

U.S. Antitrust Agencies Issue Final New Horizontal Merger Guidelines

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Yesterday the Federal Trade Commission and the Department of Justice issued revised Horizontal Merger Guidelines describing how the federal anti-trust agencies assess the likely competitive impact of mergers involving actual or potential competitors and determine whether to challenge those mergers. The new Guidelines represent the culmination of a process announced in September 2009 that included a series of public workshops and the receipt of public comments on a draft set of revised Guidelines released in April.

The final version of the new Guidelines reflects relatively minor changes from the April draft, which was described in detail in our memo of April 21, 2010. While the final version tones down some of the April draft's rhetoric proposing to abandon traditional market definition and concentration measures in merger analysis, the final version nonetheless continues to stress that analyzing market shares is not necessary if other measures of competitive effects are available. It remains to be seen whether this and other changes from the 1992 Guidelines, perhaps in part motivated by strategic litigation concerns, will be readily accepted by the courts. To the extent market concentration measures are still used by the agencies, the final version of the Guidelines retains the relaxed safe harbor thresholds set forth in the April draft.

Although the FTC voted unanimously to approve the new Guidelines, Commissioner J. Thomas Rosch issued a separate statement criticizing the revised Guidelines and the process by which they were developed. Describing the Guidelines as "flawed," Commissioner Rosch points to what he perceives as an overemphasis on economic models focusing on price effects and insufficient attention to non-price competitive effects, including potential innovation concerns. Commissioner Rosch also refutes the notion that the new Guidelines accurately describe how the FTC conducts merger investigations, calling into question one of the key goals of the entire Guidelines revision project.

The FTC and DOJ, in their respective press releases announcing the new Guidelines, advised that the separate 1995 Bank Merger Competitive Review—interagency guidelines for bank merger review jointly issued by the DOJ and the bank regulatory agencies—remain intact and will not be altered in concert with the revisions in the Horizontal Merger Guidelines. This is noteworthy because for fifteen years the safe harbors in the bank merger guidelines were more relaxed than those in the 1992 Horizontal Merger Guidelines, but in some respects will now be more restrictive than the newly revised Horizontal Merger Guidelines. The reasons for this reversal in the treatment of banking and industrial mergers are unclear, but may reflect the challenges of altering an interagency agreement with the banking regulators, particularly in light of "too big to fail" criticisms leveled during the financial crisis.

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