 and 1992.

The Administration has said that it will subject mergers to closer scrutiny. The Draft Guidelines would do so by focusing on whether a merger will increase “market power” and employing a flexible approach that affords the agencies broader enforcement discretion.

The Draft Guidelines decrease the traditional emphasis on market definition and increase emphasis on “competitive effects.” The anticompetitive effect of primary interest is whether the combined entity will be able to raise price, reduce output, or diminish innovation as to any set of buyers.

The Draft Guidelines focus on the competitive “distance” between the products of the merging parties, emphasizing that anticompetitive effects are more likely to arise when merging products are “close” substitutes, regardless of formal market definition.

As with the current guidelines, the Draft Guidelines permit the agencies to challenge mergers that pose a danger of causing anticompetitive effects through coordination between the combined entity and other firms in a concentrated industry. The Draft Guidelines, however, do not require the agencies to identify the manner in which the competitive harm will be inflicted.

Following are some highlights from the Draft Guidelines.

HHI Updated. The Draft Guidelines continue to rely on the Herfindahl-Hirschman Index (“HHI”) as a measure of market concentration, but the agencies have revised the relevant thresholds. The new market designations are: (1) Unconcentrated Markets: HHI below 1500 (currently 1000); (2) Moderately Concentrated Markets: HHI between 1500 and 2500 (currently 1000 to 1800); and (3) Highly Concentrated Markets: HHI above 2500 (currently 1800). Only mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points (currently 100 points) will be presumed to be likely to enhance market power.

Identifying Market Participants. The Draft Guidelines eliminate the specific time periods under the current guidelines that qualify suppliers as market participants or likely entrants. The Draft Guidelines, though, are at least as strict as the existing guidelines in specifying the criteria for identifying a current competitor in the relevant market. For example, a firm must be “very likely” to provide “rapid supply responses” to be counted as a current market participant. The existing guidelines, in contrast, referred to market entry within “one year.”

Partial Acquisitions. Partial acquisitions that result in effective control of the target firm are analyzed in the same manner as are mergers. Partial acquisitions that do not result in effective control are analyzed based on three principal effects: (1) whether the acquiring firm obtains the ability to influence the competitive conduct of the target firm; (2) whether the incentives of the acquiring firm to compete are reduced; and (3) whether competition is lessened by giving the acquiring firm access to nonpublic, competitively sensitive information from the target firm.

**IMPLICATIONS**

The Draft Guidelines would provide the agencies with broader latitude to challenge mergers. They also reflect a desire to influence the law so that courts will be more receptive to evidence of potential anticompetitive effects.

Whether courts will accept the less methodical and more effects-based approach of the Draft Guidelines remains to be seen. For example, courts have typically followed the approach of the current guidelines by requiring the definition of a relevant market as a first step in most merger cases, as do the current guidelines.

After the publication of the Draft Guidelines, the district court in *City of New York v. Group Health Inc.*, No. 06 Civ. 13122 (RJS) (S.D.N.Y.), reiterated that a plaintiff in an antitrust case (including a merger case) “must identify the product market in which competition will be impaired.” Further, the court rejected the plaintiff’s attempt to amend its complaint to add allegations of “upwards pricing pressure,” implying that such allegations, lacking a proper market definition, would not be sufficient to state an antitrust claim.

Comments on the Draft Guidelines are due by June 4, 2010. The Draft Guidelines will likely be published in final form shortly thereafter.

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If you seek assistance in providing comments on the Draft Guidelines, have any questions concerning the foregoing, or would like additional information, please contact William H. Rooney (212-728-8259, wrooney@willkie.com), Theodore C. Whitehouse (202-303-1118, twhitehouse@willkie.com), David K. Park (212-728-8760, dpark@willkie.com), or the Willkie attorney with whom you regularly work.

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