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## Revised Horizontal Merger Guidelines Released August 19, 2010

On August 19, 2010, the Federal Trade Commission and the U.S. Department of Justice (together the “Agencies”) jointly issued revised [Horizontal Merger Guidelines](#) (the “Guidelines”). The Guidelines articulate federal antitrust enforcement policy toward and analytic techniques used in evaluating mergers between actual or potential competitors.<sup>1</sup> These revised Guidelines are the first major revisions to the merger guidelines in 18 years, since the issuance of the 1992 Guidelines (revised in 1997). Familiarity with the new Guidelines is essential to businesses as they anticipate antitrust agency scrutiny of horizontal mergers. We summarize below the most critical of the new standards, ones that are likely to require the greatest attention from business clients in the merger analysis and planning phase and likely to have the greatest impact in the course of enforcement Agency merger review.

The touchstones of the new Guidelines are transparency and flexibility. (Guidelines at 1.) In application, these objectives are in tension. Although the general standards to be employed in merger review may be more in the open, the new Guidelines’ emphasis on real-world evidence and real-world competitive effects means, in practical terms, that the Agencies’ ultimate decision to approve, challenge or require more information on a proposed merger will be driven heavily by the facts specific to the merging parties, their competitors and the antitrust markets in which they operate. While time will tell how the new Guidelines are in fact applied, we expect that it may be more difficult for clients to predict confidently how the Agencies will respond to a proposed merger. Market definition will be less theoretical and more tied to actual market performance and

conduct. Market share calculations will have lesser impact on enforcement decisions. Clients and outside counsel will need to collaborate more closely in evaluating potential mergers and mining evidence of the types the Agencies desire to see. Presentations to the Agencies in the clearance process must address the competitive landscape as seen through the eyes of consumers and businesspeople, not as graphs displayed by econometricians.

- Flexibility is an overarching theme. The Agencies will employ any or all available analytic tools to the reasonably-available evidence. (Guidelines at 1.)
- Section 4 of the Guidelines, “Market Definition,” explains that “[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.” (Guidelines at 7.) If the most important competition is taking place in smaller economic niches and among a limited group of firms, clients should anticipate that the Agencies will likely draw a narrow market definition. The Agencies will be highly skeptical of kitchen-sink arguments for market definition.
- This is confirmed when the new Guidelines state that the “Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term ‘market.’” (Guidelines at 8.)

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- The Guidelines now include a section devoted to the most persuasive types of evidence of adverse competitive effects (Section 2). Section 2.1 describes the types of evidence the Agencies may review, including actual effects (if the merger has already been completed); historical events (“natural experiments”), such as recent mergers, entry or expansion in the relevant market; and market shares and concentration in the relevant market. (Guidelines at 3-4.) Section 2.2 addresses the “many sources of evidence” the Agencies may consider in their merger analysis. (Guidelines at 4.) The Guidelines remind that “[d]ocuments created in the normal course are more probative than documents created as advocacy materials in merger review.” (Guidelines at 4.)
- The Guidelines now reflect the long-prevailing view of the Agencies that somewhat greater market concentration is required before mergers can pose genuine risk of anticompetitive effects. Concentration will continue to be measured by the Herfindahl-Hirschman Index (“HHI”), calculated by summing the squares of each firm’s market share, but the threshold at which the Agencies see the potential for harm has been raised. Market concentration thresholds in the Guidelines are now: an unconcentrated market has an HHI of below 1500 [as opposed to 1000 in the 1992/1997 guidelines], a moderately concentrated market has an HHI between 1500 and 2500 [revised from 1000 and 1800], and a highly concentrated market has an HHI above 2500 [revised from 1800]. (Guidelines at 19.)
- Applying these thresholds, the new Guidelines explain how concentration statistics will inform their enforcement judgments: (1) mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and thus ordinarily require no further analysis; (2) mergers with an increase in HHI of less than 100 also ordinarily require no further analysis; (3) mergers that result in moderately concentrated markets that involve an increase in HHI of more than 100 points “potentially raise significant competitive concerns and often warrant scrutiny;” (4) mergers resulting in highly concentrated markets with an increase in the HHI of 100 to 200 points also “potentially raise significant competitive concerns and often warrant scrutiny;” and (5) mergers resulting in highly concentrated markets with an increase in the HHI of more than 200 points “will be presumed to be likely to enhance market power,” which presumption may be rebutted by “persuasive evidence” to the contrary. (Guidelines at 19.)
- The Guidelines have a much more detailed section on the unilateral effects that could result from a merger of two competing firms, Section 6 (compare to Section 2.2 of the 1992/1997 guidelines). (Guidelines at 20-23.) This section details four potential unilateral effects, such as unilateral price effects in markets with differentiated products and unilateral effects arising from lessened innovation or reduced product variety. Product differentiation, innovation and variety are key drivers of sales and profits for many firms across many industries. The touchstone for analysis will be the degree to which the elimination of direct competition between the merging firms either allows for supra-competitive pricing or reduces consumer choice. It may be that the merging firms compete in a broad industry. But if concrete evidence shows that the merging firms occupy a unique space, that competition between them checks price increases and fosters quality improvements, and that competition from more distant producers will be less effective, the localized competitive impact may prove sufficient to foster an enforcement challenge.
- The Guidelines also have a more detailed section on coordinated effects, Section 7 (Section 2.1 of the 1992/1997 guidelines). (Guidelines at 24-26.) The Agencies will look closely to determine whether a merger increases the risk of explicit collusion or, as can be observed in many markets, parallel conduct on pricing or terms of sale.
- The Guidelines have new sections regarding analyses of the potential impact of “powerful buyers” on the ability of merging parties to raise prices (Section 8; Guidelines at 27); mergers of competing buyers (Section 12; Guidelines at 32-33); and partial acquisitions (Section 13; Guidelines at 33-34).

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## Revised Horizontal Merger Guidelines Released August 19, 2010 (cont'd.)

- The Guidelines have a more concrete discussion of the Agencies' analysis of the impact of other parties' entry into the relevant market, including the timeliness, likelihood and sufficiency of entry. (Section 9; Guidelines at 27-29.) The underlying point is that the Agencies will now demand reliable evidence that entry will in fact happen should post-merger pricing rise or output fall to supra-competitive levels. Theoretical arguments that entry is easy and swift will not carry the day.
- With great understatement, the revised efficiency section (Section 10; Guidelines at 30) notes that "efficiencies projected reasonably and in good faith by the merging firms may not be realized." That lesson has presumably been learned through hard experience, and the new Guidelines accordingly reflect a heightened skepticism of efficiency justifications for mergers.

analyzing non-price considerations." Rosch Statement at 2-3.

The new Guidelines do not signal an abrupt change in the antitrust policing of horizontal mergers. Rather, they are intended to shed light on the way the Agencies actually analyze mergers, reflecting nearly two decades in the evolution of economic and legal thinking. And while they do not carry any legal weight, it is likely that they will influence judges and assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws to horizontal mergers.

*Endnotes*

- 1 The Guidelines reflect some modest revisions to the draft guidelines the Agencies released on April 20, 2010 for public comment but, in large part, are substantially the same.

Federal Trade Commissioner J. Thomas Rosch issued a separate statement on the release of the Guidelines, which deserves a special note. While Commissioner Rosch agreed that the new Guidelines should be issued, he also was critical of them in a number of important respects. Commissioner Rosch stated that "these Guidelines are still flawed both as a description of how the staff (at the Commission at least) conducts ex ante merger review and what the Agencies should tell courts about merger analysis." Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, Project No. P092900, Aug. 19, 2010, at 1. Commissioner Rosch argued that the Guidelines continue to overemphasize "economic formulae and models based on price theory," while saying "comparatively little about non-price competitive effects" and failing "to offer a clear framework for

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