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DOJ and FTC Issue Proposed Revisions to Horizontal Merger Guidelines

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The Department of Justice's Antitrust Division and the Federal Trade Commission (the "agencies") recently proposed a revision of the Horizontal Merger Guidelines ("*Guidelines*"). The *Guidelines* state the analytical framework and policy rationale behind how the agencies evaluate the potential competitive effects of mergers and acquisitions among businesses at the same level in the supply chain.

The *Guidelines* were published in 1992 and amended in 1997. The stated purpose of the new revisions is to update them to (a) reflect the agencies' actual current practices in reviewing horizontal transactions, and (b) allow for greater flexibility in such review. The most significant proposed changes are:

- A shift away from step-by-step analytical analysis to a more flexible, fact-specific inquiry into the likely effects of the transaction.
- Changes in approach to market definition, perhaps making it a less important factor in determining likely competitive effects.
- Upward adjustments to the Herfindahl-Hirschman Index (HHI) presumptions of likely competitive harm based on threshold levels of market concentration.
- Greater reliance on economic evidence, including discussion of the hypothetical monopolist test and other economic models such as critical loss analysis, diversion ratios, and upward pricing pressure.
- Changes in unilateral effects analysis, including more focus on direct competitive effects and dropping the presumption that merging entities with a combined market share of at least 35% are customers' first and second choices.
- Refinement of entry analysis to abandon a set two-year entry time frame in favor of a more flexible inquiry into whether entry would be rapid enough to overcome the profitability of problematic competitive effects.
- Inclusion of new section on "Powerful Buyers" - customers that may be able to protect themselves from a merged entity's attempts to, for example, raise prices.

The public comment period for the proposed revisions has ended, and a final version of the revised *Guidelines* should be issued once the comments have been reviewed.

As the changes to the *Guidelines* are purportedly only meant to better reflect the actual process of horizontal merger review, it is difficult to predict how they will impact the agencies' analyses going forward. However, it does appear that, if implemented, they will provide the agencies with greater flexibility.

Companies considering mergers or acquisitions with other companies that offer competing products or services would likely benefit from seeking antitrust guidance as to how the changes in the *Guidelines* may impact the review of their deal by the appropriate agency.

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